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"Ownership" of Underground Storage Tanks

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I. INTRODUCTION

A. *Background*

In the last ten years, ownership of an underground storage tank (UST) used for the storage of materials which might threaten human health or the environment has become a source of substantial liability. Until recently, the duties associated with owning a UST have been largely a product of the common law and the statutory and regulatory laws associated with human safety and fire prevention. Now, however, the modern concern for human safety includes the safety associated with a healthy environment. Thus, laws have evolved to promote concern for the environment. The newly created consequences of owning a UST have justified greater consideration of the question of how one resolves the "ownership" issue.

This article will highlight some of the reasons why ownership of a UST is unattractive as well as certain legal considerations which an individual or entity might consider in determining

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whether to become the owner of a UST. Rather than attempt to provide easy answers, this article will attempt to reveal those areas of the law which provide the greatest guidance by focusing on USTs used to store petroleum and its distillates.[1] This article does not address issues associated with the language of the regulatory definition of the term "owner."

B. History of Underground Storage Tanks

The petroleum UST is a creature of demand for readily accessible retail gasoline in large quantities. Horseless motoring was in its infancy at the turn of the century and the demand for drive-in gasoline was very small. It was not until mass production of the automobile that the demand for retail gasoline increased.

The modern "service station" as we know it developed during the first quarter of the twentieth century. Before the turn of the century, motorists filled their automobile at bulk depots with hand held pitchers.[2] Gasoline was stored at these depots in five-gallon containers.[3] The method for fueling automobiles became a little more convenient as bulk dealers switched to gravity fed hose transfer systems attached to aboveground bulk storage units. This method prevailed until the invention of the gasoline pump.

Advancement in gasoline-pump technology in the second decade of the twentieth century by manufacturers such as Tokheim Oil Tank & Pump Company and Gilbert and Barker Company (Gilbarco) caused a rapid expansion of retail facilities with underground storage tanks.

> As more of these modern pump units appeared on the market, gasoline storage went permanently underground, simplifying the curbside positioning of gasoline pumps in urban settings. Safety improved too.[4]

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[1] For example, in California, 80% of the USTs contain petroleum products. John J. Hill, *A State's Perspective of the Problems Associated with Petroleum Contaminated Soils*, *in* I PETROLEUM CONTAMINATED SOILS 22 (Paul T. Kostecki & John J. Calabrese eds., 1989).

[2] MICHAEL KARL WITZEL, THE AMERICAN GAS STATION: HISTORY AND FOLKLORE OF THE GAS STATION IN AMERICAN CAR CULTURE 13 (1992).

[3] *Id.*; *see generally* CHEVRON, ONE HUNDRED YEARS HELPING TO CREATE THE FUTURE 1879-1979: STANDARD OIL COMPANY OF CALIFORNIA (1979).

[4] CHEVRON, *supra* note 3, at 32-33.

So began the era of the retail sale of petroleum from USTs and their regulation.[5]

During the second quarter of the twentieth century, retail facilities with USTs grew at a rapid pace. This growth was facilitated by dealership arrangements. By creating a dealer relationship, the oil companies did not have to commit capital to real estate or buildings. Grocery stores, lumber yards, hardware stores, and other retail establishments could install, or as was frequently the case, have the oil company install, tanks and pumps. These mixed-use dealer facilities were in addition to the free-standing retail dealer facilities being developed by the oil refining companies.

The number of retail petroleum marketing facilities peaked in 1939 with almost 250,000 facilities. One author suggests that retail gasoline dealerships offered an inexpensive way to be self-employed and, thus, flourished even during the great depression.[6] As competition developed, brand identification became more important. With trademarks came customer loyalty. However, most oil companies did not solely rely on their trademark to insure control of brand identification.[7] Many oil refiners used ownership of distribution equipment, including underground storage tanks, to control their branded fuels and trademarks. This approach resulted in the development of distribution agreements.[8] Those agreements generally provided that the oil company retained own-

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[5] The first regulations were from municipalities. Fire and building departments called for inspection of facilities and permits prior to construction. Early concerns were with the explosive hazards inherent in handling a combustible liquid and aesthetic design. Finkler, *History of Service Station and Gasoline Marketing, in* THE DESIGN, REGULATION, AND LOCATION OF SERVICE STATIONS 5-6 (July-Aug. 1973).

