

58:10-23.11g4

LEGISLATIVE HISTORY CHECKLIST
Compiled by the NJ State Law Library

(Environmental liability--ECRA--
and spill compensation)

NJSA: 58:10-23.11g4

LAWS OF: 1993 **CHAPTER:** 112

BILL NO: S577

SPONSOR(S) Cardinale and others

DATE INTRODUCED: March 16, 1992

COMMITTEE: **ASSEMBLY:** Financial Institutions
SENATE: Commerce

AMENDED DURING PASSAGE: Yes Amendments during passage
First reprint -Assembly denoted by superscript numbers
Committee Substitute enacted

DATE OF PASSAGE: **ASSEMBLY:** December 14, 1992
SENATE: April 2, 1992

DATE OF APPROVAL: May 7, 1993

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: **ASSEMBLY:** Yes
SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: Yes

FOLLOWING WERE PRINTED:

REPORTS: No

HEARINGS: Yes

(over)

See newspaper clipping -- attached:

"New law limits banks' liability," 5-8-93 Trenton Times.

"New law reduces liability of lenders...", 5-8-93 Star Ledger.

Q74.90 New Jersey. Legislature. Senate. Environment Committee.
P777 Public hearing on ECRA, held 3-16-92 and 3-19-92. Trenton,
1992c 1992.

KBG:pp

P.L.1993, CHAPTER 112, approved May 7, 1993
Assembly Committee Substitute (First Reprint) for
1992 Senate No. 577

1 AN ACT concerning the responsibility of secured parties and
2 fiduciaries with respect to certain spills of hazardous
3 substances and certain transfers of industrial facilities and
4 supplementing P.L.1976, c.141 (C.58:10-23.11 et seq.) and
5 P.L.1983, c.330 (C.13:1K-6 et seq.).
6

7 BE IT ENACTED by the Senate and General Assembly of the
8 State of New Jersey:

9 1. For purposes of sections 1 through 5 of this act:

10 "Active participation in the management" or "participation in
11 the management" means actual participation in the management
12 or operational affairs by the holder of the security interest and
13 shall not include the mere capacity, or ability to influence, or the
14 unexercised right to control vessel or facility operations.

15 (1) A holder of a security interest shall be considered to be in
16 active participation in the management, while the borrower is
17 still in possession, only if the holder either:

18 (a) exercises decision making control over the borrower's
19 environmental compliance, such that the holder has undertaken
20 responsibility for the borrower's waste disposal or hazardous
21 substance handling practices; or

22 (b) exercises control at a level comparable to that of a
23 manager of the borrower's enterprise, such that the holder has
24 assumed or manifested responsibility for the overall management
25 of the enterprise encompassing the day-to-day decisionmaking of
26 the enterprise with respect to:

27 (i) environmental compliance; or

28 (ii) all, or substantially all, of the operational (as opposed to
29 financial or administrative) aspects of the enterprise other than
30 environmental compliance. Operational aspects of the enterprise
31 include functions such as that of facility or plant manager,
32 operations manager, chief operating officer, or chief executive
33 officer. Financial or administrative aspects include functions
34 such as that of credit manager, accounts payable or receivable
35 manager, or both, personnel manager, controller, chief financial
36 officer, or similar functions.

37 (2) No act or omission prior to the time that indicia of
38 ownership are held primarily to protect a security interest
39 constitutes evidence of participation in management. A

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:
Senate floor amendments adopted March 15, 1993.

1 prospective holder who undertakes or requires an environmental
2 inspection of the vessel or facility in which indicia of ownership
3 are to be held, or requires a prospective borrower to clean up a
4 vessel or facility or to comply or come into compliance (whether
5 prior or subsequent to the time that indicia of ownership are held
6 primarily to protect a security interest) with any applicable law
7 or regulation, is not by such action considered to be participating
8 in the vessel's or facility's management, provided however, that
9 a holder shall not be required to conduct or require an inspection
10 to qualify for the protection for holders granted pursuant to
11 sections 1 through 5 of this act, and the liability of a holder shall
12 not be based on or affected by the holder not conducting or not
13 requiring an inspection.

14 (3) Actions that are consistent with holding ownership indicia
15 primarily to protect a security interest do not constitute
16 participation in management for purposes of sections 1 through 5
17 of this act. The authority for the holder to make such actions
18 may, but need not, be contained in contractual or other
19 documents specifying requirements for financial, environmental,
20 and other warranties, covenants, conditions, representations or
21 promises from the borrower. Loan policing and work out
22 activities cover and include all activities up to foreclosure and its
23 equivalents.

24 (a) A holder who engages in policing activities prior to
25 foreclosure shall remain within the exemption provided that the
26 holder does not by such actions participate in the management of
27 the vessel or facility. Such actions include, but are not limited
28 to, requiring the borrower to clean up the vessel or facility during
29 the term of the security interest; requiring the borrower to
30 comply or come into compliance with applicable federal, State,
31 and local environmental and other laws, rules and regulations
32 during the term of the security interest; securing or exercising
33 authority to monitor or inspect the vessel or facility (including
34 on-site inspections) in which indicia of ownership are maintained,
35 or the borrower's business or financial conditions during the term
36 of the security interest; or taking other actions to adequately
37 police the loan or security interest (such as requiring a borrower
38 to comply with any warranties, covenants, conditions,
39 representations or promises from the borrower).

