

Senate Bill No. 1285

CHAPTER 612

An act to add Chapter 6.96 (commencing with Section 25548) to Division 20 of the Health and Safety Code, relating to hazardous materials.

[Approved by Governor September 18, 1996. Filed
with Secretary of State September 19, 1996.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1285, Killea. Hazardous materials liability: lenders and fiduciaries.

Existing law, the Carpenter-Presley-Tanner Hazardous Substances Account Act, authorizes the Attorney General to recover from the liable person, as defined, the costs incurred and payable from the Hazardous Waste Control Account, the Site Remediation Account, or the Hazardous Substance Cleanup Fund for a removal or remedial action to a hazardous substances release. Existing law makes a liable person who fails to properly provide a removal or remedial action liable for damages in an amount equal to 3 times the amount of any costs incurred.

This bill would make a statement of legislative intent with regard to the liability of lenders and fiduciaries for hazardous material contamination. The bill would define terms and would exempt from liability a person who is acting in the capacity of a lender under any state or local statute, regulation, or ordinance, to the extent that the statute, regulation, or ordinance requires the taking of a removal and remedial action, or the payment of a penalty, and the liability arises from a release or threatened release of hazardous material at, from, or in connection with the property, or to the extent the statute, regulation, or ordinance authorizes damages arising from a release or threatened release. This exemption would apply to property in which the lender maintains indicia of ownership, as defined, property owned, leased, possessed, or used by a person who is obligated under a loan or obligation and in which the lender holds no security interest, as defined, and property acquired through foreclosure or its equivalent, as defined. The bill would also limit the liability of a fiduciary under those state or local laws from exceeding the assets held in the fiduciary estate.

The bill would exclude, from these immunity provisions, the actual benefit realized by a lender, or a lender who participated in the management of the property, as defined, who failed to be divested of the property in a reasonably expeditious manner, who caused or contributed to the release or threatened release of hazardous

material by an act or failure to act, or made the loan primarily for investment purposes. The bill would not exempt a fiduciary from liability if the fiduciary's negligent acts or intentional or reckless conduct caused or contributed to the release or threatened release.

The bill also would not exempt a lender or fiduciary from liability arising from conduct of, or ownership of the property by, the lender or fiduciary, other than in its capacity as a lender or fiduciary, or if the loan obligation, fiduciary relationship, or fiduciary transaction is structured for the purpose of, evading that liability. The bill would also not exempt a fiduciary who is a beneficiary of the estate, as specified, or exempt a lender from compliance with a specified administrative order.

The bill would provide that the immunity provisions do not limit the application or enforcement of specified provisions requiring the securing of a site where there has been a release of a hazardous substance with regard to property that is acquired by a lender through foreclosure or its equivalent. The bill would also provide that these immunity provisions do not exempt or excuse a lender or fiduciary from specified statutory operational requirements or exempt a lender from liability with regard to hazardous waste or certain hazardous materials or hazardous substances releases.

The bill would declare the intent of the Legislature that these immunity provisions do not apply to certain actions filed, or orders issued, before January 1, 1997, or to proceedings to enforce orders issued before that date.

The people of the State of California do enact as follows:

SECTION 1. Chapter 6.96 (commencing with Section 25548) is added to Division 20 of the Health and Safety Code, to read:

CHAPTER 6.96. HAZARDOUS MATERIALS LIABILITY OF LENDERS AND
FIDUCIARIES

25548. (a) The Legislature hereby finds and declares all of the following:

(1) There is uncertainty in the law of this state with regard to the liability of lenders for hazardous material contamination involving property that is owned or used by borrowers, whether or not the property is collateral for the loan or obligation.

(2) There is also uncertainty in the law of this state with regard to the liability of trustees, executors, and other fiduciaries for hazardous material contamination involving property that is part of the fiduciary estate. Fiduciaries understand that the fiduciary estate may have that liability, but are concerned that a fiduciary may have independent personal liability, despite the absence of personal culpability for the contamination.