[6] Shelley Bookspan, *Tanks, But No Tanks*, 19 REAL EST. L.J. 254, 256 (1991). The history of petroleum marketing provides an interesting insight into the economic development of the United States. The ebb and flow in the number of stations and their diverse architecture provide some insights. Expansion in the number of outlets in the thirties was followed by a decline in the forties. Similarly, the growth in the number of retail facilities in the seventies is giving way to a decline in the nineties. The EPA has suggested, as have others, that the number of rural stations could fall by 50% by the end of the decade, and with it a unique visage along many rural, two-lane highways where former stations and their architecture are still visible, *id.*

[7] For instance, the Lanham Act protects trademarks and is codified at 15 U.S.C. §§ 1055 - 1127 (1992). The Lanham Act provides civil liability for any person who, in commerce, uses any imitation of a registered trademark. 15 U.S.C. § 1114 (1993).

[8] Distribution relationships invoke the jurisdiction of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801 - 2841 (1993). The PMPA (a legislative creature born in the era of the Arab embargo, gas lines and unusual market forces) regulates the relationship between a franchiser oil company or distributor/retailer. While not directly

ership of the underground storage tanks, but allowed the risks associated with the individual facility to remain with the retailer.[9]

As the retail gasoline market matured, the retail facilities became commodities. Oil companies traded locations in order to enhance distribution economies. The shorter the haul, the less cost to the market. To facilitate the trading, a standard pricing guide was developed to establish uniform pricing of equipment upon sale or trade with another oil company.[10] With the ease of trading, retail marketing outlets traded hands faster than a common baseball card. This trading confused underground storage tank ownership, as did the closing of these facilities.

II. PROBLEMS ASSOCIATED WITH "OWNERSHIP"

A. Civil Liability

Not all liability which results from the utilization of UST systems is the result of UST system installation or maintenance.

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relevant to the ownership of USTs, the PMPA is one additional aspect of the regulation facing petroleum marketers.

[9] A 1974 Gulf Oil Corporation Memorandum Agreement contained the following provisions:

> That the [purchaser of petroleum products ("purchaser")] is the owner or lessee of the premises above referred to; if lessee, that he has a valid and subsisting lease for said premises . . . and that he will procure the written consent of the owner of said premises to the installation of the equipment above mentioned, which consent shall provide that the equipment of [Gulf] stored or installed upon said premises shall be exempt from levy, sale or distress for rent, and that upon the termination of this contract, [Gulf] shall have the unrestricted right to enter upon said premises and to remove any and all of its property therefrom.
>
> . . . It is expressly understood and agreed that the title to said equipment shall at all times remain in [Gulf], and that in no event shall such equipment be considered a part of the real estate . . . .
>
> . . . .
>
> [Purchaser] shall indemnify and save harmless [Gulf] of and from any and all liability for loss, damage, injury or other casualty to persons or property, caused or occasioned by any leakage, fire or explosion of petroleum products stored in or dispensed from said equipment, or in any way growing out of or resulting from the installation and operation of said equipment, whether the same results from negligence or otherwise.

Memorandum of Agreement between Gulf Oil Corporation and Ladra Agrabrite (May 7, 1974) (on file with the *Journal of Natural Resources & Environmental Law*) [hereinafter Gulf Oil Memo].

[10] The authors were unable to obtain a copy of the standard pricing guide, but many oil marketing "old timers" confirmed in interviews that such a guide once existed. The standard pricing guide was to retail distribution facilities as *Becketts* is to baseball cards or the NADA "Blue Book" is to automobiles.

Accordingly, practitioners should be mindful that not all liability associated with the storage of petroleum and its distillates is attributable to the ownership of the USTs. In addition to the liability which is associated with the ownership of UST systems is the liability associated with the operation of those systems.[11] Thus, liability analysis should begin with determining whether the liability arises from ownership or operation.

