

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2565

Session of
1994

INTRODUCED BY LESCOVITZ, HASAY, COY, VEON, ITKIN, DeWEESE AND
BELARDI, MARCH 7, 1994

AS REPORTED FROM COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT,
HOUSE OF REPRESENTATIVES, AS AMENDED, MARCH 9, 1994

AN ACT

1 Providing for the safe harbor from liability of certain lenders
2 and fiduciaries for environmental liability and remediation
3 relating to releases which were not caused by lenders and
4 fiduciaries in order to stimulate economic development within
5 this Commonwealth.

6 The General Assembly of the Commonwealth of Pennsylvania
7 hereby enacts as follows:

8 Section 1. Short title.

9 This act shall be known and may be cited as the Environmental
10 Economic Development Promotion and Environmental Liability
11 Protection Act.

12 Section 2. Declaration of policy.

13 The General Assembly finds and declares as follows:

14 (1) That a maximum level of economic development,
15 business opportunity and employment, and the elimination or
16 prevention of abandoned industrial and commercial property
17 AND FEDERAL GOVERNMENT OR MILITARY LANDS WHICH can best be <—
18 provided by the promotion, attraction, stimulation,
19 rehabilitation and revitalization of all types of industry,

1 commerce, manufacturing and business development within this
2 Commonwealth.

3 (2) That to continue and further the stimulation of
4 business opportunities and economic development within this
5 Commonwealth and thereby cause the reuse and rehabilitation
6 of industrial and commercial property, it is necessary to
7 ensure various means of financing to promote economic growth
8 and the availability of fiduciary services to persons within
9 this Commonwealth.

10 (3) That lenders are reluctant to provide funding for
11 business opportunities and economic development, and
12 fiduciaries are reluctant to provide services to persons with
13 environmental problems because of the catastrophic risks of
14 environmental liability and remediation costs under
15 environmental laws relating to releases and contamination
16 which were not caused by lenders and fiduciaries.

17 (4) That, when borrowers default on loans, lenders are
18 reluctant to foreclose upon commercial property with
19 environmental problems because lenders may be forced to
20 assume costly environmental liabilities; thus commercial
21 property is being abandoned in this Commonwealth, and new
22 businesses are unable to obtain financing to purchase such
23 properties.

24 (5) That family businesses are unable to establish
25 trusts to convey their business interests to the next
26 generation, and other businesses are unable to receive
27 retirement, investment and other trust services from
28 fiduciaries when fiduciaries, in their personal or individual
29 capacities, may be held liable for environmental
30 contamination caused by other persons merely by virtue of

owning property in their trustee capacities and providing
fiduciary services.

(6) That, in order to continue to stimulate economic
growth and continue the use or reuse of industrial and
commercial property, it is necessary to provide protection to
lenders and fiduciaries from environmental liability and
remediation costs under the environmental laws for releases
and contamination caused by others.

(7) That environmental liability for lenders and
fiduciaries shall be limited in scope as specifically
provided in this act, and this act shall be interpreted as
broadly as possible in order to preempt any laws, regulations
or other documents imposing environmental liability on such
persons to the extent permitted by this act in order to
promote economic development.

Section 3. Definitions.

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

"Board." The Environmental Hearing Board of the
Commonwealth.

"Borrower." A person whose property is encumbered by a
security interest. The term includes a debtor, a lessor or an
obligor.

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

"Emergency event." A sudden occurrence or condition of such
severity or magnitude that it threatens immediate and
irreparable harm to the environment or public health, and an
immediate emergency response measure is necessary for its

1 stabilization or control.

2 "Emergency response measure." The notification of the
3 applicable county emergency management agency or the
4 Pennsylvania Emergency Management Agency and the Department of
5 Environmental Resources and such minimum steps as may be
6 reasonably necessary according to the equities of the situation
7 to attempt to stabilize and control the emergency event and to
8 mitigate further damages.