(3) The uncertainty as to liability or potential liability is attributable to the failure of existing law, except for the security interest exemption incorporated by reference in Section 25323.5, to recognize that usually the credit or fiduciary relationship is not sufficiently related to the hazardous material contamination to warrant, as a policy matter, the imposition of liability on lenders and fiduciaries.

(b) It is the intent of the Legislature, in enacting this chapter, to specify the type of lender and fiduciary conduct that will not incur liability for hazardous material contamination. However, the liability exemption has appropriate boundaries. For example, the exemption will not protect lenders or fiduciaries in transactions that are structured for the purpose of evading liability for hazardous material contamination if the lender or fiduciary is not acting within its respective capacity, or if the contamination is caused by the lender or fiduciary.

(c) This chapter does not apply to judicial actions filed, or administrative orders issued, before January 1, 1997, or to proceedings to enforce judicial or administrative orders issued before January 1, 1997.

25548.1. As used in this chapter, the following terms have the following meaning:

(a) “Actual benefit” means the amount, if any, realized by the lender upon the disposition of property acquired through foreclosure or its equivalent, as a direct result of a removal or remedial action undertaken by another person, not to exceed the amount, if any, by which the disposition proceeds exceed the sum of the balance of all of the following:

(1) The loan or obligation or the amount of the lien evidenced by the loan or obligation outstanding at foreclosure or its equivalent.

(2) The costs, including attorneys’ fees, incurred by the lender in connection with the foreclosure or its equivalent, subsequent ownership, any removal or remedial action, and disposition of the property.

(b) “Borrower, debtor or obligor” means a person who is obligated to a lender under a loan or obligation whether or not the lender maintains a security interest in that person’s property.

(c) “Damages” includes compensatory damages, exemplary damages, punitive damages, and costs of every kind and nature, including, but not limited to, costs of a removal or remedial action.

(d) “Fiduciary” means a person who is acting in any of the following capacities:

(1) As trustee for a trust described in paragraph (1) or (2) of subdivision (a) of Section 82 of the Probate Code.

(2) As a fiduciary in any arrangement described in paragraphs (1) to (3), inclusive, or paragraphs (5) to (14), inclusive, of subdivision (b) of Section 82 of the Probate Code.



(3) A trustee appointed in proceedings under any state or federal bankruptcy law.

(4) An assignee or a trustee acting under an assignment made for the benefit of creditors.

(5) A court-appointed receiver.

(e) “Finance lease” means a transaction with respect to which both of the following apply:

(1) The lessor does not select or manufacture the goods or does not supply the goods, except in the case of a re-lease, whether it is created by a new transaction or substitution of the lessee.

(2) The lessor acquires the goods or right to possession and use of the goods in connection with the lease or a prior lease transaction.

(f) “Foreclosure or its equivalent” means the acquisition of property by a lender through any of the following:

(1) Judicial or nonjudicial foreclosure of the lender’s security interest in the property or acceptance of a deed or other conveyance in satisfaction thereto.

(2) Acceptance of a deed in lieu or other conveyance in satisfaction of a loan or obligation previously contracted.

(3) Termination of a finance lease by consent or default.

(4) Any other formal or informal manner, whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower, by which the lender acquires, for subsequent disposition, actual possession of the property subject to a security interest.

(g) “Hazardous material” has the same meaning as defined in subdivision (d) of Section 25260.

(h) (1) “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 or its equivalent.

(2) “Evidence of an interest” includes, but is not limited to, all of the following:

(A) Mortgages.

(B) Deeds of trust

(C) Liens.

(D) Surety bonds and guarantees of obligations.

(E) Title held pursuant to a finance lease in which the lessor does not select initially the leased property.

(F) Legal or equitable title obtained pursuant to foreclosure or its equivalent.

(G) Assignments, pledges, or other rights to, or other forms of, encumbrance against property that are held primarily to protect a security interest.

(3) A person is not required to hold title or a security interest to maintain indicia of ownership.