Liability for property damage associated with the storage of petroleum or other flammable liquids is not a recent development. Prior to the advent of regulation, the common law had found theories under which owners of property upon which such substances were stored could be held accountable to their neighbors for property damages.[12] The most common theories under which one

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[11] This liability is made clear from a simple reading of the regulations applicable to UST systems. These regulations impose responsibility upon both owners and operators of USTs. For example, operators are responsible for compliance with the following regulations:
40 C.F.R. § 280.20 (1992), Performance standards for new UST systems; 40 C.F.R. § 280.30 (1992), Spill and overfill control; 40 C.F.R. § 280.31 (1992), Operation and maintenance of corrosion protection; 40 C.F.R. § 280.32 (1992), Compatibility; 40 C.F.R. § 280.33 (1992), Repairs allowed; 40 C.F.R. § 280.34 (1992), Reporting and record keeping; 40 C.F.R. § 280.40 (1992), General requirements for all UST systems; 40 C.F.R. § 280.41 (1992), Requirements for petroleum UST systems; 40 C.F.R. § 280.42 (1992), Requirements for hazardous substance UST systems; 40 C.F.R. § 280.45 (1992), Release detection record keeping; 40 C.F.R. § 280.50 (1992), Reporting of suspected releases; 40 C.F.R. § 280.51 (1992), Investigation due to off-site impacts; 40 C.F.R. § 280.52 (1992), Release investigation and confirmation steps; 40 C.F.R. § 280.53 (1992), Reporting and cleanup of spills and overfills; 40 C.F.R. § 280.60 (1992), General; 40 C.F.R. § 280.61 (1992), Initial response; 40 C.F.R. § 280.62 (1992), Initial abatement measures and site check; 40 C.F.R. § 280.63 (1992), Initial site characterization; 40 C.F.R. § 280.64 (1992), Free product removal; 40 C.F.R. § 280.65 (1992), Investigations for soil and groundwater cleanup; 40 C.F.R. § 280.66 (1992), Corrective action plan; 40 C.F.R. § 280.67 (1992), Public participation; 40 C.F.R. § 280.70 (1992), Temporary closure; 40 C.F.R. § 280.71 (1992), Permanent closure and changes-in-service; 40 C.F.R. § 280.72 (1992), Assessing the site at closure or change-in-service; 40 C.F.R. § 280.73 (1992), Applicability to previously closed UST systems; 40 C.F.R. § 280.74 (1992), Closure records; In addition, the National Fire Protection Association (NFPA) in its Automotive and Marine Service Code imposes a requirement that "[a]ccurate daily inventory records shall be maintained and reconciled on all Class I liquid and diesel fuel storage tanks for indication of possible leakage." NFPA 30, AUTOMOTIVE & MARINE SERVICE CODE, ch. 2, § 1.5 (1990). NFPA 30A devotes its Chapter 9 to "Operational Requirements" and describes the requirements for attendance or supervision of dispensing operations and prohibits dispensing of Class I liquids into nonmetallic or unapproved portable containers, among other things. NFPA 30A, AUTOMOTIVE & MARINE SERVICE CODE, ch. 9, § 2 (1990).

[12] *See* Kinnaird v. Standard Oil Co., 12 S.W. 937 (Ky. 1890) (declaring liability for damages to a spring adjacent to a warehouse at which coal oil was stored). Although the theory of liability is not clearly defined by the text of the case, the court cited the "familiar doctrine that one must so use his property as not to injure his neighbor, and . . . the owner

might bring a complaint for damages caused by contamination from leaking contents of UST's are as follows.[13]

1. Trespass

Liability for trespass because of leakage or seepage of UST contents requires more than mere proof that the contents have migrated from the UST to the property of the claimant. In *Snyder v. Jessie*,[14] the court affirmed the dismissal of a trespass claim on the theory that the defendant, a home heating oil supplier, lacked "the requisite willful intent to intrude upon [the] plaintiff's property."[15] The defendant in the case was not alleged to be the owner of the tank. The defendant was instead the supplier of home heating oil to a mentally-impaired customer who ordinarily required only two hundred gallons of fuel per season. In one season, however, the heating oil supplier added approximately one thousand gallons of fuel oil to the tank in a two-month period.[16] This case and other trespass cases have focused on the intent element of trespass.[17]

