

CHAPTER 441
FORMERLY
SENATE BILL NO. 198

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO THE DELAWARE HAZARDOUS SUBSTANCE CLEANUP ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 91, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and by redesignating accordingly:

§ 9103 Definitions.

“Fiduciary” means:

a. A person acting for the benefit of another party as a bona fide:

1. Trustee;
2. Executor;
3. Administrator;
4. Custodian;
5. Guardian of estates or guardian ad litem;
6. Receiver;
7. Conservator;
8. Committee of estates of incapacitated persons;
9. Personal representative;

10. Trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

11. Representative in any other capacity that the Secretary, after providing public notice, determines to be similar to the capacities described in paragraphs 1 through 10 above; and

b. “Fiduciary” does not mean:

1. A person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person; or

2. A person that acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or of any other person.

“Fiduciary capacity” means the capacity of a person in holding title to a facility, or otherwise having control of or an interest in the facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

“Foreclosure; foreclose” mean, respectively:

a. Acquiring, and to acquire, a facility through:

1. Purchase at sale under a judgment or decree, power of sale, or non-judicial foreclosure sale;
2. A deed in lieu of foreclosure, or similar conveyance from a trustee; or
3. Repossession.

b. If the facility was security for an extension of credit previously contracted:

1. Conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

2. Any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a facility in order to protect the security interest of the person.

“Lender” means:

a. An insured depository institution (as defined in the Federal Deposit Insurance Act at 12 U.S.C. § 1813(c)(2)) or an insured credit union (as defined in the Federal Credit Union Act at 12 U.S.C. § 1752(7)) authorized by law to do business in this State;

b. A bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. § 2001 et seq., as amended) authorized by law to do business in this State;

c. A leasing or trust company that is an affiliate of an insured depository institution authorized to do business in this State;

d. Any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

e. Any legally recognized person authorized, to buy or sell loans or interests in loans in a bona fide manner in this State;

f. A person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

g. A person that provides title insurance and that acquires a facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

“Security interest” includes a right under a mortgage, deed of trust, assignment, judgment, lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

§ 9105 Standard of liability.

(c) The following persons are not liable under this section:

(3) A person who acquires, for subsequent disposition, title to, or possession of, a property to protect a security interest held by the person ~~in that property~~ and does not participate in management of the property; or a fiduciary which has a legal title to or manages any property for purposes of administering an estate or trust of which such property is part; provided, however, that this exemption shall not relieve a person from liability under this section where such liability is based on conduct entirely independent from that covered by this exemption. This paragraph (c)(3) is further limited as follows:

a. The term “participate in management” as used in this section:

1. Means actually participating in the management or operational affairs of a facility and does not include merely having the capacity to influence, or the unexercised right to control, facility operations.

2. A person that is a lender or fiduciary that holds indicia of ownership primarily to protect a security interest in a property shall be considered to participate in management only if, while the borrower is still in possession of the property encumbered by the security interest, the person:

A. Exercises decision-making control over the environmental compliance related to the facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the facility; or

B. Exercises control at a level comparable to that of a manager of the facility, such that the person has assumed or manifested responsibility:

i. For the overall management of the facility encompassing day-to-day decision-making with respect to environmental compliance; or

ii. Over all or substantially all of the operational functions, as distinguished from financial or administrative functions, of the facility other than the function of environmental compliance.

3. The term participate in management does not include performing an act or failing to act prior to the time at which a security interest is created in a property; and, provided the actions do not rise to the level of participating in management (within the meaning of clauses 1. and 2. above), does not include:

A. Holding a security interest or abandoning or releasing a security interest;

B. Including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

C. Monitoring or enforcing the terms and conditions of the extension of credit or security interest;

D. Monitoring or undertaking one or more inspections of the facility;

E. Requiring a remedy or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the facility prior to, during, or on the expiration of the term of the extension of credit;

F. Providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the facility;

G. Restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

H. Exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

I. Conducting a remedy under this chapter or otherwise under the direction of the Department.

4. A person who is a lender that did not otherwise participate in the management of a facility as provided in subparagraph (c)(3)a.2. of this section shall not be considered to have participated in management, notwithstanding that the person forecloses on the property and, after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the property, maintains business activities, winds up operations, or undertakes a remedy under § 9107 of this chapter with respect to the facility, or takes any other measure to preserve, protect, or prepare the facility prior to sale or disposition, if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

b. A fiduciary as described in paragraph (c)(3) of this section shall not be liable in its personal capacity under this chapter for:

1. Undertaking or directing another person to undertake a remedy or any other lawful means of addressing a hazardous substance in connection with the facility;

2. Terminating the fiduciary relationship;

3. Including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

4. Monitoring or undertaking one or more inspections of the facility;

5. Providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

6. Restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

7. Administering, as a fiduciary, a facility that was contaminated before the fiduciary relationship began; or

8. Declining to take any of the actions described in subparagraphs 2 through 7.

c. The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity; provided, however, that this limitation shall not apply to the extent that a person is liable under this chapter independently of the person's ownership of a facility as a fiduciary or actions taken in a fiduciary capacity.

d. The exclusion from liability contained in this paragraph (c)(3) does not limit liability pertaining to the release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

e. Nothing contained in this paragraph (c)(3):

1. Affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this paragraph; or

2. Creates any liability for a person or a private right of action against a fiduciary or any other person.

f. Nothing in this paragraph (c)(3) applies to a person if the person:

1. Acts in a capacity other than that of a fiduciary or in a beneficiary capacity, and in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

2. Is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

g. This paragraph (c)(3) does not preclude a claim under this chapter against:

1. The assets of the estate or trust administered by the fiduciary; or

2. Nonemployee agent or independent contractor retained by a fiduciary.

§ 9109 Enforcement.

(a) Whenever, in the opinion of the Secretary, a person:

(1) Is a potentially responsible party; and

(2) Has been notified of such person's potential liability pursuant to §§ 9104 and 9105 of this title; and

(3) Has not submitted a proposed settlement or has submitted a proposed settlement and the Secretary has rejected the proposal, the Secretary may seek to have the potentially responsible party perform a remedy at a facility by giving written notice to the person;

a. specifying the basis of the person's liability under this chapter for a remedy at the facility;

b. identifying the remedy to be performed by the person at the facility, and the timeframe for its completion;

c. advising that a public hearing, conducted pursuant to §§ 6004 and 6006 of this title, on the person's alleged liability, and the remedy to be performed and the timeframe for its completion, under this chapter may be had if requested within 30 days of the notice; and

d. notifying that the proposed remedy, and the timeframe for its completion, will be ordered unless a public hearing is requested. ~~after conducting a hearing pursuant to §§ 6004 and 6006 of this title, issue such order as the Secretary he or she deems appropriate~~

§ 9113 Hazardous Substance Cleanup Fund.

(c) Money in the Fund may be used by the Secretary only to carry out the purposes of this chapter, including, but not limited to, the following activities:

(1) Implementing the hazardous substance cleanup program required under this chapter.

(2) Providing a remedy with respect to releases or imminent threats of release of a hazardous substance at or from facilities.

(3) Providing for state matching funds required under the CERCLA, as well as future operations and maintenance costs for facilities at which a state match is required.

(4) Reimbursing, or directly paying, any person for reasonable remedial costs incurred with the prior authorization of the Secretary in responding to a hazardous substance remedy, including remedies of releases from underground storage tanks, pursuant to authorization of the Secretary. Direct payments may be made to the certified environmental consultant who performed the remedial work provided that the Brownfield Developer acknowledge and sign the remedial work invoice.

Approved October 06, 2014