

THE NATIONAL LAW REVIEW

PFAS and Credit Transactions: Are You Protected From Environmental Liability?

Thursday, April 11, 2019

PFAS (Per- and polyfluoroalkyl substances), noted for its use in older non-stick cookware, fabric stain preventers, and numerous other industrial applications, is fast becoming a major environmental contaminant that is expensive to investigate and even more costly to remediate. In Wisconsin, Governor Evers' budget lists this chemical by name in seeking funding to prioritize likely PFAS contaminated sites and to hire two new managers to solely address PFAS. The Wisconsin Department of Natural Resources (WDNR) already is addressing several PFAS sites across the state with more likely to emerge.

Testing for PFAS is very expensive due to limited laboratory capacity, and cleanups are even more costly due to the very low regulatory levels and limited cleanup options. Called an "emerging chemical," potential PFAS liability is upsetting the previously stable redevelopment world given the high cost liability associated with PFAS.

For the lending community, the risks of PFAS contamination are a reminder of the early 1990s, when lenders unknowingly acquired cleanup liability in dealing with underperforming loans to businesses.

In order to assure continued lending, states like Wisconsin adopted "lender liability exemption" statutes to protect creditors from inadvertently "acquiring" environmental liability. These lender exemption laws, however, tend to be more than 20 years old. A recent review of the Wisconsin lender liability exemption by the Wisconsin Brownfields Study Group concluded that the law's narrow definition of "lender" and "lending activities" did not reflect current commercial practices. Also, lenders were not necessarily following the statutes' procedural requirements necessary to avoid cleanup liability but rather lenders were willing to accept the potential liability risk. Whether it is prudent to continue that practice in the face of growing PFAS liability concerns is questionable.

Given the potential inadvertent "acquisition" of high cost PFAS cleanup liability, it is important that those extending credit verify they qualify as "lenders" under these state laws and are engaged in qualified "lending activities." Also if dealing with a nonperforming loan, verification that all required procedures and notifications mandated by the lender exemption statute are satisfied will be essential to avoid the imposition of potentially high cost cleanup liability.

© 2019 Foley & Lardner LLP

Source URL: <https://www.natlawreview.com/article/pfas-and-credit-transactions-are-you-protected-environmental-liability>



Article By [Joseph K. Leibham](#)
[Jason M. Childress](#)[Mark A. Thimke](#)
[Foley & Lardner LLP](#) [Legal News Alert](#)

[Environmental, Energy & Resources](#)
[Financial Institutions & Banking](#)
[Wisconsin](#)