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Eligibility for Reimbursement from the Underground Storage Tank Indemnification Fund Cannot Be Determined on a Per Tank Basis

By Ronald S. Cusano and Levi Jones

On June 17, 2013, the Pennsylvania Supreme Court in *Young's Sales and Service v. Underground Storage Tank Indemnification Board*,[1] reversed a decision of the Commonwealth Court and held that eligibility for indemnification for clean-up costs from the Underground Storage Tank Indemnification Fund ("Fund") cannot be determined on a per tank basis.[2, 3] The Court found that Section 706(2) of the Act, which states that "[t]he current fee required under Section 705 has been paid" is ambiguous requiring the Court to apply the rules of statutory construction to ascertain legislative intent. In doing so, the Court concluded that adopting the Commonwealth Court's decision, which would have allowed eligibility for indemnification to be determined on a per tank basis[4] would pose, "a threat to the Fund's long-term solvency."[5] This case is of particular importance to both owners and prospective purchasers of sites with multiple underground storage tanks. Unless such owners or purchasers make certain that all required indemnification fund fees on all tanks including newer tanks upon which the manufacturer's warranty may not yet have expired, are current, such owners or purchasers could find themselves without recourse against the Fund.[6, 7] Needless to say, an audit of the status of payment of indemnification fund fees on all tanks should be added to the due diligence checklist of the prospective purchaser of such a site.

I. FACTS AND BACKGROUND

A. Facts

Young's Sales and Service ("Young's") purchased property which had formerly been used as a gas station (the "Property"). There were four underground storage tanks on the Property. Three had been used to store gasoline and the fourth had been used to store kerosene. Prior to the sale of the Property, the former owner ceased operation of the gasoline station and emptied the contents of the tanks except for a hardened residual product which remained at the base of each tank. Shortly after Young's purchased the Property, Young's registered the tanks with the Pennsylvania Department of Environmental Protection ("PaDEP" or "Department") for removal. Young's then removed the tanks. During removal, Young's discovered contamination in the soils surrounding each of the four tanks. Young's cleaned up the contamination and filed a claim for indemnification with the Fund for the clean-up costs it had incurred in cleaning up the soils around each of the four tanks. The Fund denied Young's claim because Young's was not able to demonstrate that required fees had been paid on all four tanks. Young's appealed from the Fund's decision to the Indemnification Board.

Before the Board, Young's argued that all required fees on the tanks used to store gasoline (i.e., gallon fees or through put fees) had been paid because the former owner paid the fees while the gas station was operating and no fees were due once the tanks were taken out of service. On this basis, Young's asserted that it was entitled to indemnification for, at least, the costs it incurred in cleaning up the gasoline contamination even if the fees owed on the tank used to store kerosene (i.e., the "capacity fees") were not paid. The Board rejected Young's argument and affirmed the Fund's denial of Young's claim.

Young's filed a Petition for Review of the Board's Order with the Commonwealth Court. Before that court Young's reiterated its argument that all required fees on the tanks used to store gasoline had been paid and that it was, therefore, entitled to reimbursement of the costs it incurred in cleaning up the gasoline contamination. The Commonwealth Court agreed.[8] The Commonwealth Court reasoned that since Section 706 of the Act, which establishes the eligibility requirements for Fund indemnification, does not use the word "site," but uses the word "tank" in its singular form, it was the intent of the Legislature that eligibility for Fund indemnification be determined on a per tank basis.[9] However, since the Indemnification Board did not identify the tanks for which fees were owed, the Commonwealth

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Court remanded the case to the Board for a determination of that question.

The Board and Fund filed a Petition for *Allocatur* with the Pennsylvania Supreme Court seeking review of the Commonwealth Court's decision. The Court granted the Petition.