2. Nuisance

In *Great Northern Refining Co. v. Lutes*,[18] strict rules were made applicable to those who brought petroleum on to their own property. The court there stated that

> [e]very one who brings or stores oil on his land must confine it securely in pipes, tanks, or reservoirs, or at least not permit it to escape onto the land of another, whether by flowing over the surface or percolating through the soil, and if he do [sic] not, even though guilty of no negligence, he will be liable for whatever damage is suffered by the oil escaping.[19]

[of lands through which subterranean waters pass] has no right to poison [the subterranean water], however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use either by man or beast." *Id.* at 938; *see also* Cincinnati, N. O. & T. P. RY. Co. v. Gillispie, 113 S.W. 89 (Ky. 1908).

[13] *See* William B. Johnson, Annotation, *Tort Liability for Pollution from Underground Storage Tank*, 5 A.L.R. 5th 1 (1991).

[14] Snyder v. Jessie, 565 N.Y.S.2d 924 (N.Y. App. Div. 1990).

[15] *Id.* at 929.

[16] *Id.* at 925.

[17] *Id.*

[18] Great Northern Refining Co. v. Lutes, 227 S.W. 795 (Ky. 1921).

[19] *Id.* at 796.

The *Great Northern* Court further indicated that "where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence, or to materially diminish the value of another's property, such smells constitute a nuisance."[20]

In *Standard Oil v. Bentley*,[21] the court indicated that "a lawful business cannot be a nuisance per se, but the manner in which it is conducted may be such as to create a nuisance." The court declined to hold that the operative gasoline storage plant was a nuisance per se.[22] The claim of nuisance in Kentucky is now governed by statute.[23]

3. Negligence

The theory of negligence associated with the ownership and operation of USTs is particularly interesting because of the regulated environment in which the UST is found. Due to the prevalence of regulation, the owner, operator, or both are likely to face complaints based on theories of negligence in which the standard or duty of care is codified in some form.[24] At least two cases in Kentucky have dealt with the failure to observe a statutory duty in the context of negligence claims.

In *Home Insurance Co. v. Hamilton*,[25] the district court considered a defendant's violation of a regulation promulgated pursuant to section 227.300 of the Kentucky Revised Statutes which prohibited gasoline from being "stored or handled within any service station building except packaged items."[26] This violation was considered to be negligence per se and the basis for partial summary judgment in favor of the plaintiff.[27]

Twenty years later, the district court in *Phillips Petroleum Co. v. Stokes Oil Co.* concluded that the failure to observe the requirements of the National Fire Protection Association Pam-

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[20] *Id.*

[21] Standard Oil v. Bentley, 84 S.W.2d 20, 20 (Ky. 1935).

[22] *Id.*

[23] KY. REV. STAT. ANN. § 411.500-.570 (Michie/Bobbs-Merrill 1992) [hereinafter KRS]; *see* John S. Palmore, *Kentucky's New Nuisance Statute*, 7 J. MIN. L. & POL'Y 1 (1991-92).

[24] *See supra* notes 8, 11 and *infra* notes 17, 25, 28, 30, 32 and accompanying text for discussion of the regulations applicable to USTs.

[25] Home Ins. Co. v. Hamilton, 253 F. Supp. 752, 755 (E.D. Ky. 1966).

[26] *Id.*

[27] *Id.* at 756.

phlet 30 (NFPA 30) "Flammable and Combustible Liquids Code" was presumed to be the cause of a fire unless proved otherwise.[28] During the unloading of a barge at a terminal facility, one of the tanks was overfilled.[29] NFPA 30 required the tank to be gauged frequently while it was being filled and to be equipped with a bell that rang as the tank neared being full.[30] On appeal, the decision of the district court, which had apportioned liability on account of the failure to observe NFPA 30, was affirmed.[31]

4. Ultrahazardous Activity

Some courts have been willing to hold that the storage of gasoline is an ultrahazardous activity. However, most jurisdictions have concluded that the storage of gasoline is not an ultrahazardous activity.

B. Compliance Liability and Sources of Regulation

USTs have a disjointed and confusing regulatory scheme because the installation, use, and operation of USTs and the disposal of their contents are separately governed by different agencies or branches of agencies.

