

## Technical Bulletin #14.1

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### Corporate Liability for Tank Spills

(replaces TB 14.0)

In looking at questions about the liability for cellar spills on the part of oil companies when oil tanks are improperly installed by the owner or a third party, it is important to distinguish between legal liability and good customer relations. At some point, you may want to undertake some expense for which you are not legally liable because of the customer involved. However, this response addresses only questions about legal liability.

#### **1. "Assuming the company fills the tank properly, is there any liability on the part of the company in the case of a spill?"**

If the company is contracted only to deliver oil to the consumer, and if the pipe and vent on the outside of the house appear to be appropriately installed and in working order, then the oil company should have no liability if there subsequently are problems in the house. The basis for this opinion is that the oil company has no duty to the consumer to assure that the oil tank is in good working order and, if all of the exterior connections appear satisfactory, they have no reason to know that there may be a problem. The oil company would not meet any of the tests for tort liability as in the absence of a duty, there is no negligence. As long as there is no contractual liability, the company should have no legal obligation to repair the tank or clean the spill.

In Wurst v. National Oil & Supply Co., Inc., 780 S.W. 2d 97(Mo. App. 1989), A county employee who was injured when a road oil storage tank exploded brought action against a road oil supplier, propane gas supplier and county's liability insurer.

The court in this case held that; The propane gas supplier (propane was used to heat the tank) could not be held liable for injuries suffered by county employee when road oil storage tank exploded, based on supplier's alleged failure to inspect tank for defects; no evidence indicated that there were leaks or other defects in pipes, burners, or storage tank through which propane gas escaped, but rather, evidence indicated that explosion and fire were the result of inadequate ventilation of tank and other defects which permitted tank to be heated when there was insufficient oil in it. Wurst, at 98.

The court also held, with respect to the road oil supplier's liability, that the road oil supplier could not be held liable to county employee who was injured when storage tank used to store the oil exploded, based on supplier's alleged failure to instruct its drivers to determine whether tank could safely handle the oil; supplier was responsible for safely transferring oil from its delivery trucks to storage tank, but had **no duty to inspect storage tank for defects in design, construction, ventilation, and gauging.** Wurst at 98 (emphasis added).

In a 1988 case, the California Court of Appeals for the 5th District stated that natural gas suppliers have a duty to inspect pipes in a house prior to establishing service. See Mendoza v. Eastern Gas Co., 197 CA App. 3d 781, 243 Cal. Rptr. 136 (CA Ct. of App. 5th Dist. 1988).

The Court discussed earlier cases which found a duty to inspect ( see Sawyer v. Southern California Gas Co., 206 CA 366, 274 P. 544 (CA 1929) and Ambriz v. Petroleum Ltd., 49 CA 2d 470, 319 P. 2d 1 (1957)) and distinguished Lewis v. Southern California Gas Co., 92 CA App. 670, 268 P. 930 (1928) in which the Court found no duty to inspect. The Lewis case stated: "The company is

warranted in assuming that the interior system of pipes is sufficiently secure to permit gas to be introduced with safety." Id. at 676. It is important to remember that these cases involve natural gas, not oil. Gas is regarded as being more hazardous than oil and may, therefore, give rise to a higher duty of care which would not attach in an oil case. (It should be noted that no other court has yet imposed the same duty to inspect as did the California Court in the Mendoza case.)

In Creamer v. Monarch Fuel Co., 21 A. 2d 921 (CT 1943), the Court found no liability in a case in which the oil delivery man failed to check an exterior vent which was clogged, causing the oil tank to explode. The Court found no duty to check the system and no negligence. No other cases of this kind were found.

Finally, there appear to be no DEP reporting requirements for the oil company if there is a spill inside the house. There may be a reporting requirement for the homeowner. If the oil company does the clean-up, and if the spill is not contained (i.e., the home has a dirt cellar) and there is a possibility that the oil might seep into the ground, there may be a requirement to report the spill to the DEP based on possible groundwater contamination. In such a case, it would be wise for the company at least to call the DEP to determine whether a report is necessary.