B. Regulatory Background

The Storage Tank and Spill Prevention Act ("STSPA") sets forth a comprehensive scheme for the regulation of both aboveground and underground storage tanks.[10, 11]

An "underground storage tank" is "[a]ny one or combination of tanks (including underground pipes connected thereto) which are used to contain an accumulation of regulated substances."[12] One of the purposes for which STSPA was enacted was to, "require prompt clean-up and removal of such pollution [from storage tanks]."[13]

As noted, to facilitate such prompt clean-up, the General Assembly authorized the creation of the Fund whose purpose, which as also noted, is in part to make "payments to owners … of underground storage tanks who incur liability for taking corrective action."[14]

Section 706 of the Act, enumerates the eligibility requirements for Fund indemnification and provides in part that:

> In order to receive a payment from the Underground Storage Tank Indemnification Fund, a claimant shall meet the following eligibility requirements: …
>
> ***(2) The current fee required under Section 705 has been paid.*** …

35 P.S. §6021.706.

As noted, Section 706(2) was the only eligibility requirement in dispute in the matter before the Court.

II. THE COURT'S DECISION

At the outset of its analysis, the Court credited the Board and Fund's focus on the Act's definition of, "underground storage tank." The Court concluded that by defining that term as including, "any one or combination" of tanks, the Legislature evidenced an intention that the defined term included more than one storage tank in appropriate circumstances. The Court rejected Young's argument that the term "combination" referred only to a combination of one or more tanks connected by piping and used to contain the identical regulated substance, "since the definition does not impose these additional qualifiers as to what constitutes a tank 'combination.'"[15] However, the Court's analysis did not end there.

The Court went on to conclude that the Legislature's use of the singular form of the word "tank" in Section 706 raised a question as to whether the Legislature intended that the word be taken literally or that the word should be, "understood as an abbreviated reference to the term 'underground storage tank.'" If it were the latter, it would mean that the eligibility requirements of Section 706 could be applicable to multiple tanks. Ultimately, the Court concluded that these alternative interpretations rendered Section 706(2) ambiguous.[16]

Finding this ambiguity, the Court turned to the principles of statutory construction to ascertain the Legislature's intent. The principal rule it considered was the rule that permits consideration of the consequences of an alternative construction in ascertaining legislative intent.[17] In that regard, the Court found that accepting the Commonwealth Court's construction (i.e., that eligibility should be determined on a per tank basis) would permit tank owners to decide not to pay required fees on newer tanks covered by the manufacturer's warranty while anticipating at least some recovery from the Fund for older tanks that fail.[18] "As a result, payouts from the Fund could exceed its funding and impact the Fund's financial security."[19] While the Court noted that STSPA included provisions to deter such conduct[20] it further stated that it was persuaded by the Fund and Board's argument that the Commonwealth Court's construction of Section 706(2) threatened the long-term financial solvency of the Fund. "… Appellants, who administer both the Fund's sources of revenue and the claims it pays out, have persuaded us that the Commonwealth Court's per tank construction of Section 706(2) poses a threat to the Fund's long-term solvency."[21]

In the end, the Court rejected the Commonwealth Court's reading of Section 706(2) of the Act and stated, "we read Section 706 as including the Spill Act's definition of underground storage tank for purposes of construing Section 706(2). Accordingly, we hold that the tank fee payment eligibility requirement in Section 706(2) does not apply on a per tank basis."[22]

Justice Eakin issued a concurring opinion in which he agreed with the result of the OAJC (i.e., Young's claim should be denied), but disagreed with its rationale. Justice Saylor also issued a Concurring Opinion in which Chief Justice Castille joined. [23]

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III. CONCLUSION

This case is important to both owners and prospective purchasers of sites with multiple underground storage tanks. As noted above, unless such owners and prospective purchasers make certain that all indemnification fund fees on all underground storage tanks including newer tanks upon which the manufacturer's warranty may not yet have expired, are current, such owners and purchasers could find themselves without recourse against the Fund for indemnification for future clean-up costs. A prospective purchaser of property containing underground storage tanks would be wise to add an audit of the payment status of indemnification fund tank fees to its due diligence checklist. ◆