40 (b) A holder who engages in work out activities prior to
41 foreclosure and its equivalents shall remain within the exemption
42 provided that the holder does not by such action participate in
43 the management of the vessel or facility. For purposes of this
44 act, "work out" refers to those actions by which a holder, at any
45 time prior to foreclosure and its equivalents, seeks to: prevent,
46 cure, or mitigate a default by the borrower or obligor; or
47 preserve or prevent the diminution of the value of the security.
48 Work out activities include, but are not limited to: restructuring
49 or renegotiating the terms of the security interest; requiring
50 payment of additional rent or interest; exercising forbearance;
51 requiring or exercising rights pursuant to an assignment of
52 accounts or other amounts owing to an obligor; requiring or
53 exercising rights pursuant to an escrow agreement pertaining to
54 amounts owing to an obligor; providing specific or general

1 financial or other advice, suggestions, counseling, or guidance;
2 and exercising any right or remedy the holder is entitled to by
3 law or under any warranties, covenants, conditions,
4 representations or promises from the borrower.

5 (4) A holder does not participate in the management of a
6 vessel or facility by making any response ¹[to] or performing any
7 response action or undertaking any cleanup or removal or similar
8 action under¹ the federal "Comprehensive Environmental
9 Response, Compensation, and Liability Act of 1980," Pub.L.
10 96-510 (42 U.S.C. §9601 et seq.), the "Spill Compensation and
11 Control Act," P.L.1978, c.141 (C.58:10-23.11 et seq.), or any
12 other State or federal environmental law or regulation.

13 "Date of foreclosure" means the date on which the holder
14 obtains legal or equitable title to the vessel or facility pursuant
15 to or incident to foreclosure.

16 "Fair consideration" means the value of the security interest
17 when calculated as an amount equal to or in excess of the sum of
18 the outstanding principal (or comparable amount in the cases of a
19 lease that constitutes a security interest) owed to the holder
20 immediately preceding the acquisition of full title (or possession
21 in the case of property subject to a lease financing transaction)
22 pursuant to foreclosure and its equivalents, plus any unpaid
23 interest, rent or penalties (whether arising before or after
24 foreclosure and its equivalents), plus all reasonable and necessary
25 costs, fees, or other charges incurred by the holder incident to
26 work out, foreclosure and its equivalents, retention, maintaining
27 the business activities of the enterprise, preserving, protecting
28 and preparing the vessel or facility prior to sale, re-lease of
29 property held pursuant to a lease financing transaction (whether
30 by a new lease financing transaction or substitution of the lessee)
31 or other disposition, plus response costs incurred under applicable
32 federal or State environmental cleanup laws or regulations, or at
33 the direction of an on-scene coordinator, less any amounts
34 received by the holder in connection with any partial disposition
35 of the property, net revenues received as a result of maintaining
36 the business activities of the enterprise, and any amounts paid by
37 the borrower subsequent to the acquisition of full title (or
38 possession in the case of property subject to a lease financing
39 transaction) pursuant to foreclosure and its equivalents. In the
40 case of a holder maintaining indicia of ownership primarily to
41 protect a junior security interest, fair consideration is the value
42 of all outstanding higher priority security interests plus the value
43 of the security interest held by the junior holder, each calculated
44 as set forth in this definition.

45 "Foreclosure" or "foreclosure and its equivalents" means
46 purchase at foreclosure sale; acquisition or assignment of title in
47 lieu of foreclosure; termination of a lease or other repossession;
48 acquisition of a right to title or possession; an agreement in
49 satisfaction of the obligation; or any other form or informal
50 manner (whether pursuant to law or under warranties, covenants,
51 conditions, representations or promises from the borrower) by
52 which the holder acquires title to or possession of the secured
53 property.

54 "Holder" is a person who maintains indicia of ownership

1 primarily to protect a security interest. A holder includes the
2 initial holder (such as a loan originator), any subsequent holder
3 (such as a successor-in-interest or subsequent purchaser of the
4 security interest on the secondary market), a guarantor of an
5 obligation, surety, or any other person who holds ownership
6 indicia primarily to protect a security interest, or a receiver or
7 other person who acts on behalf or for the benefit of a holder.

8 "Indicia of ownership" means evidence of a security interest,
9 evidence of an interest in a security interest, or evidence of an
10 interest in real or personal property securing a loan or other
11 obligation, including any legal or equitable title to real or
12 personal property acquired incident to foreclosure and its
13 equivalents. Evidence of such interests include, but are not
14 limited to, mortgages, deeds of trust, liens, surety bonds and
15 guarantees of obligations, title held pursuant to a lease financing
16 transaction in which the lessor does not select initially the leased
17 property (hereinafter "lease financing transaction"), legal or
18 equitable title obtained pursuant to foreclosure and their
19 equivalents. Evidence of such interests also includes
20 assignments, pledges, or other rights to or other forms of
21 encumbrance against property that are held primarily to protect
22 a security interest. A person is not required to hold title or a
23 security interest in order to maintain indicia of ownership.

