



Ohio Revised Code

Section 3746.26 Exempting persons holding indicia of ownership in property primarily to protect security interest.

Effective: September 28, 1994

Legislation: Senate Bill 221 - 120th General Assembly

(A)(1) Any person who, without participating in the management of a property, holds indicia of ownership in a property primarily to protect a security interest in the property is not liable for:

(a) The costs of conducting a voluntary action in a civil action brought under section 3746.23 of the Revised Code or otherwise brought under the Revised Code or common law of this state in connection with a voluntary action undertaken at a property in which the person holds indicia of ownership for that purpose;

(b) For for the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum at or upon any property that may be the subject of investigation or remediation of hazardous substances or petroleum, irrespective of whether or not any such costs are incurred in connection with a voluntary action undertaken pursuant to any provision of this chapter of the Revised Code in a civil action brought under section 3746.23 of the Revised Code or otherwise brought under the Revised Code or common law of this state, provided that, after taking title to the property, the person conducts or causes to be conducted all activities occurring at the property not related to the identification or remediation of releases or threatened releases of hazardous substances or petroleum in compliance with the applicable requirements of Chapters 3704., 3714., 3734., 3737., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under them.

(2) Such a person who, after taking title to property, conducts or causes to be conducted all such nonremedial activities at the property in compliance with the applicable requirements under those chapters and rules is not required to comply with any provisions of those chapters and rules pertaining to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property and shall not be subject to the issuance of an enforcement order, or a civil action for injunctive relief, under any of those chapters requiring the identification or remediation of any release or threatened release of hazardous substances or



petroleum at or upon the property.

(B) For the purposes of this section, "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 property acquired incident to foreclosure or its equivalents. Evidence of those interests includes, without limitation, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not initially select the leased property, which shall hereafter be referred to as a lease financing transaction, legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of those interests also includes assignments, pledges, or other rights or other forms of encumbrance against property that are held primarily to protect a security interest.

(1) For the purposes of this section, a "holder" is a person who maintains indicia of ownership primarily to protect a security interest. A "holder" includes the initial holder, such as the loan originator; any subsequent holder, such as a successor in interest or subsequent purchaser of the security interest in the secondary market; a guarantor of an obligation; a surety; any other person who holds indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of the holder.

(2) For the purposes of this section, a "borrower," "debtor," or "obligor" is a person whose property is encumbered by a security interest. These terms are used interchangeably in this section.

(C) As used in this section, "primarily to protect a security interest" means the holder'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 purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why ownership indicia are held shall be protection for a security interest.

(D) As used in this section, "security interest" means an interest in property created or established for the purpose of securing a loan or other obligation. "Security interest" includes, without limitation, a mortgage, deed of trust, lien, or title pursuant to a lease financing transaction. A security interest also



may arise from a transaction such as a sale and leaseback, a conditional sale, an installment sale, a trust receipt transaction, certain types of assignments, a factoring agreement, an accounts receivable financing, and a consignment if the transaction created or established an interest in a property for the purpose of securing a loan or other obligation.

(E)(1) As used in this section, "participation in the management of a property" means actual participation in the management or operational affairs by the holder and does not include the mere capacity to influence, or ability to influence, or the unexercised right to control the operations of the property. A holder is participating in management while the borrower is still in possession of the property encumbered by the security interest only if the holder does either of the following:

(a) Exercises decision-making control over the borrower's environmental compliance such that the holder has undertaken responsibility for the borrower's hazardous substance or petroleum handling or disposal practices;

(b) Exercises control at a level comparable to that of a manager of the borrower's enterprise such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision-making of the enterprise with respect to either of the following:

(i) Environmental compliance;

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

For the purposes of division (E)(1) of this section, "operational aspects of the enterprise" includes functions such as that of a property, facility, or plant manager; operations manager; chief operating officer; or chief executive officer; and "financial or administrative aspects" includes functions such as that of credit manager, accounts payable or receivable manager, personnel manager, controller, chief financial officer, or similar functions.

(2) "Participation in the management of a property" does not include either of the following:



(a) Actions at the inception of the loan or other transaction.

No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management. A prospective holder who undertakes or requires an environmental inspection of the property in which indicia of ownership are to be held, or, whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest, requires a prospective borrower to clean up a property or comply or come into compliance with any applicable law or rule, is not participating in the property's management. This section does not require a holder to conduct or require an inspection of the property to qualify for the exemption provided by this section, and the liability of a holder cannot be based on or affected by the holder's not conducting or requiring an inspection.

(b) Policing and work-out, as described in divisions (E)(2)(b)(i) and (ii) of this section.

Actions that are consistent with holding indicia primarily to protect a security interest do not constitute participation in management. The authority for the holder to take such actions may, but need not, 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 cover and include all activities up to foreclosure and its equivalents.

(i) A holder who engages in policing activities prior to foreclosure remains within the exemption provided by this section, provided that the holder does not participate in the management of the property. These activities include, without limitation, requiring the borrower to clean up the property during the term of the security interest; requiring the borrower to comply or come into compliance with applicable environmental laws, other applicable laws, and applicable rules or regulations of the United States, this state, or political subdivisions of this state during the term of the security interest; securing or exercising authority to monitor or inspect the property in which the indicia of ownership are maintained during the term of the security interest, including, without limitation, on-site inspections; securing or exercising authority to inspect or monitor the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest such as requiring a borrower to comply with any warranties, covenants, conditions, or representations or promises from the borrower.