(i) “Lender” means a person to the extent of the capacity in which that person maintains indicia of ownership primarily to protect a security interest or makes, acquires, renews, modifies, or holds a loan or obligation from a borrower. “Lender” includes either of the following persons:

(1) Any person that acts as, or on behalf of, a lender in connection with any aspect of the solicitation, negotiation, consummation, disbursement, administration, servicing, collection, enforcement, or foreclosure or its equivalent of a loan or obligation or security interest in property.

(2) Any person that makes, secures, acquires, or holds a loan or obligation or security interest by assignment, sale, pledge, subrogation, succession, or operation of law, or becomes the receiver for the holder of a loan or obligation or security interest.

(j) “Loan or obligation” means a loan, revolving or nonrevolving line of credit, finance lease, sale-leaseback which provides for a purchase option in favor of the lessee, installment sale contract, sale on account, or other credit sale, letter of credit, forbearance or guaranty, collateral pledge, or other suretyship obligation, and any extension, renewal or modification thereof. A loan or obligation may or may not involve a security interest in property.

(k) (1) Except as provided in paragraphs (3) and (4), “participate (or participation) in the management of the property” means actual participation in the management or operational affairs of the property by the lender while the borrower, under the loan or obligation, is in possession of the property, and the lender exercises decisionmaking control over the borrower’s environmental compliance, so that the lender assumes responsibility for the borrower’s hazardous material handling or disposal practices, or exercises control at a level comparable to that of a manager of the borrower’s enterprise, so that the lender assumes or manifests responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to either of the following:

(A) Environmental compliance.

(B) All, or substantially all, of the operational, as opposed to financial or administrative, aspects of the enterprise other than environmental compliance.

(2) For purposes of paragraph (1), the following terms have the following meaning:

(A) “Operational aspects of the enterprise” include functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(B) “Financial or administrative aspects” include functions such as that of a credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions.



(3) Notwithstanding paragraph (1), “participation in the management of the property” does not include an act or omission by a prospective lender prior to making, acquiring, or holding a loan or obligation. “Participation in the management of the property” also does not include the actions taken by a prospective lender who undertakes or requires an environmental inspection of property prior to making, acquiring, or holding a loan or obligation. A lender or prospective lender does not “participate in the management of the property” if the lender or prospective lender requires the borrower to clean up the property or requires the borrower to comply or come into compliance with any applicable law or regulation. This chapter does not require a lender to conduct or require an inspection prior to foreclosure or its equivalent to qualify for the exemption provided by this chapter, and the liability of a lender shall not be based on or affected by the lender not conducting or not requiring an inspection prior to foreclosure or its equivalent.

(4) Loan policing and work out activities, as specified in paragraphs (5) and (6), that are consistent with holding ownership indicia primarily to protect a security interest and consistent with a loan or obligation made, acquired, or held primarily for purposes other than investment purposes, do not constitute participation in the management of the property. The authority for the lender to take those actions may, but are not required to, 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 include all activities up to foreclosure or its equivalent.

(5) A lender who engages in loan policing activities prior to foreclosure or its equivalent is exempt from liability pursuant to this chapter if the lender does not, by those actions, participate in the management of the property. Those actions include, but are not limited to, all of the following:

(A) Requiring the borrower to conduct a removal or remedial action during the term of the security interest or loan or obligation.

(B) Requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws during the term of the security interest or loan or obligation.

(C) Securing or exercising authority to monitor or inspect the property, including onsite inspections, or the borrower’s business or financial condition during the term of the security interest or loan or obligation.

(D) Taking other actions to adequately police the loan, obligation, or security interest, such as requiring the borrower to comply with any warranties, covenants, conditions, representations, or promises in connection with the security interest or loan or obligation.



(6) (A) A lender who engages in work out activities prior to foreclosure or its equivalents is exempt from liability pursuant to this chapter if the lender does not, by those actions, participate in the management of the property.

