

# POTENTIAL LIABILITY A REALITY FOR TANK OWNERS

**A number of recent court decisions have addressed some of the potential liabilities tank owners face as a result of a release from an UST or the sale of affected property.**

**T**he past decade has seen a surge of lawsuits involving releases from underground storage tanks. Landlords, adjacent property owners and purchasers of impacted properties have all sued to recover damages they claim were caused by contamination of the soil and groundwater.

The planned termination of the Texas Petroleum Storage Tank Remediation Fund may well result in an increase in these suits. Remediation costs are often prohibitive to a tank owner, and there will no longer be a pool of funds available for remediation of any newly-identified contamination. Additionally, both the tank upgrading requirements and the inability of some owners to obtain insurance may cause some tank owners to remove tanks from service or even close down their businesses, thereby resulting in identification of additional releases and contamination.

Tank owners should understand the liabilities they may face as a result of a release from an underground storage tank or a sale of impacted property. A number of recent court decisions have addressed some of these potential liabilities, including the legal theories being used to impose liability.

## FEDERAL CLAIMS

Most people are familiar with the federal Superfund law that is being used to require responsible parties to pay for the cleanup of impacted properties around the country. That law also allows innocent property owners who clean up impacted properties to recover their costs from the parties responsible for the contamination. Fewer people realize that the Superfund law does not apply to contamination from

petroleum, including crude oil or any crude oil fractions. Gasoline and diesel fuel fall within this petroleum exclusion, such that releases of these products from underground storage tanks are not subject to claims for cost reimbursement under the Superfund law.

Another federal law, the Resource Conservation and Recovery Act, has also been used by some innocent property owners as a means of requiring the responsible party to conduct the cleanup. RCRA is especially attractive because it allows liability without proof of negligence, and it allows for recovery of attorneys' fees by the innocent property owner.

There has been a difference of opinion among the courts whether RCRA, which applies to "waste," also applies to useable gasoline and diesel fuel products that have leaked from an underground storage tank. The majority of courts now hold that releases are covered by RCRA.

The use of this law for recovering remediation costs incurred by the innocent property owner was recently severely restricted by a decision of the U.S. Supreme Court. On March 19 of this year, the Supreme Court held that a property owner cannot recover its costs under RCRA if the contamination was cleaned up prior to the lawsuit since RCRA does not permit private parties to recover the cost of cleaning up waste that does not continue to pose a danger to health or the environment. RCRA does, however, still allow a property owner to obtain a court order requiring the responsible party to take action to clean up the contamination.

## COMMON LAW TORT CLAIMS

The vast majority of the lawsuits involving releases from underground stor-

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age tanks are based on common law legal theories such as trespass, nuisance and common law strict liability. Landlords, adjacent property owners and subsequent property owners have asserted their legal theories to recover property damages, the cost to remediate contamination (whether or not those costs have already been incurred), and incidental damages such as lost rents.

Many of the courts that have reviewed claims for damages under these legal theories have ruled that a current property owner may not recover damages from an earlier owner or lessee of the property who was responsible for the contamination. The courts follow the rule of *caveat emptor* (buyer beware) because purchasers of property can readily protect themselves from unknowingly purchasing impacted property by using reasonable diligence in evaluating the property before purchase. Similarly, the courts typically have not allowed nuisance and trespass claims to be brought against an earlier, responsible owner since those legal theories apply only when the property of another, such as an adjacent landowner, is affected.

For claims involving migration of contamination to adjoining properties, courts have allowed some of these common law trespass and nuisance claims. In one Texas case, the jury awarded more than \$15 million in damages, including punitive damages, to an adjacent property owner whose property was impacted by the migrating contaminants.

Common law strict liability (liability without proof of negligence) is, as a general rule, not recognized in Texas regardless whether the claim is brought by a subsequent owner or by an adjacent property owner.

#### **BREACH OF CONDUCT AND FRAUD**

Petroleum marketers frequently lease their business premises. The lease may require the lessee to remediate any contamination on the property caused by releases from the underground storage tanks. The lease may also prohibit any releases of contaminants on the property. A viola-

tion of the lease could subject the lessee to liability for damages for breach of the lease.

Another context in which a breach of contract can occur is when an owner of underground storage tanks sells the property after termination of business. The owner may face liabilities if the property was impacted at the time of sale. If the presence of the contamination was known by the parties at the time of sale, the seller may have indemnification obligations to the purchaser. If the presence of the contamination was not known by the purchaser, the seller may face claims for fraud and breach of representation under the sale documents.

Many sale documents include language that the property is being sold "as is, where is and with all faults" without any representation being made about the presence of contamination or the condition of the property otherwise. This language can protect sellers from some claims of fraud and claims of defect in the property. In one recent case in Texas, the owner of an office building was initially held liable to the buyer for failing to disclose that the building contained asbestos. The Texas Supreme Court reversed the award and held that an "as is" clause in the sale documents precluded the buyer from claiming that he was harmed by the sellers' conduct. The court noted, however, that a buyer is not bound by an "as is" clause if the seller fraudulently induces the buyer into accepting the clause in the sale documents.

Sellers of property also need to take great care during sale negotiations to ensure proper disclosures have been made to the purchasers. In one case in Ohio, an owner of underground storage tanks removed the tanks and sold the property. The former owner did not remove the connecting piping and did not tell the new owners that the connecting piping had not been removed. When the new owner attempted to re-sell the property, an environmental assessment found contamination from the connecting piping. The potential purchaser canceled its purchase.

The court ruled that the prior owner

#### **"As is" language can protect sellers from some claims of fraud and defect in the property.**

had fraudulently concealed from its purchasers the fact that the piping was not removed, and held that the prior owner had a duty to disclose to its purchasers material facts that were not apparent from a visual inspection of the property. Moreover, as the prior owner was in the petroleum business, it should have known of the contamination risks associated with leaving the piping in the ground after removal of the underground storage tanks. The court also imposed punitive damages on the prior owner.

#### **CONCLUSION**

Owners of underground storage tanks face various potential liabilities when a release from an underground petroleum storage tanks occurs. Those potential liabilities include an order requiring the owner to remediate any contamination on the property, as well as a judgment for damages, attorneys' fees and even punitive damages. Owners may face additional liabilities upon the sale of their property if the property is sold without the seller disclosing the existence of the contamination to the purchaser.

Tank owners need to understand these potential liabilities so that they make take appropriate action to reduce the possibility that any such liability may accrue and to minimize any damages that may be caused as a result of a release from an underground storage tank. ■

**Tracey Smith Lindeen and Gregory P. Crinion are partners in the law firm of Jackson & Walker, L.L.P. Their practices are concentrated in the area of environmental law, and they regularly defend petroleum marketers against claims for alleged releases from underground storage tanks. You may contact them in Houston at 713/752-4200. Their firm also has offices in Dallas, Fort Worth and San Antonio.**