

103^D CONGRESS
1ST SESSION

H. R. 2462

To amend the Comprehensive Environmental Response, Compensation, and Liability Act and the Solid Waste Disposal Act to limit the liabilities under these Acts of both fiduciaries and lending institutions, including finance lessors, guarantors, and others directly or indirectly holding indicia of ownership primarily to protect a security interest in property which is subject to either Act.

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 1993

Mr. LAFALCE (for himself, Mr. SLATTERY, Mr. LAROCOCO, and Mr. MCCOLLUM) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and Public Works and Transportation

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act and the Solid Waste Disposal Act to limit the liabilities under these Acts of both fiduciaries and lending institutions, including finance lessors, guarantors, and others directly or indirectly holding indicia of ownership primarily to protect a security interest in property which is subject to either Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. AMENDMENTS TO COMPREHENSIVE ENVIRON-**
2 **MENTAL RESPONSE, COMPENSATION, AND LI-**
3 **ABILITY ACT OF 1980.**

4 The Comprehensive Environmental Response, Com-
5 pensation, and Liability Act of 1980 is amended—

6 (1) by striking the last sentence of paragraph
7 101(20)(A); and

8 (2) by inserting the following new paragraphs
9 101(20) (E) and (F):

10 “(E)(i) The term ‘owner or operator’ does
11 not include a person who, without participating
12 in the management of a vessel or facility, holds
13 indicia of ownership primarily to protect his or
14 her security interest in the vessel or facility.

15 “(ii) The term ‘indicia of ownership’ means
16 any legal or equitable interest in property ac-
17 quired directly or indirectly—

18 (I) for the purpose of securing pay-
19 ment of a loan or indebtedness, a right of
20 reimbursement or subrogation under a
21 guaranty, or the performance of another
22 obligation,

23 (II) evidencing ownership under a
24 lease financing transaction where the les-
25 sor does not initially select or ordinarily

1 control the daily operation or maintenance
2 of the property, or

3 (III) in the course of protecting a se-
4 curity interest or right of reimbursement
5 or subrogation under a guaranty.

6 ‘Indicia of ownership’ include evidence of inter-
7 ests in mortgages, deeds of trust, liens, surety
8 bonds, guaranties, lease financing transactions
9 where the lessor does not initially select or ordi-
10 narily control the daily operation or mainte-
11 nance of the property, other forms of encum-
12 brances against property recognized under ap-
13 plicable law as vesting the holder of the security
14 interest with some indicia of title, legal or equi-
15 table title obtained at, or in lieu of, foreclosure,
16 and their equivalents. A person may, but is not
17 required to, hold title in property in order to
18 hold indicia of ownership in that property.

19 “(iii) A ‘holder of a security interest’ is a
20 person who holds indicia of ownership in prop-
21 erty primarily to protect a security interest. A
22 ‘holder of a security interest’ includes the initial
23 holder (such as a loan originator) and any sub-
24 sequent holder (such as a successor-in-interest
25 or subsequent purchaser of the security interest

1 on the secondary market); guarantor; lease fin-
2 ancier or any successor where the lessor does
3 not initially select or ordinarily control the daily
4 operation or maintenance of the property; any
5 person who holds indicia or ownership primarily
6 to protect a security interest; or a receiver or
7 other person who acts on behalf or for the bene-
8 fit of a holder of a security interest.

9 “(iv) The term ‘security interest’ means an
10 interest in property created or established for
11 the purpose of securing a loan, right of reim-
12 bursement or subrogation under a guaranty, or
13 other obligation or constituting a lease financ-
14 ing transaction. Security interests include mort-
15 gages, deeds of trust, liens, lease financing
16 transactions in which the lessor does not ini-
17 tially select or ordinarily control the daily oper-
18 ation or maintenance of the property, trust re-
19 ceipt transactions, and their equivalents. Secu-
20 rity interests may also arise from transactions
21 such as sales and leasebacks, conditional sales,
22 installment sales, certain assignments, factoring
23 agreements, accounts receivable financing ar-
24 rangements, and consignments, if the trans-
25 action creates or establishes an interest in prop-

1 erty for the purpose of securing a loan, right of
2 reimbursement or subrogation under a guaranty
3 or other obligation.