24 "Primarily to protect a security interest" means that the
25 holder's indicia of ownership are held primarily for the purpose
26 of securing payment or performance of an obligation but does not
27 include indicia of ownership held primarily for investment
28 purposes, nor ownership indicia held primarily for purposes other
29 than as a protection for a security interest. A holder may have
30 other, secondary reasons for maintaining indicia of ownership, but
31 the primary reasons why any ownership indicia are held shall be
32 as protection for a security interest.

33 "Security interest" means an interest in a vessel or facility
34 created or established for the purpose of securing a loan or other
35 obligation. Security interests include, but are not limited to,
36 mortgages, deeds of trusts, liens, and title pursuant to lease
37 financing transactions. Security interests may also arise from
38 transactions such as sale and leasebacks, conditional sales,
39 installment sales, trusts receipt transactions, certain
40 assignments, factoring agreements, accounts receivable financing
41 arrangements, and consignments, if the transaction creates or
42 establishes an interest in a vessel or facility for the purpose of
43 securing a loan or other obligation.

44 2. A person who maintains indicia of ownership of a vessel or
45 facility primarily to protect a security interest in a vessel or
46 facility and who does not participate in the management of the
47 vessel or facility is not deemed to be an owner or operator of the
48 vessel or facility, shall not be deemed the discharger or
49 responsible party for a discharge from the vessel or facility and
50 shall not be liable for cleanup costs or damages resulting from
51 discharges from the vessel or facility pursuant to sections 8, 18,
52 and 22 of P.L.1976, c.141 (C.58:10-23.11g, 58:10-23.11q and
53 58:10-23.11u) or section 2 of P.L.1990, c.75 (C.58:10-23.11u1) ¹,
54 except to the extent that liability may still apply to holders after

1 foreclosure as set forth in section 3 of this act¹.

2 3. The indicia of ownership, held after foreclosure, continue to
3 be maintained primarily as a protection for a security interest
4 provided that the holder did not participate in management prior
5 to foreclosure and that the holder undertakes to sell, re-lease
6 property held pursuant to a lease financing transaction (whether
7 by a new lease financing transaction or substitution of the lessee)
8 or otherwise divest itself of the vessel or facility in a reasonably
9 expeditious manner in accordance with the means and
10 procedures specified in this section¹. Such a holder may
11 liquidate, maintain business operations, undertake environmental
12 response actions pursuant to State and federal law, and take
13 measures to preserve, protect or prepare the secured asset prior
14 to sale or other disposition, without losing status as a person who
15 maintains indicia of ownership primarily¹ to protect a security
16 pursuant to section 2 of this act.

17 a. For purposes of establishing that a holder is seeking to sell,
18 re-lease property held pursuant to a new lease financing
19 transaction (whether by a new lease financing transaction or
20 substitution of the lessee), or divest a vessel or facility in a
21 reasonably expeditious manner, the holder may use whatever
22 commercially reasonable means are relevant or appropriate with
23 respect to the vessel or facility, or may employ the means
24 specified in this section.

25 b. (1) A holder that outbids, rejects or fails to act upon a
26 written bona fide, firm offer of fair consideration within 90 days
27 of receipt of the offer, and which offer is received at any time
28 after six months following the date of foreclosure, shall not be
29 deemed to be using a commercially reasonable means for the
30 purpose of this section. A "written bona fide, firm offer" means
31 a legally enforceable, commercially reasonable, cash offer solely
32 for the foreclosed vessel or facility, including all material terms
33 of the transaction, from a ready, willing, and able purchaser who
34 demonstrates to the holder's satisfaction the ability to perform.
35 For purposes of this subsection, the six-month period begins to
36 run from the time that the holder acquires a marketable title,
37 provided that the holder, after the expiration of any redemption
38 or other waiting period provided by law, was acting diligently to
39 acquire marketable title.

40 (2) A holder that outbids, rejects, or fails to act upon an offer
41 of fair consideration for the vessel or facility within the 90-day
42 period, establishes that the ownership indicia in the secured
43 property are not held primarily to protect the security interest,
44 unless the holder is required, in order to avoid liability under
45 federal or State law, to make a higher bid, to obtain a higher
46 offer, or to seek or obtain an offer in a different manner.

47 c. A holder establishes that it is proceeding in a commercially
48 reasonable manner after foreclosure by, within 12 months
49 following foreclosure, listing the vessel or facility with a broker,
50 dealer, or agent who deals with the type of property in question,
51 or by advertising the vessel or facility as being for sale or
52 disposition on at least a monthly basis in either a real estate
53 publication or a trade or other publication suitable for the vessel
54 or facility in question, or a newspaper of general circulation

1 (defined as one with a circulation over 10,000, or one suitable
2 under any applicable federal, State, or local rules of court for
3 publication required by court order or rules of civil procedure)
4 covering the area where the property is located. For purposes of
5 this subsection, the 12-month period begins to run from the time
6 that the holder acquires marketable title, provided that the
7 holder, after the expiration of any redemption or other waiting
8 period provided by law, was acting diligently to acquire
9 marketable title.

