

AMENDED IN ASSEMBLY JUNE 18, 1998

AMENDED IN SENATE APRIL 29, 1998

AMENDED IN SENATE APRIL 2, 1998

SENATE BILL

No. 1521

Introduced by Senator Alpert

February 10, 1998

An act to amend ~~Sections 25548.1 and 25548.5~~ *Section 25548.1* of the Health and Safety Code, relating to hazardous materials liability.

LEGISLATIVE COUNSEL'S DIGEST

SB 1521, as amended, Alpert. Liability: lenders: fiduciaries.

~~(1) Existing~~

Existing law exempts 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 certain property, or to the extent the statute, regulation, or ordinance authorizes damages arising from a release or threatened release at certain property, except as specified. This exemption applies only if specified conditions exist, including if the lender maintains indicia of ownership in the property primarily to protect a security interest.

This bill would revise the definition of various terms for purposes of these immunity provisions.

~~(2) Existing law provides that the immunity specified in (1) above, does not apply if, among other things, the fiduciary receives benefits that exceed customary or reasonable compensation for the administration of the property or if the lender made, secured, held, or acquired the loan or obligation primarily for investment purposes.~~

~~This bill would revise those exclusions to instead provide that it does not apply if the benefits the fiduciary receives exceed customary and reasonable compensation or if the lender made, secured, held, or acquired a security interest for those reasons.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no*. State-mandated local program: no.

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

1 SECTION 1. Section 25548.1 of the Health and Safety
2 Code is amended to read:

3 25548.1. As used in this chapter, the following terms
4 have the following meaning:

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

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

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

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



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

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

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

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

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

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

17 (5) A court-appointed receiver.

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

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

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

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

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

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

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

38 (4) Any other formal or informal manner, whether
39 pursuant to law or under warranties, covenants,
40 conditions, representations or promises from the



1 borrower, by which the lender acquires, for subsequent
2 disposition, actual possession of the property subject to a
3 security interest.

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

6 (h) (1) “Indicia of ownership” means evidence of a
7 security interest, evidence of an interest in a security
8 interest, or evidence of an interest in real or personal
9 property securing a loan or other obligation, including,
10 but not limited to, any legal or equitable title to real or
11 personal property acquired incident to foreclosure or its
12 equivalent.

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

- 15 (A) Mortgages.
- 16 (B) Deeds of trust.
- 17 (C) Liens.
- 18 (D) Surety bonds and guarantees of obligations.
- 19 (E) Title held pursuant to a finance lease in which the
20 lessor does not select initially the leased property.
- 21 (F) Legal or equitable title obtained pursuant to
22 foreclosure or its equivalent.
- 23 (G) Assignments, pledges, or other rights to, or other
24 forms of, encumbrance against property that are held
25 primarily to protect a security interest.

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

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

34 (1) Any person who acts as, or on behalf of, a lender in
35 connection with any aspect of the solicitation,
36 negotiation, consummation, disbursement,
37 administration, servicing, collection, enforcement, or
38 foreclosure or its equivalent of a loan or obligation or
39 security interest in property such as a surety, escrow, or
40 title company.



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

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

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

29 (A) Environmental compliance.

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

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

35 (A) “Operational aspects of the enterprise” includes,
36 but is not limited to, functions such as that of facility or
37 plant manager, operations manager, chief operating
38 officer, or chief executive officer.

39 (B) “Financial or administrative aspects” includes,
40 but is not limited to, functions such as that of a credit



1 manager, accounts payable/receivable manager,
2 personnel manager, controller, or chief financial officer.

3 (3) Notwithstanding paragraph (1), “participation in
4 the management of the property” does not include an act
5 or omission by a prospective lender prior to making,
6 acquiring, or holding a loan or obligation. “Participation
7 in the management of the property” also does not include
8 the actions taken by a prospective lender who undertakes
9 or requires an environmental inspection of property
10 prior to making, acquiring, or holding a loan or obligation.
11 A lender or prospective lender does not “participate in
12 the management of the property” if the lender or
13 prospective lender requires the borrower to clean up the
14 property or requires the borrower to comply or come into
15 compliance with any applicable law or regulation. This
16 chapter does not require a lender to conduct or require
17 an inspection prior to foreclosure or its equivalent to
18 qualify for the exemption provided by this chapter, and
19 the liability of a lender shall not be based on or affected
20 by whether the lender conducts or requires an inspection
21 prior to foreclosure or its equivalent.