9 "Environmental acts." Collectively and separately, the act
10 of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams
11 Law, the act of January 8, 1960 (1959 P.L.2119, No.787), known
12 as the Air Pollution Control Act, the act of July 7, 1980
13 (P.L.380, No.97), known as the Solid Waste Management Act, the
14 act of October 5, 1984 (P.L.734, No.159), known as the Worker
15 and Community Right-to-Know Act, the act of July 13, 1988
16 (P.L.525, No.93), referred to as the Infectious and
17 Chemotherapeutic Waste Law, the act of October 18, 1988
18 (P.L.756, No.108), known as the Hazardous Sites Cleanup Act, the
19 act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank
20 and Spill Prevention Act, the act of December 7, 1990 (P.L.639,
21 No.165), known as the Hazardous Material Emergency Planning and
22 Response Act, and the act of June 11, 1992 (P.L.303, No.52),
23 known as the Oil Spill Responder Liability Act, and all such
24 acts as they may be amended from time to time, and any Federal,
25 State or local law, statute, regulation, rule, ordinance, court
26 or administrative order or decree, interpretation or guidance,
27 now or hereafter in existence pertaining to employees,
28 occupational health and safety, public health or safety, natural
29 resources or the environment.

30 "Environmental due diligence." Investigative techniques,

1 including, but not limited to, visual property inspections,
2 electronic environmental data base searches, review of ownership
3 and use history of the property, environmental questionnaires,
4 transaction screens, environmental assessments or audits.

5 "Fiduciary." Any person which is considered a fiduciary
6 under section 3(21) of the Employee Retirement Income Security
7 Act of 1974 (Public Law 93-406, 88 Stat. 829) or who acts as
8 trustee, executor, administrator, custodian, guardian of
9 estates, conservator, committee of estates of persons who are
10 disabled, personal representative, receiver, agent, nominee,
11 registrar of stocks and bonds, assignee or in any other capacity
12 for the benefit of another person.

13 "Foreclosure." The date upon which title vests in property
14 through realizing upon a security interest, including, but not
15 limited to, any ownership of property recognized under
16 applicable law as vesting the holder of the security interest
17 with some indicia of title, legal or equitable title obtained at
18 or in lieu of foreclosure, sheriff sales, bankruptcy
19 distributions and their equivalents.

20 "Fund." Collectively and separately, any special fund of
21 Commonwealth moneys administered by the Commonwealth or the
22 Department of Environmental Resources, including, but not
23 limited to, the Hazardous Sites Cleanup Fund and the Underground
24 Storage Tank Indemnification Fund, as well as any other fund of
25 Commonwealth moneys now or hereafter in existence created for
26 the funding or reimbursement of costs and damages such as
27 response costs, emergency response measures and their equivalent
28 relating to natural resources or the environment.

29 "Guarantor." The term includes guarantors and sureties of
30 security interests, securities and other obligations, issuers of

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

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

17 (1) The initial holder and any subsequent holder of the
18 security interest on the secondary market.

19 (2) Guarantor, lease financier or any successor where
20 the lessor does not initially select or ordinarily control
21 the daily operation or maintenance of the property.

22 (3) Any person who holds indicia of ownership primarily
23 to protect a security interest.

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

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

28 (1) for the purpose of securing payment of a loan or
29 indebtedness, a right of reimbursement or subrogation under a
30 guaranty or the performance of another obligation;

1 (2) evidencing ownership under a lease financing
2 transaction where the lessor does not initially select or
3 ordinarily control the daily operation or maintenance of the
4 property; or

5 (3) in the course of creating, protecting or enforcing a
6 security interest or right of reimbursement of subrogation
7 under a guaranty.

8 The term includes evidence of interest in mortgages, deeds of
9 trust, liens, surety bonds, guaranties, lease financing
10 transactions where the lessor does not initially select or
11 ordinarily control the daily operation or maintenance of the
12 property, other forms of encumbrances against property
13 recognized under applicable law as vesting the holder of the
14 security interest with some indicia of title.

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, including its officers,
18 directors, employees, representatives or agents, and any Federal
19 or State banking or lending agency or its successors, including,
20 but not limited to, Resolution Trust Corporation, Federal
21 Deposit Insurance Corporation, Federal Reserve Bank, Board of
22 Governors of the Federal Reserve System, Federal Home Loan Bank,
23 National Credit Union Administrator Board, Office of the
24 Comptroller of the Currency, Office of Thrift Supervision, Farm
25 Credit Administration and Small Business Administration or
26 similarly chartered Federal instrumentality. The term also
27 includes the initial lender and any subsequent holder of a
28 security interest or note, guarantor, lease financier or any
29 successor or a receiver or other person who acts on behalf or
30 for the benefit of a holder of a security interest.

1 "Person." An individual, partnership, corporation, business
2 trust, joint-stock fund, estate trust, banking association,
3 governmental, administrative or regulatory agency, institution
4 or any other type of legal entity whatsoever.