10 d. 1A holder shall sell, re-lease the property held pursuant to a
11 new lease financing transaction, or otherwise divest such vessel
12 or facility in a reasonably expeditious manner, but not later than
13 five years after the date of foreclosure, except that a holder may
14 continue to hold the property for a time period longer than five
15 years without losing status as a person who maintains indicia of
16 ownership primarily to protect a security interest if (1) the holder
17 has made a good faith effort to sell, re-lease or otherwise divest
18 itself of the property using commercially reasonable means or
19 other procedures prescribed by this act; (2) the holder has
20 obtained any approvals required pursuant to applicable federal or
21 State banking or other lending laws to continue its possession of
22 the property; and (3) the holder has exercised reasonable
23 custodial care to prevent or mitigate any new discharges from
24 the vessel or facility that could substantially diminish the market
25 value of the property.

26 e. (1) The exemption granted to holders pursuant to this
27 section shall not apply to the liability for any new discharge from
28 the vessel or facility, occurring after the date of foreclosure,
29 that is caused by acts or omissions of the holder which can be
30 shown, based on a preponderance of the evidence, to have been
31 negligent. In the event a property has both preexisting and new
32 discharges, the liability, if any, allocable to the holder pursuant
33 to this subsection shall be limited to those cleanup costs or
34 damages that relate directly to the new discharge. In the event
35 there is a substantial commingling of a new discharge with a
36 preexisting discharge, the liability, if any, allocable to the holder
37 pursuant to this subsection shall be limited to the cleanup costs
38 or damages in excess of those cleanup costs or damages relating
39 to the preexisting discharge.

40 In order to establish that a discharge occurred or began prior to
41 the date of foreclosure, a holder may perform, but shall not be
42 required to perform, an environmental audit, in accordance with
43 any applicable Department of Environmental Protection and
44 Energy regulations and guidelines, to identify such discharges at
45 the vessel or facility. Upon receipt of a complete audit from the
46 holder, the Department of Environmental Protection and Energy
47 shall, within 90 days of its receipt of the audit, review the audit
48 and transmit its findings to the holder. The Department of
49 Environmental Protection and Energy may charge reasonable fees
50 and adopt any additional regulations necessary to provide
51 guidelines for the submission and review of such audits.

52 (2) Nothing in this subsection shall be deemed to impose
53 liability for a new discharge from the vessel or facility that is
54 authorized pursuant to a federal or State permit or cleanup

1 procedure.

2 (3)¹ The exemption granted to holders of indicia of ownership
3 to protect a security interest shall not apply to liability, if any,
4 pursuant to applicable law and regulation, for arranging for ¹the
5 offsite¹ disposal or treatment of a hazardous substance or by
6 accepting for transportation and disposing of a hazardous
7 substance at ¹[a] an offsite¹ facility selected by the holder.

8 4. ¹a.¹ Nothing in sections 1 through 5 of this act shall be
9 deemed to prohibit or limit the rights of the Department of
10 Environmental Protection and Energy to clean up ¹[sites] a
11 property¹ or to obtain a lien on ¹[sites] the property of a
12 discharger or holder in order to recover cleanup costs¹ pursuant
13 to section 7 of P.L.1976, c.141 (C.58:10-23.11f). ¹Any recovery
14 of cleanup costs from a holder pursuant to a lien obtained by the
15 Department of Environmental Protection and Energy shall be
16 limited to the actual financial benefit conferred on such holder
17 by a cleanup or removal action, and shall not exceed the amount
18 realized by the holder on the sale or other disposition of the
19 property.

20 b. Nothing in sections 1 through 5 of this act shall be deemed
21 to prohibit or limit the rights of the Department of
22 Environmental Protection and Energy, pursuant to section 7 of
23 P.L.1976, c.141 (C.58:10-23.11f), to direct the holder to take any
24 emergency response actions, including closure of the vessel or
25 facility, necessary to prevent, contain or mitigate a continuing or
26 new discharge that poses an immediate threat to the environment
27 or to the public health, safety or welfare.

28 c. (1) If a holder forecloses on a vessel or facility at which it
29 has actual knowledge a discharge occurred or began prior to the
30 date of foreclosure, the holder shall, within 30 days of the date of
31 foreclosure, notify the Department of Environmental Protection
32 and Energy that foreclosure has occurred. Any person who fails
33 to give notice required pursuant to this subsection or knowingly
34 gives or causes to be given false information in any such report,
35 shall be subject to a civil penalty not to exceed \$25,000. A court,
36 in determining the amount of the penalty to be imposed, shall
37 consider, among other relevant factors, the amount of any
38 damages caused by the failure to give timely notice and whether
39 the failure to notify was inadvertent or intentional.

40 (2) The holder shall immediately notify the Department of
41 Environmental Protection and Energy of any new discharge, of
42 which it has actual knowledge, occurring after the date of
43 foreclosure, from the vessel or facility. Any person who fails to
44 give notice required pursuant to this subsection or knowingly
45 gives or causes to be given any false information in any such
46 report, shall be subject to a civil penalty not to exceed \$10,000
47 per day for each violation. A court, in determining the amount of
48 the penalty to be imposed and the appropriateness of imposing
49 multiple penalties for a continuing offense, shall consider, among
50 other relevant factors, the amount of any damages caused by the
51 failure to give timely notice and whether the failure to notify
52 was inadvertent or intentional.

