

**In the matter of: Objection to the Denial of Excess Liability Fund
Claim No. 9710523/Fac ID 12934 Kiel Bros. Oil Co., Inc., Jefferson County
2003 OEA 15 (02-F-J-2851; 02-F-J-2918)**

TOPICS:

summary judgment
excess liability trust fund
ELTF
underground storage tank
UST
third-party
principal
328 IAC 1-1-10
consolidation
registration fees
gasoline contamination
corrective action
clean up
claim
owner/operator
deductible
lease
settlement
reimbursement
CERCLA
joint and several liability
contribution

PRESIDING JUDGE:

Vogel

PARTY REPRESENTATIVES:

Petitioner: Christopher J. Braun, Esq., Amy E. Romig, Esq.
Attorney General's Office: Timothy J. Junk, Esq.
IDEM: Anne M. Patterson, Esq.

ORDER ISSUED:

April 23, 2003

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[appealed]

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FINDINGS OF FACTS

1. Kiel Bros. leased and operated a gasoline station with underground storage tanks ("USTs") on property at 219 North Clifty Avenue, Madison, Indiana ("Site") from May 1987 until May 1997. The property was leased from Hukill Oil Company, Inc. ("Hukill") owner of the station from approximately 1962 until February, 1999 when it sold the property to an unrelated party.
2. During the applicable time period, all UST Registration Fees were paid in full. Kiel Bros. paid the UST Registration Fees while lessee of the station and Hukill paid the fees at all other times.
3. After the Kiel Bros. lease expired in 1997, Hukill discovered gasoline contamination on the Site and performed corrective action to clean up the gasoline spill.
4. Hukill submitted a first party claim for reimbursement of its corrective action costs in September, 1999 to the Indiana ELTF. The ELTF paid Hukill \$ 189,469.49; however, \$48,209.14 of the claim was denied; \$35,000 of which being Hukill's deductible, the portion to be borne by the tank owner/operator.
5. On June 10, 2000, Kiel Bros. submitted an application for eligibility with the ELTF. The ELTF Administrator confirmed the eligibility of Kiel Bros. on July 10, 2000, by letter indicating that the Site is eligible for reimbursement from the ELTF for eligible costs associated with any work phase.
6. In January, 1998, Hukill filed suit against Kiel Bros. alleging that gasoline contamination at the Site was the result of Kiel Bros.' Lease and operation of the gas station; *Hukill Oil Company, Inc. v. Kiel Bros. Oil Co., Inc.*, Jefferson Circuit Court, Cause No. 39C01-9801-CP-25.
7. On October 12, 2001, Hukill and Kiel Bros., reached a settlement in the Jefferson Circuit Court suit whereby Kiel Bros. paid \$200, 986.41 to Hukill. The settlement resulted in a stipulated dismissal of the action on November 20, 2002.
8. Kiel Bros. filed an Application with the ELTF on November 2, 2001 as a third-party claimant requesting \$ 230,986.41 and supported the claim with the settlement agreement with Hukill per *Hukill Oil Company, Inc. v. Kiel Bros. Oil Co., Inc., supra*.
9. On January 25, 2002, the IDEM denied Kiel Bros.' third-party claim; on December 20, 2001, the Attorney General, denied Kiel Bros.' third-party claim.
10. To date, Kiel Bros. has not filed a direct claim or presented documentation of any corrective action costs incurred by Kiel Bros.

ISSUE

The issue of whether Kiel Bros. as lessee and statutory "operator" of the underground storage tanks owned by Hukill is eligible for ELTF funds as a third-party claimant is dispositive of the case and the only issue to be addressed by the OEA.

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DISCUSSION

Kiel Bros. argues that it is entitled to reimbursement from the ELTF as a third-party claimant due to a settlement with Hukill in a State Court action for damages resulting from an accidental release of petroleum from Hukill's USTs while Kiel Bros. was operator of the USTs. Although Indiana defines "Third party liability"¹ it does not define third party. Absent a legislative definition of a word, the court gives the word its common and ordinary meaning. *Kaghann's Korner, Inc. v. Brown & sons Fuel Company, Inc.*, 706 N.E. 2d 556, 1999 Ind. App. LEXIS 179. Black's Law Dictionary, 7th Ed., defines third party as "One who is not a party to a lawsuit, agreement or other transaction but who is somehow involved in the transaction; someone other than the principle parties. -- Also termed *outside party*. ..."