5 "Property." All types of real and personal and tangible and
6 intangible property.

7 "Regulated substance." Any element, compound or material
8 which is subject to regulation under the environmental acts or
9 any element, compound or material defined as a HAZARDOUS, TOXIC, <—
10 REGULATED INFECTIOUS CHEMOTHERAPEUTIC SUBSTANCE OR CHEMICAL,
11 contaminant, ~~pollution~~, waste, ANY TYPE OF POLLUTION OR <—
12 CONDITION or ANY equivalent under the environmental acts. <—

13 "Release." Any spill, rupture, emission, discharge, other
14 action, occurrence, CONDITION or any other term defined as a <—
15 "release" or "THREAT OF RELEASE" OR other operative word OR <—
16 EVENT WHICH WOULD TRIGGER COMPLIANCE REQUIREMENTS OR LIABILITY
17 under the environmental acts.

18 "Reportable event." Any release, threat of release or action
19 which must be reported to the Department of Environmental
20 Resources or any other governmental agency, including, but not
21 limited to, notices of amounts equal to or greater than
22 reportable released quantities of regulated substances, any
23 amounts equal to or greater than a discharge or any permit
24 violations or other violations which may require reports or
25 notifications to government agencies under the environmental
26 acts.

27 "Response action." An action, including, but not limited to,
28 a response or interim response, remedial response or remedy or
29 corrective action, closure, or any other action under the
30 environmental acts IN RESPONSE TO A RELEASE, such as testing, <—

1 inspections, sampling, installations, corrective action,
2 removals, closure, response costs, assessments, OR ANY TYPES OF <—
3 claims, damages, actions, fines and penalties.

4 "Security interest." An interest in property created or
5 established for the purpose of securing a loan, right of
6 reimbursement or subrogation under a guaranty or other
7 obligation or constituting a lease financing transaction. The
8 term includes security interests created under 13 Pa.C.S.
9 (relating to commercial code), mortgages, deeds of trust, liens,
10 lease financing transactions in which the lessor does not
11 initially select or ordinarily control the daily operation or
12 maintenance of the property, trust receipt transactions and
13 their equivalents. Security interest may also arise from
14 transactions such as sales and leasebacks, conditional sales,
15 installment sales, certain assignments, factoring agreements,
16 accounts receivable, financing arrangements and consignments, if
17 the transaction creates or establishes an interest in property
18 for the purpose of securing a loan, right of reimbursement or
19 subrogation under a guaranty or other obligation. The term also
20 includes a confession of judgment or money judgment whereby a
21 lender commences an execution on such judgments with a writ of
22 execution and thereby causes property to be levied and attached.
23 Section 4. Limitation of lender environmental liability.

24 (a) Scope of lender liability.--A lender who provides
25 financial services or holds indicia of ownership in property as
26 a security interest shall not be liable under the environmental
27 acts OR COMMON-LAW EQUIVALENTS to the department or to any other <—
28 person by virtue of fact that the lender provides financial
29 services or holds indicia of ownership primarily to protect its
30 security interest in the property, unless:

1 (1) the lender, its employees or agents cause or
2 exacerbate a release of regulated substances on or from the
3 property; or

4 (2) the lender, its employees or agents knowingly and
5 willfully compelled the borrower to:

6 (i) do an action which caused an immediate release
7 of regulated substances; or

8 (ii) violate an environmental act.

9 (b) Limitation of lender liability.--Liability pursuant to
10 this act shall be limited to the cost for a response action
11 which may be directly attributable to the lender's activities as
12 specified in subsection (a). No lender shall be liable for any <—
13 ~~damages, including~~ any response action, if such ~~damages arise~~ <—
14 RESPONSE ACTION ARISES solely from a release of regulated <—
15 substances which occurred prior to or commences before and
16 continues after foreclosure, provided, however, that the lender
17 shall be responsible for that portion of ~~damages which are~~ THE <—
18 RESPONSE ACTION WHICH IS directly attributed to the lender's
19 exacerbation of a release. A release of regulated substances
20 discovered in the course of conducting environmental due
21 diligence shall be presumed to be a prior or continuing release
22 on the property.