53 (3) Any penalty incurred under this section may be recovered
54 with costs in a summary proceeding pursuant to "the penalty

1 enforcement law, N.J.S.2A:58-1 et seq., in the Superior Court or
2 a municipal court. Failure to give any required notice pursuant
3 to this subsection shall not cause the holder to lose its status as a
4 person who maintains indicia of ownership primarily to protect a
5 security interest.¹

6 5. Nothing in sections 2 through 4 of this act shall be
7 construed to require a holder of a security interest to conduct or
8 require an environmental inspection and the liability of the holder
9 of the security interest pursuant to P.L.1976, c.141
10 (C.58:10-23.11 et seq.) shall not be based on or affected by a
11 failure to conduct an environmental inspection.

12 6. In the event of the discharge of a hazardous substance from
13 a vessel or facility, which vessel or facility is all or part of a
14 trust, receivership estate, guardianship estate or estate of a
15 deceased person, only the assets of the trust or estate, or assets
16 of any discharger other than the fiduciary of such trust or estate,
17 shall be subject to the obligation to pay for the cleanup of the
18 discharge as set forth in the "Spill Compensation and Control
19 Act," P.L.1976, c.141 (C.58:10-23.11 et seq.).

20 7. a. The following transactions shall be excluded from the
21 provisions of the "Environmental Cleanup Responsibility Act,"
22 P.L.1983, c.330 (C.13:1K-6 et seq.):

23 (1) Execution, delivery and filing or recording of any
24 mortgage, security interest, collateral assignment or other lien
25 on real or personal property; and

26 (2) Any transfer of personal property pursuant to a valid
27 security agreement, collateral assignment or other lien,
28 including, but not limited to, seizure or replevin of such personal
29 property which transfer is for the purpose of implementing the
30 secured party's rights in the personal property which is the
31 collateral.

32 b. In the event of the closing, termination or transfer of an
33 industrial establishment, which industrial establishment is all or
34 part of a trust, receivership estate, guardianship estate or estate
35 of a deceased person, only the assets of the trust or estate, or
36 assets of any discharger other than the fiduciary of such trust or
37 estate shall be subject to the obligation to remove the discharge
38 as set forth in P.L.1983, c.330 (C.13:1K-6 et seq.).

39 8. This act shall take effect immediately.

40

41

42

43

44 Limits liability of secured lenders and fiduciaries under certain
45 environmental laws.

1 as set forth in P.L.1983, c.330 (C.13:1K-6 et seq.).
2 8. This act shall take effect immediately.

3
4

5 STATEMENT

6
7 This bill supplements the "Spill Compensation and Control Act"
8 to limit the liability of a holder of a security interest who,
9 without participating in the management of a vessel or facility,
10 acts primarily to protect his security interest in the vessel or
11 facility, and to limit the liability of a fiduciary to the value of
12 the property involved or the assets of the particular trust or
13 estate and not the assets of the fiduciary in the event of a
14 discharge of a hazardous substance.

15 This bill also supplements the "Environmental Cleanup
16 Responsibility Act" to make certain that act does not apply to
17 personal property or is triggered by purely personal property
18 transactions, and to limit the liability of a fiduciary of a trust or
19 estate by providing that only the assets of the trust or estate
20 would be liable to remove any discharge under that act.

21
22
23
24

25 Limits liability of secured lenders and fiduciaries under certain
26 environmental laws.

ASSEMBLY FINANCIAL INSTITUTIONS COMMITTEE

STATEMENT TO

ASSEMBLY COMMITTEE SUBSTITUTE FOR

SENATE, No. 577

STATE OF NEW JERSEY

DATED: OCTOBER 19, 1992

The Assembly Financial Institutions Committee favorably reports Assembly Committee Substitute for Senate, No. 577.

This bill creates a secured creditor exemption under New Jersey's "Spill Compensation and Control Act" by providing that a lender is not liable under that act if the lender holds an ownership or other security interest in a vessel or facility primarily to protect a security interest in the vessel or facility and, while holding such ownership or other security interest, does not actively participate in the management of the vessel or facility. A lender with a security interest may foreclose, retain possession, and, if necessary to maintain the value of the secured property, continue the functioning of the enterprise in order to protect the lender's security interest, without triggering liability under that act if the lender takes specific action to attempt to dispose of the property, or does not reject or ignore a written bona fide, firm offer of fair consideration for the property. A secured lender must take at least the following actions to sell the property to avoid triggering potential liability: within 12 months following the foreclosure, a secured lender must list the vessel or facility with a broker, dealer or agent who deals with the type of property in question or make some other bona fide effort to sell or dispose of the property; and, at any time following six months after foreclosure, the secured lender must not have rejected, or failed to act upon within 90 days of receipt of, a written bona fide, firm offer of fair consideration for the property. Thus, a secured lender may avail itself of the secured creditor exemption unless the lender fails to take reasonable steps to sell the property or rejects or fails to act upon a bona fide offer of fair consideration.

The bill also provides that, if a secured lender outbids or refuses bids from parties offering fair consideration for a vessel or facility, it would be evidence that the vessel or facility is not held primarily to protect the security interest.

The bill further provides that while a trust or estate may be liable under the "Spill Compensation and Control Act" in the event of a discharge of a hazardous substance or the "Environmental Cleanup Responsibility Act" to remove any discharge, the fiduciary of that trust or estate would not be liable.

Finally, the bill clarifies that the "Environmental Cleanup Responsibility Act" does not apply to personal property or is not triggered by personal property transactions.