Indiana's underground storage tank laws as drafted are based on the Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. & 9601 et seq. *Western Ohio Pizza, Inc. v. Clark Oil & Refining Corporation* 704 N.E.2d 1086; 1999 Ind. App. LEXIS 68 citing *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713, 721 (S.D. Ind. 1991), modified on denial of reconsideration, 796 F. Supp. 1164 (S.D. Ind. 1992). Pursuant to CERCLA, owners or operators of petroleum underground storage tanks are required to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. 40 CFR 280.93. Courts have held that joint and several liability may be imposed against the owner or operator under CERCLA and that a person held jointly and severally liable may seek contribution from other potentially liable parties. *Bourbon Mini-Mart, Inc. et al v. Gast Fuel and Services, Inc., et al*, 783 N.E. 2d 253, 263; 2003 Ind. LEXIS 116 (Ind. Sup. Ct. 2003).

Under similar Indiana law² a person who undertakes cleanup of a release from an underground storage tank may seek contribution from a former owner or operator who owned or operated the tanks at the time the release occurred. *Western Ohio Pizza, Inc. v. Clark Oil & Refining Corporation* 704 N.E.2d 1086; 1999 Ind. App. LEXIS 68. Thus Hukill, an owner of USTs who incurred expenses during the cleanup of a site from the accidental release of petroleum from the UST's operated by Kiel Bros., is entitled to seek contribution from Kiel Bros. in State Court. However, as owner of the USTs and jointly and severally liable for the accidental release, Hukill is a principle in this action and not a third party in the claim for reimbursement from the ELTF. Kiel Bros. is entitled to request reimbursement for reasonable costs Kiel Bros. incurred in cleanup of the site, but is not a third-party claimant. As responsible parties, Hukill, as owner and Kiel Bros. as operator of the USTs are both principle parties to this action; no third-party claim may be made.

¹ **328 IAC 1-1-10.** "Third party liability" is the damage a tank owner or operator is legally obligated to pay for injury suffered by a third party as the result of a release. Third party liability includes bodily injury and property damage.

² **I.C. 13-28-13-8 (b).** A person who: (2) undertakes corrective action resulting from a release from an underground storage tank,is entitled to receive a contribution from a person who owned or operated the underground storage tank at the time the release occurred...

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Conclusions of Law

Based on the foregoing Findings of Fact and Discussion, the Environmental Law Judge concludes, as a matter of law:

1. The Indiana Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to the controversy pursuant to IC § 4-21.5-3-23.
2. Hukill, as owner of the USTs which leaked petroleum, is jointly and severally liable with Kiel Bros. for the cleanup of the site, and a principle in this action; and is not a third party for purposes of reimbursement from the fund based on a settlement of a contribution claim by the parties.
3. An owner or operator is a principle party in respect to the ELTF fund and not a third-party claimant.
4. The IDEM's and Attorney General's denials of Kiel Bros. third-party claim are Final Orders of the Commissioner and confers jurisdiction to the Office of Environmental Adjudication for review of the orders.
5. The IDEM's and Attorney General's denials of Kiel Bros. third-party claim are based on the correct interpretation of 328 IAC 1-1-10 "Third party liability" and are authorized by rule.
6. As per the previous discussion in this Order, no genuine issue of material facts exist in the instant case and IDEM is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23.

ORDER

The Court **NOW GRANTS SUMMARY JUDGMENT** to the Attorney General and the IDEM pursuant to I.C. § 4-21.5-3-23(b) and Ind. Trial Rule 56 (C) and upholds their denial of a third-party claim seeking payment by Indiana's Excess Liability Trust Fund ("ELTF") submitted by Kiel Bros.

You are further notified that, pursuant to Indiana Code § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code § 4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS HEREBY ORDERED this 23rd day of April, 2003 in Indianapolis, Indiana.

Candace T. Vogel,
Environmental Law Judge