(B) “Work out” means those actions by which a lender, at any time prior to foreclosure or its equivalent, seeks to prevent, cure, or mitigate a default by the borrower, or to preserve or prevent the diminution of the value of the property, security interest or loan or obligation.

(C) Work out activities include, but are not limited to, all of the following:

(i) Restructuring or renegotiating the terms of the loan, obligation or security interest.

(ii) Requiring payment of additional rent or interest.

(iii) Exercising rights pursuant to an assignment of accounts or other amounts owing to a lender.

(iv) Requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to a lender.

(v) Exercising forbearance.

(vi) Providing specific or general financial or other advice, suggestions, counseling, or guidance.

(vii) Exercising any right or remedy the lender is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(7) A lender does not participate in the management of the property by taking any response action under Section 107(d)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607(d)(1)). However, the lender may be liable for damages, as defined by this chapter, that occur as a result of the lender’s gross negligence or willful misconduct in the lender’s performance of a response action under Section 107 (d)(1) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607(d)(1)).

(l) “Person” means any entity, including an individual, estate, trust, firm, business trust, joint stock company, corporation, partnership, joint venture, limited liability company, association, or government. Person includes any city, county, district, or the state, or any department, subdivision, or agency thereof.

(m) “Primarily to protect a security interest” means that the lender’s indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation. “Primarily to protect a security interest” does not include indicia of ownership held primarily for investment purposes or indicia of ownership held primarily for purposes other than as protection for a security interest. A lender may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any indicia of ownership are held shall be as protection for a security interest.



(n) “Property” means any real or personal property where hazardous materials is or was generated, handled, managed, deposited, stored, disposed of, placed, released, or otherwise have come to be located. In the context of a loan or obligation, property includes any real or personal property in which the obligor has or had an ownership, leasehold, or possessory interest, whether or not it was the subject of a security interest for the loan or obligation.

(o) “Release” has the same meaning as defined in Section 25320.

(p) “Remedial action” has the same meaning as defined in subdivision (g) of Section 25260.

(q) “Removal” means the cleanup or removal of released hazardous materials from the environment or the taking of other actions that may be necessary to prevent, minimize, or mitigate damages which may otherwise result from a release or threatened release, as further defined in Section 101(23) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9601(23)).

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

25548.2. (a) (1) Except as provided in Sections 25548.4 and 25548.5, a person, by reason of acting in the capacity of a lender, shall not be liable under any state or local statute, regulation, or ordinance to the extent of either of the following:

(A) To the extent that the statute, regulation, or ordinance requires the person to take a removal or remedial action, pay a penalty, fine, imposition, or assessment, or to forfeit the property specified in paragraph (2), and that liability arises from the release or threatened release of hazardous materials, at, from, or in connection with the property.

(B) To the extent that the statute, regulation, or ordinance authorizes damages arising from the release or threatened release of hazardous materials, at, from, or in connection with the property specified in paragraph (2).

(2) The exemption from liability provided by paragraph (1) shall apply to the following property:

(A) Property in which the lender maintains indicia of ownership primarily to protect a security interest.

(B) Property that was acquired by the lender through foreclosure or its equivalent.



(C) Property that is owned, leased, possessed, or used by a person who is obligated to the lender under a loan or obligation and in which the lender holds no security interest.

(b) A lender who did not participate in the management of the property prior to foreclosure or its equivalent may sell, re-lease property held pursuant to a finance lease, whether by a new finance lease or by substitution of the lessee, liquidate, maintain business activities, wind up operations, undertake any response action under Section 107(d)(1) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607 (d) (1)) and take measures to preserve, protect, or prepare the property prior to sale or other disposition. The lender may conduct those activities without voiding the exemption set forth in subdivision (a), subject to the requirements of subdivision (a) of Section 25548.5. However, the lender may be liable for damages, as defined by this chapter, that occur as a result of the lender's gross negligence or willful misconduct in the lender's performance of a response action under Section 107(d)(1) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607(d)(1)).