1. Fire Marshall Regulations

First in the regulatory scheme is the State Fire Marshall.[32] In fact, the State Fire Marshall has been regulating gasoline storage tanks for many years.[33] A permit from the State Fire Marshall is currently required for any changes in construction, remodeling or operation of a refinery, bulk storage plant, distributing station, service station, or airport not under jurisdiction of the Kentucky Building Code.[34] Thus, the regulations of the State Fire Marshall govern the installation, modification and removal of petroleum

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[28] Phillips Petroleum Co. v. Stokes Oil Co., 639 F. Supp. 291, 297 (W.D. Ky. 1986).

[29] *Id.* at 296.

[30] *Id.* at 297.

[31] Phillips Petroleum Company v. Stokes Oil Co., 863 F.2d 1250 (6th Cir. 1988).

[32] *See* KRS § 227.300 (Baldwin 1993) and 815 KY. ADMIN. REGS. 10:040, § 15(c) (1993) [hereinafter KAR]; *see also* 815 KAR 10:045 (1993) (incorporating NFPA 30A, AUTOMOTIVE & MARINE SERVICE CODE (1990)).

[33] *See* Glenmore Distilleries v. Fiorella, 117 S.W.2d 173 (Ky. 1938) (describing the effects of a plaintiff acquiring "a permit to erect tanks according to adopted standards").

[34] *See* KRS § 224.60-105(4)(a) (Baldwin 1993) (authorizing cabinet to regulate USTs and preempt laws except existing fire marshal regulations).

USTs. For obvious reasons, these operations can involve significant fire or explosion hazards. The State Fire Marshall has adopted national standards of safety promulgated by the National Fire Protection Association.[35]

2. Underground Storage Tank Regulations

The major scheme of regulations applicable to USTs was drafted by the United States Environmental Protection Agency (EPA) following the passage of the 1984 amendments to the Resource Conservation and Recovery Act (RCRA).[36] These regulations became effective December 22, 1988. Through a Memorandum of Agreement between the Underground Storage Tank Section of the Kentucky Department for Environmental Protection and the Underground Storage Section and Water Management Division of the United States Environmental Protection Agency, Kentucky assumed responsibility for the implementation of title 40, section 280 of the Code of Federal Regulations for the period beginning December 22, 1988 and ending when Kentucky received interim or final program approval in accordance with title 40, section 281 of the Code of Federal Regulations.[37] Final program approval has not yet been obtained. The General Assembly approved legislation requiring the registration of underground storage tanks, requiring the NREPC to regulate USTs, and stating that the intent of the General Assembly was that the NREPC "establish a program to regulate [USTs] which implements federal regulatory requirements for [USTs]."[38]

USTs must be operated in conformity with the regulations promulgated pursuant to RCRA. These regulations are more commonly known as "the underground storage tank regulations."[39]

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[35] *Glenmore Distilleries*, 117 S.W.2d 173.

[36] 42 U.S.C. § 6991-6992 (1993) provided the framework for the federal legislative response to the problems associated with underground storage tanks. These statutes, among other things, provided definitions and exemptions, 42 U.S.C. § 6991; required notification by owners of the existence of USTs, 42 U.S.C. § 6991a; required the promulgation of regulations regarding release detection, prevention, reporting and corrective action, 42 U.S.C. § 6991b; and provided for the approval of state programs for UST release detection, prevention and correction, 42 U.S.C. § 6991c. The regulations are located at 40 C.F.R. pt. 280 (1992).

[37] *Memorandum of Agreement*, 93 TANK FUND NEWS, Mar. 1993, at 2. Such approval has not yet been received, *id.*

[38] *See* KRS § 224.824 (Baldwin 1993).