4 “(v) The term ‘participating in the man-
5 agement of property’ means actual participation
6 in the management or operational affairs of the
7 property by the holder, and does not include the
8 mere capacity to influence, or ability to influ-
9 ence, or the unexercised right to control facility
10 operations. A holder is participating in manage-
11 ment while the borrower is still in possession of
12 the property encumbered by the security inter-
13 est, only if the holder either—

14 “(I) exercises decisionmaking control
15 over the borrower’s environmental compli-
16 ance, such that the holder has undertaken
17 responsibility for the borrower’s solid waste
18 handling or disposal practices; or

19 “(II) exercises control at a level com-
20 parable to that of a manager of the bor-
21 rower’s enterprise, such that the holder
22 has assumed or manifested responsibility
23 for the overall management of the enter-
24 prise encompassing the day-to-day deci-

1 sionmaking of the enterprise with respect
2 to—

3 “(aa) environmental compliance;

4 or

5 “(bb) all, or substantially all, of
6 the operational (as opposed to finan-
7 cial or administrative) aspects of the
8 enterprise other than environmental
9 compliance. Operational aspects of the
10 enterprise include functions such as
11 that of facility or plant manager, op-
12 erations manager, chief operating offi-
13 cer, or chief executive officer. Finan-
14 cial or administrative aspects include
15 functions such as that of credit man-
16 ager, personnel manager, controller,
17 chief financial officer, or similar func-
18 tions.

19 “(vi) The term ‘primarily to protect a se-
20 curity interest’ includes indicia of ownership ac-
21 quired as a consequence of having or exercising
22 rights as a holder of a security interest where
23 the same is necessary or appropriate to protect
24 the security interest, to provide for compliance
25 with laws, to preserve the value of the property

1 or benefits therefrom, or to recover a loan, in-
2 debtedness or right of reimbursement or sub-
3 rogation under a guaranty or to redress any
4 other obligation secured by such interest or to
5 recover property subject to a finance lease. A
6 holder of a security interest who directly or in-
7 directly acquires full title or a right to title or
8 possession of such property upon default under
9 the security interest, or at, or in lieu of, fore-
10 closure, or, in the case of a finance lease, upon
11 expiration, cancellation, or termination of such
12 lease, shall continue to hold indicia of owner-
13 ship primarily to protect a security interest so
14 long as such holder is diligently proceeding to
15 sell or convey title or the right to title or to re-
16 lease such property on commercially reasonable
17 terms at the earliest possible time, while pre-
18 serving the property in the interim.

19 “(vii) The term ‘property’ means real and
20 personal property and includes facilities, stor-
21 age tanks, equipment, vessels, vehicles, and
22 other modes of transportation whether by sea,
23 land, or air.

24 “(viii)(I) The term ‘guarantor’ includes
25 guarantors and sureties of security interests,

1 securities, and other obligations, issuers of let-
2 ters of credit and other credit enhancements,
3 title insurers, and entities which directly or in-
4 directly acquire indicia of ownership in the
5 course of protecting a security interest or acting
6 as such guarantors, sureties, issuers of letters
7 of credit or other credit enhancements or title
8 insurers, and the term ‘guaranty’ includes guar-
9 anties, surety bonds, title insurance policies, let-
10 ters of credit and other credit enhancements,
11 and other agreements with a guarantor relating
12 to the obligations described in this subclause
13 (I).

14 “(II) ‘Directly or indirectly’ includes any
15 interest in property, security interest, indicia of
16 ownership title, or right to title held or acquired
17 by a fiduciary or similar entity for the benefit
18 of a holder of a security interest.

19 “(ix) The terms ‘borrower’, ‘debtor’, and
20 ‘obligor’ mean a person whose property is en-
21 cumbered by a security interest and includes a
22 lessee under a lease financing transaction.