The Assembly Committee Substitute for Senate, No. 577 differs primarily from Senate, No. 577 in its use of final language of the Environmental Protection Agency in that agency's rule adopted April 29, 1992, to clarify the definitions of "participation in the management," "fair consideration," "date of foreclosure," "foreclosure and its equivalents," and "indicia of ownership."

The Assembly Committee Substitute for Senate, No. 577 is identical to the Assembly Committee Substitute for Assembly, No. 1274.

SENATE COMMERCE COMMITTEE

STATEMENT TO

SENATE, No. 577

with Senate committee amendments

STATE OF NEW JERSEY

DATED: MARCH 26, 1992

The Senate Commerce Committee reports favorably and with committee amendments Senate, No. 577

This bill creates a secured creditor exemption under New Jersey's "Spill Compensation and Control Act" by providing that a lender is not liable under that act if the lender holds an ownership or other security interest in a vessel or facility primarily to protect a security interest in the vessel or facility and has not had an active participation in the management of the vessel or facility. A lender with a security interest may foreclose, retain possession, and, if necessary to maintain the value of the secured property, continue the functioning of the enterprise in order to protect the lender's security interest, without triggering liability under that act if the lender takes specific action to attempt to dispose of the property, or does not reject or ignore a written bona fide, firm offer of fair consideration for the property. A secured lender must take at least the following actions to sell the property to avoid triggering potential liability: within 12 months following the foreclosure, a secured lender must list the vessel or facility with a broker, dealer or agent who deals with the type of property in question or make some other bona fide effort to sell or dispose of the property; and, at any time following six months after foreclosure, the secured lender must not have rejected, or failed to act upon within 90 days of receipt of, a written bona fide, firm offer of fair consideration for the property. Thus, a secured lender may avail itself of the secured creditor exemption unless the lender fails to take reasonable steps to sell the property or rejects or fails to act upon a bona fide offer of fair consideration.

The bill also provides that, if a secured lender outbids or refuses bids from parties offering fair consideration for a vessel or facility, it would be evidence that the vessel or facility is not held primarily to protect the security interest.

The bill further provides that while a trust or estate may be liable under the "Spill Compensation and Control Act" in the event of a discharge of a hazardous substance or the "Environmental Cleanup Responsibility Act" to remove any discharge, the fiduciary of that trust or estate would not be liable.

Finally, the bill clarifies that the "Environmental Cleanup Responsibility Act" does not apply to personal property or is not triggered by personal property transactions.

The committee made technical amendments to the bill.

ADOPTED
MAR 15 1993

SENATE Amendments
(Proposed by Senator Cardinale)

to

SENATE, No. 577 (ACS)

(Sponsored by Senator Cardinale)

REPLACE SECTION 1 TO READ:

1. For purposes of sections 1 through 5 of this act:

"Active participation in the management" or "participation in the management" means actual participation in the management or operational affairs by the holder of the security interest and shall not include the mere capacity, or ability to influence, or the unexercised right to control vessel or facility operations.

(1) A holder of a security interest shall be considered to be in active participation in the management, while the borrower is still in possession, only if the holder either:

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

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

(i) environmental compliance; or

(ii) all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of credit manager, accounts payable or receivable manager, or both, personnel manager, controller, chief financial officer, or similar functions.

(2) No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management. A prospective holder who undertakes or requires an environmental inspection of the vessel or facility in which indicia of ownership are to be held, or requires a prospective borrower to clean up a vessel or facility or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the vessel's or facility's management, provided however, that a holder shall not be required to conduct or require an inspection to qualify for the protection for holders granted pursuant to sections 1 through 5 of this act, and the liability of a holder shall not be based on or affected by the holder not conducting or not requiring an inspection.

(3) Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of sections 1 through 5 of this act. The authority for the holder to make such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and work out activities cover and include all activities up to foreclosure and its equivalents.

(a) A holder who engages in policing activities prior to foreclosure shall remain within the exemption provided that the holder does not by such actions participate in the management of the vessel or facility. Such actions include, but are not limited to, requiring the borrower to clean up the vessel or facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, State, and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the vessel or facility (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial conditions during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations or promises from the borrower).

(b) A holder who engages in work out activities prior to foreclosure and its equivalents shall remain within the exemption provided that the holder does not by such action participate in the management of the vessel or facility. For purposes of this act, "work out" refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to: prevent, cure, or mitigate a default by the borrower or obligor; or preserve or prevent the diminution of the value of the security. Work out activities include, but are not limited to: restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations or promises from the borrower.

(4) A holder does not participate in the management of a vessel or facility by making any response ¹[to] or performing any response action or undertaking any cleanup or removal or similar action under¹ the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," Pub.L. 96-510 (42 U.S.C. §9601 et seq.), the "Spill Compensation and Control Act," P.L. 1976, c. 141 (C. 58:10-23.11 et seq.), or any other State or federal environmental law or regulation.

"Date of foreclosure" means the date on which the holder obtains legal or equitable title to the vessel or facility pursuant to or incident to foreclosure.