[39] *See* Bookspan, *supra* note 6; Heidi E. Brieger, *LUST and the Commom Law: A Marriage of Necessity*, 13 B.C. ENVTL. AFF. L. REV. 521 (1986); Geoffrey Commons,

Kentucky, rather than attempt to create an entirely new set of regulations, has incorporated the EPA's regulations in an unaltered form.[40] These regulations are administered by the Kentucky Natural Resources and Environmental Protection Cabinet's (KNREPC) Underground Storage Tank Branch (UST Branch).[41] These regulations created the standards and certain specific duties applicable to owners and operators. Very few of these obligations are specifically assigned by the language of the regulations to ei-

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Plugging the Leak in Underground Storage Tanks: The 1984 RCRA Amendments, 11 VT. L. REV. 267 (1986); Blaine D. Edwards, *LUST—Deep in the Heart of Texas: Federal EPA Regulations Affecting Underground Storage Tanks—the Texas Statutory and Regulatory Counterparts*, 21 ST. MARY'S L.J. 401 (1989); Thurman A. Gardner, Jr., *Underground Storage Tanks: A Lawyer's Guide to Recent Federal and North Carolina Legislation*, 12 CAMPBELL L. REV. 447 (1990); Candace C. Gauthier, *The Enforcement of Federal Underground Storage Tank Regulations*, 20 ENVTL. L. 261 (1989); Glenn Waddell, *A Practitioner's Guide to the Recently Promulgated UST Regulations*, 41 ALA. L. REV. 487 (1990).

[40] *See* 401 KAR 42:011 (1993), incorporating the applicability, definitions and interim prohibition requirements of 40 C.F.R. pt. 280, subpt. A (1992); 401 KAR 42:020 (1993), incorporating the performance standards, notification, and alternatives for upgrading requirements of 40 C.F.R. pt. 280, subpt. B (1990); 401 KAR 42:030 (1993), incorporating the spill and overfill control, operation and maintenance of corrosion protection, compatibility, repairs, reporting and record-keeping requirements of 40 C.F.R. pt. 280, subpt. C (1992); 401 KAR 42:040 (1993), incorporating the release detection and record-keeping requirements of 40 C.F.R. pt. 280, subpt. D (1992); 401 KAR 42:050 (1993), incorporating the requirements for reporting of suspected releases and investigation of off-site impacts of 40 C.F.R. pt. 280, subpt. E (1992); 401 KAR 42:060 (1993), incorporating the requirements for release response, site characterization, corrective action and public participation of 40 C.F.R. pt. 280, subpt. F (1992); 401 KAR 42:070 (1993), incorporating the out-of-service and closure requirements of 40 C.F.R. pt. 280, subpt. G (1992); 401 KAR 42:080 (1993), incorporating the financial responsibility requirements of 40 C.F.R. pt. 280, subpt. H (1992).

[41] The address of the Petroleum Storage Tank Environmental Assurance Fund Commission is 911 Leawood Drive, Frankfort, Kentucky 40601.

ther one or the other of these parties.[42] Thus, these regulations magnify the hazards of owning USTs. [43]

3. Hazardous Waste Regulations

The owner and operator of petroleum USTs will very likely be confronted with Kentucky's hazardous waste regulations. The owner or operator will at least confront these regulations at the time when the USTs are being removed from the ground or are in "corrective action."[44] Clearly, an examination of the hazardous and solid waste regulations would be beyond the scope of this article. However, the consequences of falling within the definition of a hazardous waste are numerous and include the following: a waste

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[42] *See* letter from Leah MacSwords, Manager, ENFORCEMENT BRANCH, DIVISION OF WASTE MGMT., NAT. RESOURCES AND ENVTL. PROTECTION CABINET, to Gary W. Napier (Jan. 26, 1993) (on file with the *Journal of Natural Resources & Environmental Law*)(advising that the NREPC "holds both the owner and operator jointly and severally liable for all aspects of an underground storage tank"); letter from Mr. Jim McCormick, Director, POLICY AND STANDARDS DIVISION, UNITED STATES ENVTL. PROTECTION AGENCY, OFFICE OF UNDERGROUND STORAGE TANKS, to Mr. Elmer Street, Owner of underground storage tanks (undated) (on file with the *Journal of Natural Resources & Environmental Law*) (advising that "[t]he regulations hold both the owner and operator of [a] UST liable" and further advising that the EPA could hold the owner, lessor and sublessor responsible for assuring compliance with the closure regulations); letter from Ms. Kirsten Engel, OFFICE OF THE GENERAL COUNSEL OF THE UNITED STATES ENVTL. PROTECTION AGENCY, to Mr. Alan Campbell, Dow, Lohnes & Albertson (Jan. 19, 1990) (on file with the *Journal of Natural Resources & Environmental Law*) (advising that "[w]hile it may be easier for the operator of an UST to comply with the [reporting and record keeping] requirements, the regulations do not distinguish between owners and operators and thus do not establish that the operator is 'primarily responsible' for ensuring compliance with these provisions." This letter further advises that "nothing in the language of the regulation would suggest . . . that compliance with the notification requirement is 'primarily' the responsibility of the UST operator" and that the "regulations do not provide that the owner will be held 'primarily' responsible for complying with [the upgrading] requirement[s]" of 40 C.F.R. § 280.21 (1992)).

