

CHAPTER 145

AN ACT concerning liability for underground storage tank facilities under certain circumstances and amending P.L. 1993, c. 112.

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

1. Section 3 of P.L.1993, c.112 (C.58:10-23.11g6) is amended to read as follows:

C.58:10-23.11g6 Status and liability of holders after foreclosure.

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, facility, or underground storage tank facility in a reasonably expeditious manner in accordance with the means and procedures specified in this section. 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 primarily to protect a security pursuant to section 2 of P.L.1993, c.112 (C.58:10-23.11g5).

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, facility, or underground storage tank facility in a reasonably expeditious manner, the holder may use whatever commercially reasonable means are relevant or appropriate with respect to the vessel, facility, or underground storage tank 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, facility, or underground storage tank 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, facility, or underground storage tank 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, facility, or underground storage tank facility with a broker, dealer, or agent who deals with the type of property in question, or by advertising the vessel, facility, or underground storage tank 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, facility, or underground storage tank 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. A holder shall sell, re-lease the property held pursuant to a new lease financing transaction, or otherwise divest such vessel, facility, or underground storage tank 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, re-lease 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, facility, or underground storage tank facility that could substantially diminish the market value of the property.

e. (1) The exemption granted to holders pursuant to this section shall not apply to the liability for any new discharge from the vessel, facility, or underground storage tank facility, occurring 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. 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 Protection regulations and guidelines, to identify such discharges at the vessel, facility, or underground storage tank facility. Upon receipt of a complete audit from the holder, the Department of Environmental Protection 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 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, facility, or underground storage tank facility that is authorized pursuant to a federal or State permit or cleanup procedure.

(3) 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 the offsite disposal or treatment of a hazardous substance or by accepting for transportation and disposing of a hazardous substance at an offsite facility selected by the holder.

f. (1) A holder who acquires an underground storage tank facility continues to hold the exemption from liability for the underground storage tank facility granted to holders pursuant to this section if there is an operator of the underground storage tank facility, other than the holder, who is in control of the underground storage tank facility or has responsibility for compliance with applicable federal and State requirements.

(2) If an operator does not exist, a holder continues to maintain the exemption from liability for the underground storage tank facility granted to holders pursuant to this section if the holder: (i) empties all underground storage tank facilities within 60 days after foreclosure or within 60 days after the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.), whichever is later, so that no more than one inch of residue, or .3 percent by weight of the total capacity of the underground storage tank facility remains in the underground storage tank facility, leaves vent lines open and functioning, and caps and secures all other lines, pumps, manways, and ancillary equipment; (ii) empties those underground storage tank facilities that are discovered after foreclosure within 60 days of discovery or within 60 days of the effective date of P.L.1997, c.278, whichever is later, so that no more than one inch of residue, or .3 percent by weight of the total capacity of the underground storage tank facility remains in the system, leaves vent lines open and functioning, and caps and secures all other lines, pumps, manways, and ancillary equipment; and (iii) permanently closes the underground storage tank facility pursuant to the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.) or temporarily closes the underground storage tank facility.

g. An underground storage tank facility may be temporarily closed until a subsequent purchaser has acquired marketable title to the underground storage tank facility. When a subsequent purchaser acquires marketable title to the facility, the purchaser shall operate the underground storage tank facility in accordance with applicable State and federal laws or shall

permanently close or remove the underground storage tank facility in accordance with the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.).

For the purposes of this section, an underground storage tank facility shall be considered temporarily closed if a holder continues to operate and maintain corrosion protection and reports suspected releases to the Department of Environmental Protection. If the underground storage tank facility has not been upgraded to comply with the provisions of P.L.1986, c.102 and the applicable federal law or does not comply with the standards for new underground storage tanks pursuant to State and federal law except for spill and overfill protection, and is temporarily closed for 12 months or more following foreclosure, the holder shall conduct a site investigation of the underground storage tank facility in accordance with rules and regulations adopted by the department and shall be required to take any emergency response actions 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.

2. This act shall take effect immediately.

Approved July 10, 2001.