"Fair consideration" means the value of the security interest when calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the cases of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of property subject to a lease financing transaction) pursuant to foreclosure and its equivalents, plus any unpaid interest, rent or penalties (whether arising before or after foreclosure and its equivalents), plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining the business activities of the enterprise, preserving, protecting and preparing the vessel or facility prior to sale, re-lease of property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or other disposition, plus response costs incurred under applicable federal or State environmental cleanup laws or regulations, or at the direction of an on-scene coordinator, less any amounts received by the holder in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title (or possession in the case of property subject to a lease financing transaction) pursuant to foreclosure and its equivalents. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this definition.

"Foreclosure" or "foreclosure and its equivalents" means purchase at foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other form or informal manner (whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower) by which the holder acquires title to or possession of the secured property.

"Holder" is a person who maintains indicia of ownership primarily to protect a security interest. A holder includes the initial holder (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest, or a receiver or other person who acts on behalf or for the benefit of a holder.

"Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), legal or equitable title obtained pursuant to foreclosure and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.

"Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation but does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as a protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reasons why any ownership indicia are held shall be as protection for a security interest.

"Security interest" means an interest in a vessel or facility created or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trusts receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in a vessel or facility for the purpose of securing a loan or other obligation.

REPLACE SECTION 2 TO READ:

2. A person who maintains indicia of ownership of a vessel or facility primarily to protect a security interest in a vessel or facility and who does not participate in the management of the vessel or facility is not deemed to be an owner or operator of the vessel or facility, shall not be deemed the discharger or responsible party for a discharge from the vessel or facility and shall not be liable for cleanup costs or damages resulting from discharges from the vessel or facility pursuant to sections 8, 18, and 22 of P.L. 1976, c. 141 (C. 58:10-23.11g, 58:10-23.11q and 58:10-23.11u) or section 2 of P.L. 1990, c. 75 (C. 58:10-23.11u1) 1, except to the extent that liability may still apply to holders after foreclosure as set forth in section 3 of this act¹.

REPLACE SECTION 3 TO READ:

3. The indicia of ownership, held after foreclosure, continue to be maintained primarily as a protection for a security interest provided that the holder did not participate in management prior to foreclosure and that the holder undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or otherwise divest itself of the vessel or facility in a reasonably expeditious manner in accordance with the means and procedures specified in this section¹. Such a holder may liquidate, maintain business operations, undertake environmental response actions pursuant to State and federal law, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition, without losing status as a person who maintains indicia of ownership primarily¹ to protect a security pursuant to section 2 of this act.

a. For purposes of establishing that a holder is seeking to sell, re-lease property held pursuant to a new lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest a vessel or facility in a reasonably expeditious manner, the holder may use whatever commercially reasonable means are relevant or appropriate with respect to the vessel or facility, or may employ the means specified in this section.

b. (1) A holder that outbids, rejects or fails to act upon a written bona fide, firm offer of fair consideration within 90 days of receipt of the offer, and which offer is received at any time after six months following the date of foreclosure, shall not be deemed to be using a commercially reasonable means for the purpose of this section. A "written bona fide, firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed vessel or facility, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this subsection, the six-month period begins to run from the time that the holder acquires a marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title.

(2) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the vessel or facility within the 90-day period, establishes that the ownership indicia in the secured property are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or State law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

c. A holder establishes that it is proceeding in a commercially reasonable manner after foreclosure by, within 12 months following foreclosure, listing the vessel or facility with a broker, dealer, or agent who deals with the type of property in question,

or by advertising the vessel or facility as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the vessel or facility in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, State, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located. For purposes of this subsection, the 12-month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title.

d. 1A holder shall sell, re-lease the property held pursuant to a new lease financing transaction, or otherwise divest such vessel or facility in a reasonably expeditious manner, but not later than five years after the date of foreclosure, except that a holder may continue to hold the property for a time period longer than five years without losing status as a person who maintains indicia of ownership primarily to protect a security interest, if (1) the holder has made a good faith effort to sell, or otherwise divest itself of the property using commercially reasonable means or other procedures prescribed by this act; (2) the holder has obtained any approvals required pursuant to applicable federal or State banking or other lending laws to continue its possession of the property; and (3) the holder has exercised reasonable custodial care to prevent or mitigate any new discharges from the vessel or facility that could substantially diminish the market value of the property.

✓
-re-lease

e. (1) The exemption granted to holders pursuant to this section shall not apply to the liability for any new discharge occurring after the date of foreclosure, from the vessel or facility, that is caused by acts or omissions of the holder which can be shown, based on a preponderance of the evidence, to have been negligent. In the event a property has both preexisting and new discharges, the liability, if any, allocable to the holder pursuant to this subsection shall be limited to those cleanup costs or damages that relate directly to the new discharge. In the event there is a substantial commingling of a new discharge with a preexisting discharge, the liability, if any, allocable to the holder pursuant to this subsection shall be limited to the cleanup costs or damages in excess of those cleanup costs or damages relating to the preexisting discharge.

✓

In order to establish that a discharge occurred or began prior to the date of foreclosure, a holder may perform, but shall not be required to perform, an environmental audit, in accordance with any applicable Department of Environmental Energy regulat

shall, within 90 days of its receipt of the audit, review the audit and transmit its findings to the holder. The Department of Environmental Protection and Energy may charge reasonable fees and adopt any additional regulations necessary to provide guidelines for the submission and review of such audits.