23 “(x) Actions taken by a holder of a secu-
24 rity interest to foreclose, sell, liquidate, release
25 or otherwise divest or cause the transfer of

1 property subject to a security interest; or pre-
2 serve or protect the value of such property; or
3 otherwise to exercise rights of a holder of a se-
4 curity interest specified in subparagraph (v)
5 above; or to assist the borrower, debtor, obligor,
6 or lessee in winding down its operations or ac-
7 tivities related to such property; or to abandon
8 or release the property prior to foreclosure or
9 its equivalents; or to require or conduct re-
10 sponse action on, or relating to, the property;
11 shall not be deemed 'participating in the man-
12 agement of property' within the meaning of this
13 subsection (101)(20)(E). Completion of an envi-
14 ronmental inspection or evaluation consistent
15 with good commercial or customary practice by
16 or for the use of a holder of a security interest
17 is probative evidence that a holder of a security
18 interest is acting to preserve and protect the
19 property during the time the holder of a secu-
20 rity interest may have possession or control of
21 such property, except that this Act does not re-
22 quire a holder of a security interest to conduct
23 nor does it require any environmental inspec-
24 tion or evaluation to qualify for this exemption.

1 “(xi) A holder of a security interest who,
2 in taking actions referred to in subparagraph
3 (x) above respecting property, actively and di-
4 rectly causes or exacerbates a release of a haz-
5 ardous waste for which a Federal or an author-
6 ized State government determines that response
7 action is necessary, shall be liable for the cost
8 of such response action to the extent only that
9 the release is directly attributable to such hold-
10 er’s activities, except that such a holder shall
11 not be liable for response action costs arising
12 from a release which commences before and
13 continues after such holder takes any action re-
14 ferred to in subparagraph (x) above.

15 “(F)(i) The term ‘fiduciary’ means any en-
16 tity which is considered a fiduciary under sec-
17 tion 3(21) of the Employee Retirement Income
18 Security Act of 1974, as amended from time to
19 time, or who is acting as trustee, executor, ad-
20 ministrator, custodian, guardian of estates, con-
21 servator, committee of estates of disabled per-
22 sons, personal representative, receiver, agent,
23 nominee or in any other fiduciary capacity for
24 the benefit of another entity.

1 “(ii) A fiduciary who acquires ownership or
2 control of property without having owned, oper-
3 ated, or participated in the management of that
4 property prior to assuming ownership or control
5 as fiduciary, other than for the benefit of a
6 holder of a security interest, shall not be an
7 ‘owner’ or ‘operator’ under this Act.

8 “(iii) Such a fiduciary who willfully, know-
9 ingly, or recklessly causes (in a direct and ac-
10 tive manner) a release of a hazardous sub-
11 stance, for which a Federal or an authorized
12 State government determines that response ac-
13 tion is necessary, shall be liable for the cost of
14 such response action to the extent only that the
15 release is directly attributable to the fiduciary’s
16 activities, except that such a fiduciary shall not
17 be liable for response action costs arising from
18 a release which commences before and contin-
19 ues after such fiduciary acquires ownership or
20 control of the property.

21 “(iv) Nothing in this subsection shall pre-
22 vent claims against the assets that constitute
23 the estate held by the fiduciary or the filing of
24 actions against the fiduciary in its representa-
25 tive capacity.

1 **SEC. 2. AMENDMENTS TO SOLID WASTE DISPOSAL ACT.**

2 The Solid Waste Disposal Act is amended—

3 (1) by adding at the end of section 1004 the
4 following paragraph:

5 “(41) The terms ‘owner’, ‘operator’, ‘generator’,
6 ‘transporter’, and ‘person’ do not include any entity
7 which would not be an ‘owner’ or ‘operator’ within
8 the meaning of paragraphs 101(20) (E) or (F) of
9 the Comprehensive Environmental Response, Com-
10 pensation, and Liability Act of 1980.”;

11 (2) by adding at the end of paragraph
12 9003(h)(a) the following sentence: “This definition
13 shall be construed to be parallel to the provisions of
14 paragraph 101(20)(E) of the Comprehensive Envi-
15 ronmental Response, Compensation, and Liability
16 Act of 1980.”, and

17 (3) by adding at the end of section 3006 the
18 following subsection:

19 “(i) AMENDMENTS MADE BY 1993 ACT.—The provi-
20 sions of section 1004(41) of this Act shall apply in each
21 State having an interim or finally authorized State pro-
22 gram to the same extent that such provisions apply in
23 other States.”.

24 **SEC. 3. SCOPE OF APPLICATION.**

25 The provisions of this Act shall apply to—

1 (1) all indicia of ownership acquired prior to
2 the date of enactment that are held primarily to pro-
3 tect a security interest in property; and

4 (2) each fiduciary with respect to any property
5 acquired by the fiduciary prior to the date of enact-
6 ment.

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