

Pennsylvania Underground Storage Tank Indemnification Fund/Registration Fees: Pennsylvania Court Addresses Eligibility Issue



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A Commonwealth Court of Pennsylvania (“Court”) addressed in an August 5th Opinion an issue arising under the Pennsylvania Underground Storage Tank Indemnification Fund. See *Shrom v. Pennsylvania Underground Storage Tank Indemnification Board*, 2021 WL 3411473.

The question considered was whether the failure to pay certain underground storage tank (“UST”) registration fees at the time of the release rendered the USTs ineligible for Underground Storage Tank Indemnification Fund reimbursement.

Hundreds of thousands of petroleum USTs are utilized at facilities nationwide. These businesses and governmental agencies include convenience stores, bus terminals, fire and police stations, airports, utilities, construction companies, and car dealerships. In the 1980s concerns about leaks and other releases from USTs prompted the establishment of a regulatory program for such equipment.

Subtitle I was added to the Resource Conservation and Recovery Act (“RCRA”) in 1984 to require that the United States Environmental Protection Agency develop UST design and installation, leak prevention detection, and corrective action provisions. 1986 amendments added a requirement for UST owners and operators to meet minimum financial responsibility requirements to address potential third party claims and ensure funds were available to remediate releases.

Concerns regarding the ability of some owners and operators to comply with the federal financial responsibility requirements prompted many states (including Arkansas) to create petroleum UST trust funds. The principal purpose of the trust funds has been to enable UST owners and operators to partially or completely comply with the RCRA financial responsibility requirement.

A UST owner’s and/or operator’s ability to access such trust funds is typically predicated on complying with various rules or regulations. Such requirements may include registration of the USTs, payment of fees, reporting of the releases within a prescribed time, mandated bidding procedures, etc. Therefore, state trust funds vary as to which eligibility criteria are applied.

Pennsylvania’s trust fund is denominated the Underground Storage Tank Indemnification Fund (“Fund”). It is administered to some extent by the Underground Storage Tank Indemnification Board (“Board”). The Board’s duty includes review of requests for fund eligibility by UST owners and operators.

Dr. Timothy Shrom and Debra Shrom (collectively “Shroms”) inherited a property in Quarryville, Pennsylvania (“Property”) that utilized USTs. The Property included a convenience store with retail motor fuel sales.

Five USTs were sited at the Property. They were registered with the Pennsylvania Department of Environmental Protection in the name of a lessee who was operating the convenience store.

The lessee is stated to have ceased pumping fuel at the Property in 2016 and amended the USTs’ registration to reflect an out-of-service status. The lessee vacated the Property and the USTs remained. In 2017 the registration for the USTs expired for failure to pay the required fees. Letters from the Pennsylvania Office of Attorney General seeking unpaid fees were never received by the Shroms.

The Shroms retained a contractor to remove the USTs in 2017. One of the Shroms signed a required closure form as the owner of the USTs. However, he subsequently indicated that this was inadvertent because neither of the Shroms ever owned the USTs.

A diesel fuel release was discovered during the removal of the USTs. The Shroms expended approximately \$170,000 in undertaking remediation. The Shroms’ environmental consultant reported the release to the Fund and a third-party claims administrator investigated eligibility coverage.

The Opinion indicates that at the time the release was discovered all tank capacity and per-gallon fees (Section 705 fees) were current. This is because these fees were not required while the tanks were in out-of-service status. However, the UST registration fees (Section 503) had not been paid. As a result, the USTs were determined to be unregistered.

The Fund denied coverage on the basis that the USTs were not registered and fees unpaid at the time of the discovery of the release. The Fund’s Executive Director upheld denial of coverage and the Board did the same.

The Court identified the Pennsylvania statutory eligibility criteria for repayment from the Fund. It noted that the Board had concluded that a number of Pennsylvania Appellate decisions had held that both Section 705 fees and Section 503 registration fees must be paid before the discovery of the release giving rise to the claim. The reference to Section 503 is the statutory requirement that the USTs be registered.

The Shroms argued that requiring the registration fees to be paid before the discovery of the release was enforcement of a de facto regulation. They contended that such a requirement should have been promulgated as a regulation. Further, they distinguished the 705 fees from Section 503. The Shroms argued that Section 705 fees were used to provide the Fund liquidity to pay claims. They indicated that the registration fees under Section 503 are not used in that manner.

The Board responded that the statutory eligibility requirements are unambiguous concerning registration of USTs. Further, it stated to the extent the statute is ambiguous the Board was due deference to its interpretation of the statute. The Board also disagreed with the argument that failure to pay the UST registration fees would not affect the solvency of the Fund.

The Court determined that there was no existing precedent addressing this issue. It stated that the:

... sole question is whether the tanks have “been registered in accordance with the requirements of section 503.”

The eligibility requirements set forth in Section 503 of the relevant statute were found by the Court to not state expressly when the registration requirements must be met, or registration fee paid, relative to the discovery of a release or the filing of a claim. This was deemed in contrast with the provisions relating to Section 705 fees.

The Court noted that the rule applied to the USTs on the Shroms’ Property that disqualified them from eligibility is not found in any statute, regulation, or court decision. It stated that such a requirement must

be promulgated as a regulation in accordance with the Pennsylvania Commonwealth Documents Law. The failure to do so made the requirement imposed by the Board void and unenforceable.

The Court also stated that the case served as an example of why liberal construction of the UST Act was essential. It noted the potential harm of contamination to natural resources and the expense associated with remediating the contamination. Further, it stated that the Fund was established for purposes of providing UST owners aid in undertaking such remediation.

The Court reverses the Order of the Board and remands for computation of the amount of coverage for the Shroms' claim for remediation costs.

A copy of the Opinion can be downloaded [here](#).