[43] In addition to creating a compliance duty, these regulations might establish minimum standards of care from a negligence standpoint under the logic of Phillips Petroleum Co. v. Stokes Oil Co., 639 F. Supp. 291 (W.D. Ky. 1986), *aff'd*, 863 F.2d 1250 (6th Cir. 1988) and Home Ins. Co. v. Hamilton, 253 F. Supp. 752 (E.D. Ky. 1966). Without suggesting the outcome of the analysis, the relevant inquiries would be whether the regulation was enacted for safety purposes and not just for governmental convenience; whether the injury sustained must be one that the statute was enacted to prevent; whether the injury was sustained by a person or by a property interest which the statute or ordinance contemplated protecting; and finally, whether the violation of the statute was the proximate cause of the injury. *Home Ins. Co.*, 253 F. Supp. at 755.

[44] The term "corrective action" is derived from the federal underground storage tank regulations. Following a suspected release, an owner or operator may be required to submit a "corrective action plan." 40 C.F.R. pt. 280, subpt. F. For a description of the mechanics of a "corrective action plan," see Gauthier, *supra* note 39, at 272.

determination must be made;[45] the generator of the hazardous waste must register as such prior to treating, storing, disposing, transporting or offering the hazardous waste for transportation;[46] hazardous waste must be manifested before being transported or offered for transportation;[47] the hazardous waste must be packaged, labeled, marked and placarded in accordance with the regulations of the United States Department of Transportation before being transported;[48] the transporter of the hazardous waste must have an EPA identification number;[49] and the hazardous waste must only be disposed of at disposal facilities which have an EPA identification number.[50]

Fortunately, the hazardous waste regulations provide limited relief from their application in the form of an exemption from the definition of "hazardous waste" for "[p]etroleum-contaminated media and debris that fail the test for the toxicity characteristics of title 401, section 31:030 of the Kentucky Administrative Regulations (hazardous waste codes D018 through D043 only) and are subject to the corrective action regulations under title 401, chapter 42 of the Kentucky Administrative Regulations."[51] This exclusion is very important. Failure to treat the wastes at an UST site consistently with this exclusion can cause owners and operators to run afoul of the hazardous waste regulations.

If the waste is the subject of a "corrective action plan" and would *only* be classified as "hazardous" because it fails a TCLP analysis for benzene, then the waste is not a hazardous waste under the exclusion. Such wastes remain subject to the jurisdiction of the UST Branch. If the waste fails the TCLP analysis for lead (hazardous waste number D008), is not the subject of a corrective action plan, or exhibits hazardous characteristics other than toxicity[52], it is still a hazardous waste notwithstanding the petroleum UST exclusion.[53] Thus, most UST sites which are in

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[45] 401 KAR 32:010, § 2 (1992).
[46] 401 KAR 32:010, § 3.
[47] 401 KAR 32:020 (1992).
[48] 401 KAR 32:030 (1992).
[49] 401 KAR 32:010, § 3(3); 401 KAR 33:010, § 2 (1992).
[50] 401 KAR 32:010, § 3(3).
[51] 401 KAR 31:010, § 4(2)(j) (1992).
[52] 401 KAR 31.030, §§ 2-4 (1992).
[53] *See* Notice from Caroline P. Haight, Director, DIVISION OF WASTE MANAGEMENT, NATURAL RESOURCES & ENVTL. PROTECTION CABINET, KENTUCKY DEPT. FOR ENVTL. PROTECTION, to Underground Storage Tank Owners, Contractors, and Landfill Operators (Jan. 19, 1993)(on file with the *Journal of Natural Resources & Environmental Law*).

