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RAWLE'S REPORTS

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RAWLE & HENDERSON LLP

www.rawle.com

Philadelphia, PA
215. 575. 4200
Fax 215. 563. 2583

New York, NY
212. 323. 7070
Fax 212. 323. 7099

Marlton, NJ
856. 596. 4800
Fax 856. 596. 6164

Pittsburgh, PA
412. 261. 5700
Fax 412. 261. 5710

Harrisburg, PA
717. 234. 7700
Fax 717. 234. 7710

Wilmington, DE
302. 778. 1200
Fax 302. 778. 1400

Wheeling, WV
304. 232. 1203
Fax 304. 232. 1205

@1783Rawle

PENNSYLVANIA APPELLATE

Underground Storage Tank Fund

Carl D. Buchholz, III

Rawle & Henderson LLP recently obtained a favorable decision from the Pennsylvania Supreme Court in the case of *Young's Sales & Service v. The Underground Storage Tank Indemnification Fund, et al.* **Carl D. Buchholz, III,** Chair of Rawle & Henderson's Appellate Section, represented the Commonwealth's Underground Storage Tank Indemnification Fund ("Fund") in the appeal.

The case involved a claim for coverage submitted by Young's Sales & Services to the Fund pursuant to the Storage Tank Spill Prevention Act, 35 P.S. § 6021.101 et. seq., for certain remediation fees incurred by Young's stemming from underground leaks consisting of both gasoline and kerosene discovered in the year 2000 during removal of four underground storage tanks on Young's property. The Fund determined that Young's was ineligible for Fund coverage because mandatory tank fees had not been paid on at least one of the four tanks at the time the contamination was discovered, and Young's had otherwise failed to meet its burden of proving eligibility for Fund coverage.

A panel of the Commonwealth Court of Pennsylvania vacated the Fund's decision, agreeing with Young's contention that eligibility for reimbursement for leak-related remediation expenses is on a "per tank" basis, such that if all current fees are paid with respect to any one particular tank at a multi-tank site prior to the discovery of contamination, then the owner should be entitled to recover for the remediation costs associated with that one tank. The Commonwealth Court then remanded the matter back to the Fund for more specific findings on which fees were owed at the time the contamination was discovered and from which tanks the leaks had occurred.

The Pennsylvania Supreme Court granted allowance of appeal to determine whether the Commonwealth Court's holding that eligibility for recovery from the Fund is on a "per tank" basis misinterprets the purpose of, and misapplies, both federal and state laws requiring mandatory financial responsibility for underground storage tanks and threatens the overall financial sustainability of the Fund itself.

At oral argument before the Supreme Court, Carl Buchholz made three arguments as to why the Commonwealth Court had erred in deciding that eligibility for reimbursement in a multi-tank site is on a "per tank" basis. The first argument was that an "underground storage tank" is defined in the Act as "any one or combination of tanks," such that the eligibility for reimbursement requirement applies to all the tanks in a multi-tank site.

The second argument was that if there was any ambiguity regarding the requirement for payment of fees on all the tanks in a multi-tank site, the Commonwealth Court failed to give "due deference" to the interpretation of the Underground Storage Tank Indemnification Fund which administers the Act.

The third argument was that the Commonwealth Court's "per tank" interpretation of the fee requirement under the Act threatened the financial stability of the Fund since tank owners would only be able to pay the tank fees on older underground storage tanks, which are more likely to leak, and not pay fees on newer tanks, so that the amount of fees that would be collected by the Fund to pay remediation expenses would be dramatically reduced.

Each of these three arguments was accepted by at least one of the Justices. The majority of the Court, consisting of Justices Todd, Baer, and McCaffery, agreed with the argument that the Commonwealth Court had failed to give due deference to the Fund's interpretation of the Act. These Justices held that although the language of the Act regarding payment of fees on all tanks in a multi-tank site was ambiguous, the Commonwealth Court failed to give due deference to the Fund's interpretation of the Act, as the Fund was the entity the legislature had entrusted with administering the Act. Further, these Justices also agreed with the argument that the tank fee payment requirement had to be applied to all tanks in a multi-tank site or the financial stability of the Fund would be severely threatened.

Justice Saylor on the other hand, joined by Chief Justice Castille, also agreed with the argument that the Fund had acted within its discretion in denying eligibility for Young's claim. However, these two Justices did not agree that the Fund had correctly determined that the fees on all the tanks in a multi-tank site had to be current in order to obtain reimbursement. Rather, they felt the Fund had acted within its discretion in determining that Young's did not carry its burden of proving that all fees were current as to the tanks involved in the contamination. Justice Saylor noted that if Young's had been able to establish that the contamination emanated from tanks on which the fees were current, there might have been coverage.

Lastly, Justice Eakin issued his own opinion, agreeing with the argument that the definition of "tank" in the Act is "one tank or a combination of tanks", so that the eligibility requirement that the tank fee be current at the time the contamination is discovered applies to all the tanks in a multi-tank site.

Although there was not a clear consensus on the reason to reverse the Commonwealth Court's holding, the holding of the majority and Justices Saylor and Chief Justice Castille that "due deference" must be given the Fund's eligibility decisions, should prove extremely helpful to the Fund in future eligibility claims.