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ENDNOTES

1. No. 6 MAP 2011, 2013 Pa. LEXIS 1255 (Pa. June 17, 2013).
2. Section 704(a)(1) of the Storage Tank and Spill Prevention Act ("STSPA" or "Act"), the Act of July 6, 1989, P.L. 169, No. 32, as amended, 35 P.S. §6021.704(a)(1) authorizes the creation of the Fund. The purpose of the Fund is to permit the Underground Storage Tank Indemnification Board ("Board") to make "payments to owners, operators and certified tank installers of underground storage tanks who incur liability for taking corrective actions…".
3. The Fund consists largely of fees that the Board is authorized to assess against the owners, operators or certified installers of underground storage tanks under Section 705(d), 35 P.S. §6021.705(d). Under Section 705(d)(2) of the Act, the owner or operator of an underground storage tank used to store heating oil, diesel fuel or other regulated substance is required to pay a fee based upon the per gallon capacity of the tank. This fee is known as a "capacity fee." The capacity fee is not applicable to owners and operators of underground storage tanks used to store gasoline. [See Pennsylvania Insurance Department, Frequently Asked Fee Questions, *available* here. 25 Pa. Code §977.12(b)(2) authorizes the Board to assess a fee known as a "gallon fee" or "through put" fee on all regulated substances entering an "underground storage tank." Gallon fees are not applicable to underground storage tanks used to store kerosene. *See Id.*
4. *Young's Sales and Service v. Underground Storage Tank Indemnification Board*, 978 A.2d 1051, 1055 (Pa. Commw. Ct. 2009).
5. Slip Opinion at 22.
6. Even without the Court's decision, the Act imposes significant consequences for failure to keep fees current. Section 705(e), authorizes the imposition of a monetary penalty on unpaid fee balances. Section 1301 of the Act authorizes the withholding or revoking of permits to applicants in violation. Also, Section 1306 of the Act, 35 P.S. §6021.1306, authorizes the imposition of criminal penalties for violations of the Act.
7. Footnote 8 of the Opinion Announcing the Judgment of the Court ("OAJC") indicates that the Court is not holding that fees required on all tanks at a multi-tank site must be paid for eligibility for indemnification. Rather, the Court indicates that only fees on tanks involved in the claim need be current for eligibility. However, other language of the OAJC suggests that the OAJC could be interpreted to require payment of such fees

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on all such tanks for eligibility. "Therefore, given the Spill Act's definition of underground storage tank, Appellants are correct that Section 706(2)'s fee payment requirement may be construed to apply to all of Appellee's tanks, i.e., the 'combination of tanks' located on its property." Given this possible interpretation, prudence dictates that owners of a site containing multiple underground storage tanks make sure that all fees on all such tanks are current.

8. See endnote 4.
9. *Young's Sales and Service v. Underground Storage Tank Indemnification Board*, 978 A.2d 1051, 1055 (Pa. Commw. Ct. 2009).
10. See 35 P.S. §§6021.101 through 6021.2104.
11. A "storage tank" is "[a]ny aboveground or underground storage tank which is used for the storage of any regulated substance."
12. "Regulated substance" is "[a]n element, compound, mixture, solution or substance that, when released into the environment, may present substantial danger to the public health, welfare or the environment which is: (1) any substance defined as a hazardous substance in Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 …; (2) petroleum …; or (3) any other substance determined by the Department by regulation whose containment, storage, use or dispensing may present a hazard to the public health and safety or the environment…".
13. Section 102(b).
14. Section 704(a)(1), 35 P.S. §6021.704(a)(1).
15. Slip Opinion at 20.
16. Slip Opinion at 21.
17. See 1 Pa. C.S.A. §1921(c)(6).
18. Slip Opinion at 21.
19. Slip Opinion at 22.
20. See endnote 19.
21. Slip Opinion at 22.
22. Slip Opinion at 24.
23. Slip Opinion at 29.