25548.3. (a) Except as provided in Sections 25548.4 and 25548.5 of this code, and in Sections 18001 and 18002 of the Probate Code, the liability of a fiduciary to any person under any state or local statute, regulation, or ordinance, to the extent that the statute, regulation, or ordinance requires or permits a removal or remedial action as a result of, or authorizes the recovery of damages, payment of a penalty, fine, imposition, or assessment arising from, the release or threatened release of hazardous material at, from, or in connection with any property held at any time by the fiduciary as part of the fiduciary estate, shall be limited to, and satisfied only from, the assets held in the fiduciary estate.

(b) This section does not expand the applicability of any state or local statute, regulation, or ordinance to a substance or material that is not otherwise subject to that statute, regulation, or ordinance.

25548.4. This chapter does not do any of the following:

(a) Affect any rights, defenses, or immunities that are available to any lender or fiduciary under any applicable law.

(b) Create any liability for any lender or fiduciary.

(c) Create any private right of action against any lender or fiduciary.

(d) Exempt or excuse a lender or fiduciary who operates or directs the operation, or maintains the operation, of the property from compliance with the operational requirements of applicable laws. Those operational requirements include, but are not limited to, permitting, reporting, monitoring, emission limitation, corrective action, financial responsibility and assurance requirements, requirements to take removal or remedial action to respond to a release or threatened release of hazardous materials caused by the



lender or fiduciary and the requirements of Division 26 (commencing with Section 39000) of this code or of Division 7 (commencing with Section 13000) of the Water Code. Operational requirements include the payment of fees, fines, and penalties, and compliance with any other enforcement provisions that are applicable as a result of the operation, or the direction of the operation, or the maintenance of the operation, of the property by the lender or fiduciary.

(e) Affect any liability of a fiduciary to a beneficiary of a fiduciary estate for breach of trust under Chapter 4 (commencing with Section 16400) of Part 4 of Division 9 of the Probate Code.

(f) Affect any liabilities of a fiduciary estate.

(g) Exempt a lender from liability imposed by Chapter 6.8 (commencing with Section 25300) for a removal or remedial action or the recovery of damages relating to a release or threatened release of hazardous material, to the extent that the lender is a responsible party pursuant to Section 107(a)(3) or (4) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607(a)(3) or (4)).

(h) Exempt a lender or fiduciary from any liability imposed by Chapter 6.5 (commencing with Section 25100).

(i) Exempt or excuse a lender from liability under any state or local statute, regulation, or ordinance for a known or suspected release or known or suspected threatened release of hazardous materials caused by events or conditions occurring prior to foreclosure or its equivalent, unless, after taking possession of the property, the lender promptly takes each of the following actions in accordance with applicable law:

(1) Suspends operations with respect to that portion of the property where the known or suspected release or known or suspected threatened release occurred or may occur.

(2) Removes from the suspended operations and affected areas on the property, all hazardous material not released into the environment and secures the suspended operations.

(3) Reports any known or suspected releases of hazardous material.

(j) Limit the application or enforcement of Section 25359.4 or 25359.5 or other state or local fencing, posting, securing, notification, or reporting laws with regard to property that is acquired by a lender through foreclosure or its equivalent, to the extent that those requirements are otherwise applicable to the property.

(k) Exempt a lender from compliance with an administrative order requiring immediate and temporary measures to prevent, abate, or minimize an emergency caused by a release or threatened release of hazardous material at, from, or in connection with, any property that has been acquired by the lender through foreclosure or its equivalent, when all of the following circumstances exist:



(1) The release or threatened release presents an imminent and substantial endangerment to the public health or welfare or the environment.

(2) No other person who is viable and potentially responsible for the release or threatened release has been identified and located by the agency issuing the order, following a reasonable effort by the agency to identify and locate any such person.

(3) The costs and expenses incurred by the lender to comply with the administrative order do not exceed twenty-five thousand dollars (\$25,000).

(4) If the lender complies with the administrative order, the compliance would not, in and of itself, subject the lender to liability for a removal or remedial action or damages, fines, penalties, impositions, or assessments relating to the release or threatened release under any federal law.