22 (4) Loan policing and work out activities, as specified
23 in paragraphs (5) and (6), that are consistent with
24 holding ownership indicia primarily to protect a security
25 interest and consistent with a loan or obligation made,
26 acquired, or held primarily for purposes other than
27 investment purposes, do not constitute participation in
28 the management of the property. The authority for the
29 lender to take those actions may, but are not required to,
30 be contained in contractual or other documents
31 specifying requirements for financial, environmental,
32 and other warranties, covenants, conditions,
33 representations, or promises from the borrower. Loan
34 policing and work out activities include all activities up to
35 foreclosure or its equivalent.

36 (5) A lender who engages in loan policing activities
37 prior to foreclosure or its equivalent is exempt from
38 liability pursuant to this chapter if the lender does not, by
39 those actions, participate in the management of the



1 property. Those actions include, but are not limited to, all
2 of the following:

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

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

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

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

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

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

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

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

34 (ii) Requiring payment of additional rent or interest.

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

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

40 (v) Exercising forbearance.



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

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

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

18 (l) “Person” means any entity, including, but not
19 limited to, an individual, estate, trust, firm, business trust,
20 joint stock company, corporation, partnership, joint
21 venture, limited liability company, association, or
22 government. “Person” includes, but is not limited to, any
23 city, county, district, the state, or the federal government,
24 or any department, subdivision, or agency thereof.

25 (m) (1) “Primarily to protect a security interest”
26 means that the indicia of ownership of a lender are held
27 primarily for the purpose of securing payment or
28 performance of an obligation.

29 (2) “Primarily to protect a security interest” does not
30 include indicia of ownership held primarily for
31 investment purposes or indicia of ownership held
32 primarily for purposes other than as protection for a
33 security interest. A lender may have other, secondary
34 reasons for maintaining indicia of ownership, but the
35 primary reason that any indicia of ownership are held
36 shall be as protection for a security interest.

37 (n) “Property” means any real or personal property
38 where hazardous materials are or were generated,
39 handled, managed, deposited, stored, disposed of, placed,
40 released, or otherwise have come to be located. In the



1 context of a loan or obligation, “property” includes any
2 real or personal property in which the obligor has or had
3 an ownership, leasehold, or possessory interest, whether
4 or not it was the subject of a security interest for the loan
5 or obligation.

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

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

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

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

30 ~~SEC. 2. Section 25548.5 of the Health and Safety Code~~
31 ~~is amended to read:~~

32 ~~25548.5. The exemptions set forth in Sections 25548.2~~
33 ~~and 25548.3 shall not apply under any of the following~~
34 ~~conditions:~~

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



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

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

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

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

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

24 (ii) A newspaper of general circulation, which is a
25 newspaper with a circulation over 10,000 or one suitable
26 under any applicable federal, state, or local rules of court
27 for publication required by court order or rules of civil
28 procedure, covering the area where the property is
29 located.

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

38 (b) If, after foreclosure or its equivalent, the lender
39 does not comply with all applicable statutes, regulations;



1 ~~or ordinances that require the disclosure of information~~
2 ~~or conditions regarding the property to any person.~~

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

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

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

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

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

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

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

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

38 ~~(k) If the lender made, secured, held, or acquired the~~
39 ~~security interest primarily for investment purposes.~~



1 ~~(l) If the lender outbids, rejects, or fails to act upon an~~
2 ~~offer of fair consideration for the property acquired~~
3 ~~through foreclosure or its equivalent, unless the lender is~~
4 ~~required, to avoid liability under federal or state law, to~~
5 ~~make a higher bid, to obtain a higher offer, or to seek or~~
6 ~~obtain an offer in a different manner. For purposes of this~~
7 ~~subdivision, the following terms shall have the following~~
8 ~~meaning:~~

9 ~~(1) (A) “Fair consideration” means the sum of all of~~
10 ~~the following less the amounts specified in subparagraph~~
11 ~~(B):~~

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

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

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

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

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

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

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



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

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

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

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