23 (c) Emergency event after foreclosure.--If an emergency
24 event occurs after foreclosure and, if upon the basis of
25 information available to the lender at the time of that
26 emergency event, there is a clear and convincing basis to
27 believe that prompt action is necessary, then the lender shall
28 undertake an emergency response measure without the loss of the
29 protection afforded by this act. A lender which undertakes an
30 emergency response measure must use reasonable care and endeavor

1 to complete the emergency response measure so as to stabilize
2 the emergency event. No lender shall be liable for any damages
3 resulting from an emergency event or TAKING OR FAILING TO TAKE <—
4 AN emergency response measure or any other damages, including,
5 but not limited to, costs for response actions at the property,
6 adjoining areas and locations to which hazardous substances are
7 transported for handling, treatment, storage and disposal,
8 except for damages due to the lender's acts or omissions which
9 constitute gross negligence or willful misconduct. Liability
10 pursuant to this subsection shall be limited to the lesser
11 amount of:

- 12 (1) the remaining FAIR MARKET value of the affected <—
13 property;
14 (2) the principal amount of the loan secured by the
15 affected property; or
16 (3) the extent of the damages that result due to the
17 lender's acts or omissions which constitute gross negligence
18 or willful misconduct in undertaking the emergency response
19 measure.

20 FOR PURPOSES OF THIS SECTION, "FAIR MARKET VALUE" SHALL NOT MEAN <—
21 ANY ASSESSED VALUE FOR REAL PROPERTY TAX PURPOSES WHICH HAS A
22 VALUE OF \$0. It shall be a rebuttable presumption of law that a
23 lender who has taken steps to conduct an emergency response
24 measure has acted properly and is entitled to protection from
25 liability and reimbursement as provided in this act; and
26 provided further that an occurrence or condition constituting a
27 reportable event under the environmental acts alone shall not be
28 considered by reason of such status as a reportable event to be
29 an emergency event.

30 (d) Notification requirements.--Notification for an

emergency response measure TO THE APPLICABLE COUNTY EMERGENCY
MANAGEMENT AGENCY OR THE PENNSYLVANIA EMERGENCY MANAGEMENT
AGENCY AND THE DEPARTMENT under this section shall include the
following to the extent known by the lender at the time of such
notification:

(1) The name and telephone number of the person making
the notification.

(2) The name and telephone number of the person employed
by the lender who has the authority to take or coordinate the
emergency response measure.

(3) The time, location and duration of the release.

(4) The chemical name or identity of any substance
involved in the release.

(5) The medium or media into which the release occurred.

(6) An estimate of the quantity of the substance that
was released into the environment.

(7) Such steps taken to attempt to stabilize and control
the emergency event and mitigate damages.

(8) Any additional information that such person deems
appropriate under the circumstances.

(e) Emergency response measure costs.--A lender who
undertakes an emergency response measure may be reimbursed for
its costs, including, but not limited to, legal fees, from the
fund by filing an action with the board within 60 days after
completion of the emergency response measure in accordance with
section 505(f) of the act of October 18, 1988 (P.L.756, No.108),
known as the Hazardous Sites Cleanup Act. To recover costs, the
action must include a written summary of the acts taken for the
emergency response measure and documentation of the costs.

Notwithstanding the foregoing, a lender who undertakes an

1 emergency response measure may also recover its costs and
2 damages, including legal fees, or seek contribution from a
3 responsible person in a legal action brought before a court of
4 competent jurisdiction. In the event that a lender recovers
5 duplicative costs and damages in a legal action against a
6 responsible person after being reimbursed for its costs by the
7 board, the lender shall promptly return to the board any
8 duplicative amounts received from the fund.

9 Section 5. Limitation of fiduciary environmental liability.

10 (a) Scope of fiduciary liability.--Any person who acts or
11 has acted as a fiduciary to another person shall not be liable
12 in its personal or individual capacity under the environmental
13 acts OR COMMON-LAW EQUIVALENTS to the department or to any other <—
14 person by virtue of the fact that the fiduciary provides or
15 provided such services unless:

16 (1) during the time when the fiduciary services were
17 actively provided, an event occurred which constituted a
18 release of regulated substances according to the
19 environmental acts at the time of such event;

20 (2) the fiduciary had the express power and authority to
21 control property which was the cause of or the site of such
22 release as part of actively providing services; and

23 (3) the release was caused by an act or omission which
24 constituted gross negligence or willful misconduct of the
25 fiduciary according to the law or standard practices at the
26 time of the release.