(l) (1) Exempt a lender who has acquired title to property through foreclosure or its equivalent from operation and maintenance requirements that were established on the property as a result of a removal or remedial action conducted on the property.

(2) “Operation and maintenance requirements” include, but are not limited to, deed restrictions and requirements to maintain passive exposure controls and to perform monitoring. If there are requirements other than operation and maintenance requirements, which are applicable to the property to maintain the effectiveness of the removal or remediation action, the lender shall comply with those requirements unless the lender, upon foreclosure or its equivalent, notifies the appropriate agency that it does not intend to comply with the requirements and the agency concurs.

(m) Require a lender to conduct, or require a lender to direct the taking of, an inspection of the property after foreclosure or its equivalent to qualify for the exemption provided by this chapter, and the liability of a lender shall not be based on, or affected by, the lender not conducting, or not requiring, an inspection of the property after foreclosure or its equivalent.

(n) Require a fiduciary to conduct or require an inspection of the property in a fiduciary estate to qualify for the exemption provided by this chapter and the liability of the fiduciary shall not be based on, or affected by, the fiduciary not conducting or not requiring an inspection prior to holding the property as part of the fiduciary estate.

25548.5. The exemptions set forth in Sections 25548.2 and 25548.3 shall not apply:

(a) If, after foreclosure or its equivalent is conducted, the lender does not undertake to sell, re-lease property held pursuant to a finance lease, whether by a new finance lease or by substitution of the lessee, or otherwise undertake to be divested of the property in a reasonably expeditious manner, using whatever commercially



reasonable means are relevant or appropriate with respect to the property, taking all facts and circumstances into consideration. For purposes of establishing that a lender is seeking to sell, re-lease property held pursuant to a finance lease, whether by a new finance lease or substitution of the lessee, or be divested of property in a reasonably expeditious manner, the lender may use whatever commercially reasonable means as are relevant or appropriate with respect to the property, or may employ the following means:

(1) For purposes of this subdivision, the exemption set forth in subdivision (a) of Section 25548.2 shall apply following foreclosure or its equivalent, if, within 12 months following foreclosure or its equivalent, the lender does either of the following:

(A) Lists the property for sale, re-lease, or other disposition with a broker, dealer, or agent who deals with that type of property.

(B) Advertises the property for sale, re-lease, or other disposition on at least a monthly basis in either of the following:

(i) A real estate publication or trade or other publication suitable for advertising the property.

(ii) A newspaper of general circulation, which is a newspaper 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.

(2) For purposes of this subdivision, the 12-month period shall begin to run from the date that the lender acquires marketable title to the property if the lender, after the expiration of any redemption or other waiting period provided by law, has acted diligently to acquire marketable title. If the lender has failed to act diligently to acquire marketable title, the 12-month period shall begin to run on the date of foreclosure or its equivalent.

(b) If, after foreclosure or its equivalent, the lender does not comply with all applicable statutes, regulations, or ordinances that require the disclosure of information or conditions regarding the property to any person.

(c) If the fiduciary's negligent or intentional or reckless conduct causes or contributes to the release or threatened release of a hazardous material at, from, or in connection with a property held by the fiduciary as part of the fiduciary estate.

(d) With respect to liability that arises from a voluntary removal or remedial action taken by a fiduciary if, prior to initiating a voluntary removal or remedial action, the fiduciary does not notify the appropriate agency of the fiduciary's intent to conduct that action.

(e) With respect to liability that arises from conduct of, or ownership of the property by, the lender or fiduciary, other than in its capacity as a lender or fiduciary.



(f) Where the loan or obligation or fiduciary relationship or fiduciary transaction is structured for the purpose of evading liability for a release or threatened release of hazardous materials.

(g) If the fiduciary is both a beneficiary and fiduciary with respect to the same fiduciary estate, or as a fiduciary, receives benefits that exceed customary or reasonable compensation for the administration of the property permitted under other applicable law.

