LEGAL Q&A

Are lenders really insulated from environmental liability merely because the lender is a "secured party" and not an "owner or operator" under the New Jersey Spill Act?

Generally speaking, the New Jersey "Spill Act" (N.J.S.A. 58:10-23.11), et. seq., provides a "safe harbor" provision for lenders or holders of security interests. Spill Act liability will not be imposed on lenders where "releases" or "discharges" of hazardous substances occur on the property serving as collateral where the borrower is still in possession and the lender is not an "active participant in management." That begs the question as to when lenders become "actively participating" in management. The statute and cases interpreting this provision focus on the level of decision making control the lender exercises and to what degree the lender is actually managing the property. Day-to-day management control over environmental matters or substantially all of the management issues will dilute the effectiveness of the safe harbor defense. Further, lenders must take into account the new LSRP Program in New Jersey, which effectively privatizes remediation. Under the LSRP Program, in many cases, Licensed Site Remediation Professionals (LSRPs) have a heightened duty to report environmental violations. In the event the lender's LSRP reports such violations and becomes the LSRP of record, additional concerns may ensue relative to the lender's otherwise generally insulated position.

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