## **2. "Can we assume that the plumber or other installer of the tank or pipes could be held financially responsible by the consumer for the defect?"**

First of all, the only people who are allowed to install oil tanks are licensed oil burner technicians.

These people are licensed by the State and are regulated by the Oil and Solid Fuel Board. They are responsible to install all oil burning equipment, including oil tanks in accordance with NFPA-31 (National Fire Protection Association) and the State Board Rules, Chap. 140. NFPA-31 is a national code which has been adopted as the standard in Maine. If a licensed installer has failed to install the oil

burning equipment in accordance with NFPA-31, they can be held liable to the homeowner or the consumer for any defect, and they are also subject to action against their license by the licensure board.

A plumber, by virtue of a plumbing license, is not legally authorized to install oil burning equipment, including an oil tank. Therefore, if a plumber installs defective oil burning equipment or the installation itself is defective, the homeowner may have a cause of action against the plumber. The plumber may have a defense under a tort theory that the homeowner assumed the risk or was also negligent by knowingly having an inappropriately licensed person install their oil tank. Regardless of possible tort liability, the plumber would be subject to discipline by the plumber's licensure board for practice exceeding the scope of the plumbing license.

**3. "How can the company be subrogated to the rights of the consumer where the company has performed the clean-up of the spill caused by a third-party repairman?"**

The company could enter into a subrogation agreement with the customer as a condition of clean-up.

A subrogation agreement is one which authorizes a party to bring an action in the name of or instead of the party sustaining the injury. For example, many insurance companies will enter into subrogation agreements with their insured allowing the company to sue a third party on behalf of the insured.

The subrogation agreement should include not only the right to sue in the consumer's place but also the right to any insurance proceeds which may be available (particularly if the consumer is responsible for the problem).

If the company has no subrogation agreement with the consumer, the company could sue the consumer, who could then implead the third-party installer. In the

absence of a subrogation agreement, the company's cause of action is against the consumer for whom they have done the work, and the consumer would have standing to bring an action against the installer.

#### **4. "Are there any other issues or questions in this area which we ought to be examining?"**

Another area to examine would be any contractual liability or responsibility that the oil company has undertaken with the particular consumer. Liability will probably arise where the oil company has an on-going service contract with the homeowner. Such a contract could make the oil company responsible for any leaks or malfunctioning in the system.

It is unlikely that a court will find strict tort liability on the part of the oil company. Fuel oil is not considered an "ultra hazardous substance" which is a necessity for the imposition of strict liability. Additionally, to give rise to strict liability in a product liability analysis, the product must be in defective condition when leaving the manufacturer and it must be considered unusually dangerous. Fuel oil does not meet either of those conditions.

Therefore, no strict liability under a tort theory or a products liability theory would attach to the company.

Surprisingly, there is no caselaw in Maine involving oil spills in cellars (or elsewhere) based upon improperly installed tanks and a dearth of even vaguely related cases. Therefore, any advice must necessarily be based on the standard tort and contract liability analysis. As stated above, based upon those analyses and the few cases cited earlier, there is likely no liability on the part of the company for spills from tanks that they have not installed or maintained by the company. The individual, licensed or not, who has installed the tank would bear some responsibility if there was a defect in the installation which caused the spill. In a lawsuit between the consumer and the company, that installer could be

impleaded by the consumer as a third-party defendant. If the homeowner himself or the consumer has tampered in any way with the installation of the oil tank or the lines, or any part of them, that would help relieve the installer and the oil company of liability.

In summary, there does not appear to be any liability for a spill if the oil company has agreed only to deliver oil and neither knows, nor has reason to know, that any problems exist. If the company inspects the oil tank and lines prior to establishing service for a new customer, some liability may attach if there are problems which the company did not discover. They would be responsible to repair problems but would need to report any problems discovered to the owner. The company, to protect itself, should have customers who accept company assistance in clean-up enter into a contractual subrogation agreement which would apply to any cost incurred by the Company for cleaning up any oil spilled.