(2) Nothing in this subsection shall be deemed to impose liability for a new discharge from the vessel or facility, that is authorized pursuant to a federal or State permit or cleanup procedure.

(3)¹ The exemption granted to holders of indicia of ownership to protect a security interest shall not apply to liability, if any, pursuant to applicable law and regulation, for arranging for ¹the offsite¹ disposal or treatment of a hazardous substance or by accepting for transportation and disposing of a hazardous substance at ¹[a] an offsite¹ facility selected by the holder.

REPLACE SECTION 4 TO READ:

4. ¹a.¹ Nothing in sections 1 through 5 of this act shall be deemed to prohibit or limit the rights of the Department of Environmental Protection and Energy to clean up ¹[sites] a property¹ or to obtain a lien on ¹[sites] the property of a discharger or holder in order to recover cleanup costs¹ pursuant to section 7 of P.L.1976, c.141 (C.58:10-23.11f). ¹Any recovery of cleanup costs from a holder pursuant to a lien obtained by the Department of Environmental Protection and Energy shall be limited to the actual financial benefit conferred on such holder by a cleanup or removal action, and shall not exceed the amount realized by the holder on the sale or other disposition of the property.

b. Nothing in sections 1 through 5 of this act shall be deemed to prohibit or limit the rights of the Department of Environmental Protection and Energy, pursuant to section 7 of P.L. 1976, c.141 (C.58:10-23.11f), to direct the holder to take any emergency response actions, including closure of the vessel or facility, necessary to prevent, contain or mitigate a continuing or new discharge that poses an immediate threat to the environment or to the public health, safety or welfare.

c. (1) If a holder forecloses on a vessel or facility at which it has actual knowledge a discharge occurred or began prior to the date of foreclosure, the holder shall, within 30 days of the date of foreclosure, notify the Department of Environmental Protection and Energy that foreclosure has occurred. Any person who fails to give notice required pursuant to this subsection or knowingly gives or causes to be given false information in any such report, shall be subject to a civil penalty not to exceed \$25,000. A court, in determining the amount of the penalty to be imposed, shall consider, among other relevant factors, the amount of any damages caused by the failure to give timely notice and whether the failure to notify was inadvertent or intentional.

(2) The holder shall immediately notify the Department of Environmental Protection and Energy of any new discharge, of which it has actual knowledge, occurring after the date of foreclosure, from the vessel or facility. Any person who fails to

give notice required pursuant to this subsection or knowingly gives or causes to be given any false information in any such report, shall be subject to a civil penalty not to exceed \$10,000 per day for each violation. A court, in determining the amount of the penalty to be imposed and the appropriateness of imposing multiple penalties for a continuing offense, shall consider, among other relevant factors, the amount of any damages caused by the failure to give timely notice and whether the failure to notify was inadvertent or intentional.

(3) Any penalty incurred under this section may be recovered with costs in a summary proceeding pursuant to "the penalty enforcement law," N.J.S. 2A:58-1 et seq., in the Superior Court or a municipal court. Failure to give any required notice pursuant to this subsection shall not cause the holder to lose its status as a person who maintains indicia of ownership primarily to protect a security interest.

STATEMENT

These amendments provide that:

a. A holder must sell, re-lease or otherwise divest the vessel or facility foreclosed upon within five years after the date of foreclosure, except in certain circumstances;

b. The exemption granted to holders under the bill does not apply to the liability for any new discharge occurring from the vessel or facility after the date of foreclosure, that is caused by acts or omissions of the holder which can be shown, based on a preponderance of the evidence, to have been negligent;

c. Nothing in the bill limits the current power of the Department of Environmental Protection and Energy to direct the holder to take any emergency response act necessary to prevent, contain or mitigate continuing or new discharge that poses an immediate threat to the environment;

d. If a holder forecloses on a vessel or facility at which it has actual knowledge a discharge occurred or began prior to the date of foreclosure, the holder must, within 30 days of the date of foreclosure, notify the Department of Environmental Protection and Energy that foreclosure has occurred. Failure to so notify would be subject to a civil penalty not to exceed \$25,000; and

e. The holder must immediately notify the Department of Environmental Protection and Energy of any new discharge, of which it has actual knowledge, occurring from the vessel or facility after the date of the foreclosure. Failure to so notify would be subject to a civil penalty not to exceed \$10,000.



S577/A1274

OFFICE OF THE GOVERNOR NEWS RELEASE

**CN-001
Contact:**

Jon Shure
609/777-2600

**TRENTON, N.J. 08625
Release:**

Friday
May 7, 1993

ADVISORY

Governor Jim Florio today signed S 577, which helps lift the credit crunch by easing the severe liability requirements now imposed on financial institutions making loans to manufacturers. He issued the following statement:

"This is about jobs. We're working to help ease the credit crunch and stimulate job growth and economic development. This new law will encourage financial institutions to make loans to manufacturers instead of penalizing them, and in doing so, invest in older industrial sites for future economic potential and create jobs. This measure strikes a careful balance between important economic and environmental concerns, and provides a timely, workable solution to a vexing problem experienced by New Jersey's banking and manufacturing sectors in recent years."

S 577/A 1274 was sponsored by Senator Gerald Cardinale, and Assemblypersons John Penn and Paul Kramer.

###