27 (b) Limitation of fiduciary liability.--Liability under this
28 act shall be limited to only the cost for a response action
29 which is directly attributable to the fiduciary's activities as
30 specified in this section. No fiduciary shall be liable for any

1 ~~damages, including any~~ response action, if such ~~damages~~ RESPONSE <—
2 ACTION solely ~~arise~~ ARISES from a release of regulated <—
3 substances which occurred prior to, or commences before and
4 continues after the fiduciary takes action as specified in
5 subsection (a). Notwithstanding the foregoing, a fiduciary shall
6 be responsible for that portion of ~~damages which are~~ THE <—
7 RESPONSE ACTION WHICH IS directly attributable to exacerbating a
8 release. A release of regulated substances discovered in the
9 course of conducting an environmental due diligence shall be
10 presumed to be a prior and continuing release on the property.

11 (c) Estate claims.--Nothing in this section shall prevent
12 claims against the fiduciary in its representative capacity.

13 Section 6. Defenses to liability.

14 A lender or fiduciary can avoid liability under this act by
15 showing evidence that a release or threatened release of
16 regulated substances for which the lender or fiduciary otherwise
17 be responsible was caused by any of the following:

18 (1) An act of God.

19 (2) An intervening act of a public agency.

20 (3) Migration from property owned by a third party.

21 (4) Actions taken or omitted in the course of rendering
22 care, assistance or advice in accordance with the
23 environmental acts or at the direction of the department.

24 (5) An act of a third party who was not an agent or
25 employee of the lender or fiduciary.

26 (6) If the alleged liability for a lender arises after
27 foreclosure and the lender exercised due care with respect to
28 the regulated substance and took precautions against
29 foreseeable actions of third parties and the consequences
30 arising therefrom.

1 Section 7. Savings clause.

2 Nothing in this act shall affect the rights, immunities or
3 other defenses that are available under other applicable law to
4 a lender or fiduciary, including, but not limited to, rights of
5 contribution and indemnity. Nothing in this act shall be
6 construed to create any NEW, DIFFERENT OR ADDITIONAL liability <—
7 for or create a private right of action against any lender or
8 fiduciary.

9 Section 8. Apportionment of liability.

10 Notwithstanding anything to the contrary, if two or more
11 persons acting independently cause distinct harm or a single
12 harm for which there is a reasonable basis for division
13 according to the contribution of each, a lender or fiduciary
14 shall be subject to liability only for the portion of the total
15 liability that is directly attributable to the lender or
16 fiduciary.

17 Section 9. Construction of act.

18 The terms and conditions of this act are to be liberally
19 construed so as to best achieve and effectuate the goals and
20 purposes of this act. THIS ACT ELIMINATES ALL PRESENT LIABILITY <—
21 STANDARDS, INCLUDING, BUT NOT LIMITED TO, THE CONCEPT OF A
22 PERSON WHO, WITHOUT PARTICIPATION IN THE MANAGEMENT OF SITE,
23 HOLDS INDICIA OF OWNERSHIP PRIMARILY TO PROTECT A SECURITY
24 INTEREST. The burden of proof shall be upon the person seeking
25 to have a lender or a fiduciary held liable for a response
26 action or damages.

27 Section 10. Severability.

28 The provisions of this act are severable. If any provision of
29 this act or its application to any person or circumstance is
30 held invalid, the invalidity shall not affect other provisions

1 or applications of this act which can be given effect without
2 the invalid provision or application.

3 Section 11. Repeals.

4 To the extent that any environmental acts are inconsistent
5 with this act, such laws are deemed repealed so that the
6 provisions of this act may be enforced. No environmental law
7 enacted after this act shall be applied retroactively to impose
8 liability upon lenders and fiduciaries.

9 Section 12. Applicability.

10 The provisions of this act shall apply to the following:

11 (1) All indicia of ownership, including those presently
12 or subsequently acquired, or those acquired prior to the date
13 of enactment that are held primarily to protect a security
14 interest in the property.

15 (2) Each fiduciary with respect to any services provided
16 by the fiduciary, including those presently or subsequently
17 provided, and those rendered prior to the date of enactment.

18 (3) All administrative actions, actions, suits or claims
19 against lenders or fiduciaries not yet finally resolved by
20 the department or any court or administrative hearing board
21 having any action, suit or claim pending before it or an
22 appeal from a lower court.

23 Section 13. Effective date.

24 This act shall take effect immediately.