Young's Sales and Service v. Underground Storage Tank Indemnification Board et al, case number 6 MAP 2011, Supreme Court of Pennsylvania

Carl D. Buchholz, III, is Chair of the Maritime, Insurance Coverage and Appellate Sections. His federal appellate practice includes an argument before the United States Supreme Court, as well as numerous arguments before the U.S. Court of Appeals for the Third Circuit. His state appellate practice includes seven arguments before the Pennsylvania Supreme Court, as well as numerous arguments before the Pennsylvania Superior Court and Commonwealth Court. In 2006, the Pennsylvania Supreme Court appointed Carl to the Disciplinary Board of the Supreme Court of Pennsylvania. In 2010, the Pennsylvania Supreme Court designated Carl as Chair of the Disciplinary Board. He graduated from Muhlenberg College in 1967 and Villanova Law School in 1970 where he was a member of the *Villanova Law Review* and graduated with honors.

Carl can be reached at:
(215) 575-4235 • cbuchholz@rawle.com

NEW YORK LABOR LAW

Settlement in Burn Case

Derek E. Barrett

Rawle & Henderson's client, a legendary auto dealer in New York City for years, was planning to sell their iconic dealership located in midtown Manhattan. To do so though, it was first necessary to remove several old gasoline tanks that had been buried below the dealership for decades. This would require digging them up, then purging them of any gasoline residue before they could be decommissioned and scrapped.

They engaged the services of a well-known company that specialized in such removals. One of the crew that was sent, Mr. Williams, was a 17-year veteran of the company and the apparent foreman of the crew. He was also the union shop steward. The procedure to be followed was simple: locate and expose the tanks, call in the "pump truck" to purge the contents, then cut them up and ship them out. Two of the tanks had already been disposed of when another two were exposed (they were in pairs).

Mr. Williams called his office to request the pump truck, but was told that none would be available until the next morning. It was not yet 11:00 am, so there was still a day to fill. Without further instruction over the telephone (Williams was speaking to his superior), Williams decided to start cutting the piping that led from the tanks. But rather than use a "Sawzall," a saw that cuts metal, he decided to use a welding torch to remove the pipes, despite the obvious risk given the sparks this would create and the potential for igniting any gas residue in the tanks.

Yet, that is exactly what happened. After less than a minute, a fireball erupted, severely burning Mr. Williams. After multiple operations and skin grafts, he was left with a hand where the thumb and fingers had been burned off halfway, making it useless as a hand, as well as multiple scars over his torso and legs. He never returned to work.

His attorney sued our client, the owner of the property, asserting a provision of the New York State Labor Law. That provision, Section 241(6), makes the owner of a property liable where a worker is injured in certain types of construction or demolition if plaintiff can prove there has been a violation of the New York State Industrial Code, and that said violation was a significant factor in causing plaintiff's injury. The fact that the property owner did not himself violate the code or that the owner did not in any way supervise or direct the worker is irrelevant. Indeed, the owner does not even need to be on site at the time of the accident. The law does allow the owner, if he is able to prove that he was not actively negligent (didn't direct the work or the plaintiff) to implead the actively negligent party and pass the liability through to that party.

Here, the actively negligent party was plaintiff's employer, but because plaintiff had received worker's compensation

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benefits, he could not sue his employer. In this case, the law only allows an impleader and "pass through" of the owner's statutory negligence to the employer if either: the owner has a contract with the employer, which has an expressed indemnification provision in favor of the owner, or the plaintiff has suffered a "grave injury," which basically means complete loss of a body part. In this case, although both our client and the employer were both long established firms in New York City, they had failed to enter into a contract with an indemnity provision leaving our client totally exposed to what could be a very high verdict in a jurisdiction considered very favorable to plaintiffs. The entire verdict could go in against our client. It was essential to gather sufficient evidence that showed that plaintiff's actions were overwhelmingly the reason for the accident, and that the cause of his injuries was the negligence of the plaintiff and his employer.

Derek E. Barrett, Of Counsel in Rawle & Henderson's New York office, retained the services of a cause and origin fire expert, who opined that–after viewing the surveillance video–it was clear that plaintiff caused his own accident by cutting a pipe that was still connected to a tank, which he had denied. He also obtained depositions of the witnesses to the occurrence as well as responding fire personnel whose testimony backed up the expert's observations. When plaintiff moved for summary judgment on Labor Law, we challenged his motion on every front, citing our fire expert's opinion and pointing out that many of the provisions of the Industrial Code cited by plaintiff did not apply to the case.

The judge ruled on the summary judgment motion, granting only the one provision relating to not purging the tank (plaintiff's fault), but refusing to find that it was caused by anything our client did, ruling that to be a question of fact.

It was then that plaintiff asked if we would mediate. After an entire day, the insurance carrier for the employer decided that they would pay the bulk of a settlement. Our client agreed to pay 10% since there was still a risk that a grave injury might not be found, which would let the employer out of the case. Thus, our client paid $300,000 on a settlement totalling $3,250,000. The jury exposure for such an injury was in excess of $7,000,000. The arbitrary and unfair nature of the New York Labor Law continues, and had the plaintiff not suffered such a major injury, the lack of a contract with the employer would have prevented the claim against the employer.

Ernest Williams and Lynette Williams v. Potamkin Cadillac, et. al. Kings County Index No. 8350/10.

Derek E. Barrett, Counsel to the Firm in Rawle & Henderson's New York office, is an active trial lawyer whose practice is concentrated in the areas of commercial motor vehicle litigation, construction and premises liability as well as medical and dental malpractice. Mr. Barrett obtained his law degree from New York Law School in 1991. He graduated with a B.S. degree from Queens College of the City University of New York. He is admitted to practice in New York and New Jersey, and before the U.S. District Court for the District of New Jersey and the United States District Courts for the Northern and Southern Districts of New York.

Derek can be reached directly at: 212-323-7077 • dbarrett@rawle.com

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