(ii) A holder who engages in work-out activities prior to foreclosure and its equivalents remains within the exemption provided by this section if the holder does not participate by that action in the management of the property.

As used in this section, "work-out" means those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor or to preserve or prevent the diminution of the value of the security interest. These actions include, without limitation, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, or guidance; and exercising any right or remedy that the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(iii) A holder does not participate in the management of a property by taking a voluntary action under this chapter and rules adopted under it.

(iv) A holder who, after taking title to a property, conducts or causes to be conducted all activities occurring at the property not related to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property in compliance with the applicable requirements of Chapters 3704., 3714., 3734., 3737., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under them does not participate in the management of the property.

(F)(1) Indicia of ownership that are held primarily to protect a security interest include, without limitation, legal or equitable title acquired through or incident to foreclosure and its equivalents.

As used in this section, "foreclosure and its equivalents" includes purchase at a foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other formal or informal manner by which the borrower acquires title to or possession of the secured property regardless of whether title to or possession of the property is acquired pursuant to law or under warranties, covenants, conditions, representations, or promises of the borrower. The indicia of



ownership held after foreclosure continue to be maintained primarily as protection for a security interest, provided that the holder undertakes to sell property, 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 property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the property taking into consideration all facts and circumstances, and provided that the holder did not participate in management of the property prior to foreclosure or its equivalents. For purposes of establishing that a holder is seeking to sell property, re-lease property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, or divest a property in a reasonably expeditious manner, the holder may use whatever commercially reasonable means are relevant or appropriate with respect to the property or may employ the means specified in this section. A holder that outbids, rejects, or fails to act upon a bona fide, written offer of fair consideration for the property as provided in this section is not considered to hold indicia of ownership primarily to protect a security interest.

(2) A holder who did not participate in management prior to foreclosure and its equivalents may sell property, re-lease property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, liquidate, maintain business activities, wind up operations, undertake any voluntary action under this chapter and rules adopted under it, or take measures to preserve, protect, or prepare the secured asset prior to sale or other disposition. The holder may conduct any of these activities without voiding the exemption provided by this section, subject to the requirements of this section.

(a) A holder establishes that the ownership indicia maintained following foreclosure and its equivalents continue to be held primarily to protect a security interest by, within twelve months following foreclosure, listing the property with a broker, dealer, or agent who deals with the type of property in question, or by advertising the property 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 property in question, or a newspaper of general circulation in the area where the property is located. For the purposes of division (F)(2)(a) of this section, the twelve-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. If the holder fails to act diligently to acquire marketable title, the twelve-month period begins to run



on the date of foreclosure and its equivalents.

(b) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the property 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.

For the purposes of division (F)(2)(b) of this section:

(i) "Fair consideration," in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the property, is the value of the security interest as described in division (F)(2)(b)(i) of this section. The value of the security interest is calculated as an amount equal to or in excess of the sum of the outstanding principal, or the comparable amount in the case of a lease that constitutes a security interest, owed to the holder immediately preceding the acquisition of full title, or possession in the case of property subject to a lease financing transaction, pursuant to foreclosure and its equivalents; plus any unpaid interest, rent, or penalties whether arising before or after foreclosure and its equivalents; plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining business activities of the enterprise, preserving, protecting, and preparing the property prior to sale, re-lease of property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, or other disposition; plus voluntary action costs incurred under this chapter and rules adopted under it; plus any costs of conducting or causing to be conducted all activities occurring at the property not related to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property that are required under Chapters 3704., 3714., 3734., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under those chapters; less any amounts received by the holder in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title, or possession in the case of property subject to a lease financing transaction, pursuant to foreclosure and its equivalents. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as described in the provisions of division (F)(2)(b)(i) of this section applicable to senior security



interests.

(ii) "Outbids, rejects, or fails to act on an offer of fair consideration" means the holder outbids, rejects, or fails to act upon within ninety days after receipt of a bona fide, firm, written offer of fair consideration for the property received at any time after six months following foreclosure and its equivalents. That six-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. If the holder fails to act diligently to acquire marketable title, that six-month period begins to run on the date of foreclosure and its equivalents.

For the purposes of division (F)(2)(b)(ii) of this section, a "bona fide, firm, written offer" means a legally enforceable, commercially reasonable cash offer solely for the foreclosed property, 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.

(3)(a) Provided that the holder did not participate in management prior to foreclosure and its equivalents, and that the holder complies with the requirements of this section during the period following foreclosure and its equivalents, a holder in possession of a property may incur civil liability in connection with its activities related to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon such a foreclosed property only by arranging for disposal or treatment of a hazardous substance or petroleum or by accepting for transportation or disposing of hazardous substances or petroleum at a facility selected by the holder.

(b) Following foreclosure and its equivalents, a foreclosing holder that directs or undertakes activities at the foreclosed property under this chapter and rules adopted under it is not liable in a civil action for the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum at or upon the property, except as otherwise specifically provided in section 3746.29 of the Revised Code.

(G)(1) This section does not create, and shall not be construed as creating, a new cause of action against or substantive legal right against a holder.

(2) This section does not affect, and shall not be construed as affecting, any immunities from civil



liability or defenses established by another section of the Revised Code or available at common law to which a holder may be entitled under circumstances not covered by this section.