(h) To the extent of the actual benefit, if any, realized by a lender upon the disposition of property acquired through foreclosure or its equivalent as a result of a removal or remedial action undertaken by another person.

(i) If the lender participated in the management of the property before foreclosure or its equivalent, except that the lender's liability shall be limited to any release or threatened release which occurred while the lender participated in the management of the property.

(j) If the lender, by an act or failure to act caused or contributed to the release or threatened release of the hazardous material.

(k) If the lender made, secured, held, or acquired the loan or obligation primarily for investment purposes.

(l) If the lender outbids, rejects, or fails to act upon an offer of fair consideration for the property acquired through foreclosure or its equivalent, unless the lender is required, 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. For purposes of this subdivision, the following terms shall have the following meaning:

(1) (A) "Fair consideration" means the sum of all of the following less the amounts specified in subparagraph (B):

(i) The value of the security interest or loan or obligation calculated as an amount equal to or in excess of, the sum of the outstanding principal, or comparable amount in the case of a finance lease, owed to the lender immediately preceding the acquisition of full title pursuant to foreclosure or its equivalent.

(ii) Any unpaid interest, rent, or penalties, whether arising before or after foreclosure or its equivalent.

(iii) All reasonable and necessary costs, fees, or other charges incurred by the lender incident to workout, foreclosure or its equivalent, retention, maintaining the business activities of the enterprise, preserving, protecting, and preparing the property prior to sale, re-leasing the property held pursuant to a finance lease, whether by a new finance lease or substitution of the lessee, or other disposition.

(iv) The lender's costs incurred for any removal or remedial action, including but not limited to, response costs for response action taken by the lender under Section 107(d)(1) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607(d)(1)).



(B) In determining fair consideration, the following amounts shall be subtracted from the sum calculated pursuant to subparagraph (A):

(i) Any amounts received by the lender in connection with any partial disposition of the property.

(ii) Net revenues received as a result of maintaining the business activities of the enterprise.

(iii) Any amounts paid by the borrower subsequent to the acquisition of full title pursuant to foreclosure or its equivalent.

(C) In the case of a lender holding a junior security interest, junior loan, or junior obligation, “fair consideration” is the value of all outstanding higher priority security interests, loans or obligations plus the value of the security interest, loan or obligation held by the junior holder, calculated as set forth in this paragraph.

(2) “Outbids, rejects, or fails to act upon an offer of fair consideration” means that the lender outbids, rejects, or fails to act upon within 90 days from the date of receipt of a written, bona fide and firm offer of fair consideration for the property received at any time after six months following foreclosure or its equivalent. That six-month period shall begin to run from the date that the lender acquires marketable title, if the lender, after the expiration of any redemption or other waiting period provided by law, has acted diligently to acquire marketable title. If the lender has failed to act diligently to acquire marketable title, the six-month period shall begin to run on the date of foreclosure or its equivalent.

(3) “Written, bona fide and firm offer” means a legally enforceable, commercially reasonable, cash offer solely for the property, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the lender’s satisfaction the ability to perform.

25548.6. A lender’s compliance with the requirements of this chapter with regard to property that has been acquired by the lender through foreclosure or its equivalent shall not, in and of itself subject the lender to liability under any law for a removal or remedial action or damages, penalties, fines, impositions, or assessments relating to the release or threatened release of hazardous materials, as defined in subdivision (g) of Section 25548.1.

25548.7. (a) If a provision of this chapter would result in any of the actions specified in subdivision (b), the provision shall be deemed inoperative. However, the inoperation of a provision shall not affect other provisions or applications of this chapter which can be given effect without the inoperative provision and to this end the provisions of this chapter are severable.

(b) Subdivision (a) shall apply if any provision of this chapter is inconsistent with federal law and the use or application of the provision would result in any of the following actions:



- (1) The imposition of a penalty by a federal agency on the state or any local agency.
- (2) A loss of federal authorization or loss of federal approval of a program conducted by the state or local agency.
- (3) A loss of federal funding to the state or any local agency for a program.

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