

General Counsel's Legal Update Report

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Dealer's Breach of Supply Agreements and Refusal to Pay for Fuel Shipments Results in \$435,489 Judgment.

Our client, a petroleum jobber, entered into two agreements to supply fuel and other petroleum products in specific quantities for three years and to brand two retail fuel stations. The dealer was to pay for these products upon receipt of invoice. In the event of nonpayment the agreements provided that the jobber was entitled to recover the amounts owed and interest at 12% per annum.

Two years into the supply agreement, the dealer, after receiving five fuel shipments totaling \$41,257.25, decided to issue stop payment orders and refused to pay the jobber. The dealer also decided to switch suppliers in hopes of obtaining better pricing, even though the supply agreements were far from expiring. The jobber filed suit asserting claims of breach of contract, check fraud, fraudulent inducement and lost profits. The jobber argued that by placing a stop payment orders after receiving the fuel shipments, the dealer committed check fraud, which entitled the jobber to an award of treble damages, cost of the action and reasonable attorneys' fees under the statute.

The court granted the supplier's motion for summary judgment and awarded damages of \$435,489.20 in favor of the jobber and against the dealer, which consisted of the following elements of damages: (a) treble damages of \$123,771.75 for the stop payment orders on the fuel shipments; (b) lost profits on the remaining term of the two supply agreements totaling \$204,499.58; (c) attorney fees of \$85,778.35; (d) interest of \$20,736.95 on the unpaid fuel shipments at 12%; and (e) incentive and recapture damages of \$702.52. In sum, this case highlights the perils that await dealers who decide not to pay for their fuel shipments and shop suppliers in hopes of better pricing, resulting in a damage award 10 times greater than the initial cost of the fuel shipments.

IPCA Provides Comments to EQSC on UST and ELTF Legislative Issues.

During the 2009 session the Indiana General Assembly directed the Environmental Quality Service Council ("EQSC") to study various issues relating to changes being proposed by IDEM to its Underground Storage Tank Program and the Excess Liability Trust Fund program ("ELTF"). On October 20, 2009 the IPCA's General Counsel, Chris Braun, testified regarding the IPCA's comments on IDEM's proposed changes. The IPCA's principal concerns with the proposed changes are as follows.

1. Clarifying Definition of Owner.

IDEM stated it needed clarification that the owner of the property that contains, or contained, an underground storage tank is considered the owner of the tank and any contamination from the tank.

It is the IPCA's position that in the event of a petroleum release from an underground or above ground storage tank system that migrates off-site and impacts a third party, off-site property owner, current law allows a private litigant, such as a neighboring property owner, to pursue claims against both the owner of the real estate (landlord) as well as the owner/operator of the tank system (tenant). However, current law does not allow IDEM to pursue claims against the owner of the real estate when the tenant is the owner and/or operator of the UST system.

The IPCA agreed that it was appropriate to level the playing field and allow IDEM the same rights as a private litigant in pursuing claims against the landlord by holding them responsible for the environmental liabilities arising from the tenant's use of the property. In addition, the IPCA and IDEM agreed that the ELTF statute needs to be amended to allow the landlord to step into the shoes of the tenant and accept the tenant's level of ELTF eligibility to pay for such environmental liabilities. This will encourage the landlord to address these issues in its lease with the tenant and also be vigilant in encouraging the tenant to maintain the UST system in compliance with IDEM and ELTF regulations.

The EQSC partially adopted the IPCA's position and recommended extending to IDEM the same standing as a private litigant, though any legislation will need to provide funding for the owner's expanded UST liability.

2. **Ceiling on Maximum Annual ELTF Payments.**

IDEM requested authority to increase the current annual limits of \$3,000,000 on reimbursement of environmental expenses from the ELTF to owners/operators with more than 100 USTs. The IPCA opposed the request on several grounds, including the fact that it would benefit only one ELTF applicant, Speedway America. The EQSC adopted the IPCA's position and did not approve IDEM's requested change in its recommendations.

3. **Clarifying IDEM's Cost Recovery Authority.**

Under current law, recoverable costs from UST owners and operators are limited to costs IDEM incurs in undertaking the corrective action at a site. IDEM sought to obtain authority to recover similar administrative and oversight costs arising from abandoned UST sites in the State cleanup program that are not ELTF eligible.

It is the IPCA's position that it is willing to work with IDEM to develop a system that would allow for limited recovery of certain oversight costs that are reasonably and necessarily incurred by IDEM. These costs would be limited to items that are properly documented, with the proceeds to be used for the State Cleanup Program and not for general IDEM expenses. The EQSC adopted the IPCA's position as its recommendation.

4. **ELTF Funding for Abandoned UST Sites.**

The Petroleum Trust Fund ("PTF") is a statutory funding mechanism to pay for the environmental cleanup of abandoned UST sites. IDEM currently spends roughly \$700,000 from the PTF Fund to staff salary and contractor review for low and medium priority sites. IDEM wants to use money from the ELTF to provide additional funding for cleaning up abandoned UST sites.

It is the IPCA's position that the PTF routinely maintains a balance of approximately \$4,000,000. However, while IDEM regularly charges the PTF expenses in the range of \$750,000 to \$1.5 million annually, none of these monies is used to actually perform environmental investigations and cleanups of abandoned UST sites, with these monies instead being used for various IDEM's agency expenses. In addition, IDEM has failed to show that the PTF cannot provide adequate funding for orphan tank cleanups. Nor has IDEM pursued cost recovery, fees and penalties from former UST owners and operator who are responsible for the orphan tank sites.

Regarding IDEM's proposal to use monies from the ELTF program to pay for abandoned UST sites, while for the first time since 2005 the ELTF is finally out of the "priority payment" mode of claims due to insufficient funding, the IPCA remains concerned about the ELTF solvency because the ELTF continues to receive claims for reimbursement of expenses (\$66+million) which exceed the amount of revenue paid into the ELTF (\$57+ million), with IDEM only paying about half of the claims submitted for reimbursement (\$32+ million).

The EQSC recommended that a mechanism be developed to assist IDEM with remediating UST sites for which there is no responsible party.

5. **IDEM Lacks Statutory Authority For Current ELTF Rulemaking**

In response to IDEM's proposed amendments to the rules governing Indiana's ELTF program, on August 28, 2009 the IPCA submitted extensive written comments reflecting the members' concerns that IDEM is seeking to restrict access to the ELTF and narrow eligibility for reimbursement. These concerns were expressed again during the IPCA's testimony at the EQSC hearing.

Sufficient funding mechanisms through the ELTF to pay for environmental investigation and remediation costs for UST petroleum releases are of critical importance to the IPCA's members. Such cleanups are one of the major liabilities associated with the UST and petroleum-handling industry. The General Assembly created the ELTF with the stated purpose of "[p]roviding a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action." IC 13-23-7(2). The environmental funding currently afforded under the ELTF provides certainty, fairness and economic rationality in an industry where the UST owners and operators and the motoring public provide 100% of the funding for the ELTF to pay for these environmental liabilities. Many of IDEM's proposed changes would significantly alter and restrict the ELTF program.

If you have any questions about these legal developments or would like to receive copies of the IPCA's testimony or written comments do not hesitate to contact the author or the IPCA's office.