"corrective action" will have some materials which are hazardous wastes and some wastes which would be hazardous wastes but for the special petroleum-contaminated media and debris exclusion.[54] In construing the exception, it should be remembered that the terms "petroleum-contaminated media" and "debris" are not as broad as they might appear. The terms have been interpreted to include only the media and debris found outside a UST rather than inside.[55] The NREPC's interpretation of the terms are best exhibited by the closure guidelines issued by the NREPC's UST Branch.[56]

4. Division of Water Regulations

The NREPC's Division of Water administers the Kentucky Pollutant Discharge Elimination System (KPDES).[57] This system is based on the Federal Clean Water Act (CWA) which provides that "[e]xcept as in compliance with [33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, and 1344] the discharge of any pollutant by any person shall be unlawful."[58] Thus, the provisions of the CWA are not invoked until the instant of discharge.

The NREPC may issue federal permits pursuant to the CWA.[59] The KPDES is responsible for issuing, modifying, revoking, reissuing, terminating, monitoring and enforcing discharge permits.[60] The KPDES program requires permits for the dis-

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[54] *See infra* note 56 (discussing different types of material found at a UST site).

[55] 55 Fed. Reg. 11,798 (1990) (to be codified at 40 C.F.R. pts. 261, 264, 265, 268, 271, 302).

[56] Sludge, cleaning material(s), as well as any water accumulated *in* the tank are subject to a hazardous waste determination in accordance with 401 KAR Chapters 31 and 32. This includes Toxicity Characteristic Leaching Procedure (TCLP) testing . . . and flash point to determine if the materials are a hazardous waste. Sludge, cleaning material(s) as well as any water accumulated *in* the tank that have not had a hazardous waste determination or are determined to be a hazardous waste must be removed from the site by a registered hazardous waste hauler for transportation to a permitted hazardous waste treatment, storage, or disposal facility.

DIVISION OF WASTE MANAGEMENT, NATURAL RESOURCES & ENVTL. PROTECTION CABINET, KENTUCKY DEPT. FOR ENVTL. PROTECTION, UNDERGROUND STORAGE TANK SYSTEMS(S) CLOSURE OUTLINE FOR COLLECTION OF SAMPLES AND LABORATORY ANALYSIS FOR UNDERGROUND STORAGE TANK SYSTEM(S) IN KENTUCKY (1992) (on file with the *Journal of Natural Resources & Environmental Law*)(emphasis added).

[57] *See* KRS § 224.10-110 (Baldwin 1993); 401 KAR 5:050 (1993).

[58] 33 U.S.C. § 1311(a) (1988).

[59] KRS § 224.16-050 (Michie/Bobbs-Merrill 1991).

[60] 401 KAR 5:050, § 1(23) (1992).

charge of pollutants from any point source into the waters of the Commonwealth.[61] The regulations, therefore, become important where the contents of a UST have escaped into the waters of the Commonwealth from a "point source."[62] These regulations are also important when the corrective action plan for a UST site includes a groundwater treatment system with an effluent discharge into the waters of the Commonwealth.[63] In these cases, a KPDES permit must be obtained prior to discharge in order to comply with the law.[64]

5. Air Quality Regulations

In some instances, "corrective action" will involve the use of air stripper technology to remove the volatile organic compounds from the contaminated water and wastewater.[65] Air stripper technology most typically involves an emission of an air contaminant into the outdoor atmosphere. As a result, air stripper treatment of petroleum-contaminated media and debris requires a construction permit prior to construction, reconstruction or modification of a source and also requires registration as an operator of a source.[66]

6. Kentucky Petroleum Storage Tank Environmental Assurance Fund

In 1990, the Kentucky General Assembly created the Kentucky Petroleum Storage Tank Environmental Assurance Fund Commission (KPSTEAF Commission).[67] Among other things, the KPSTEAF Commission was authorized to "[e]stablish criteria to be met by a petroleum storage tank owner or operator to be eligi-

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[61] 401 KAR 5:055, § 1 (1992).

[62] A "point source" is "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft, from which pollutants are or may be discharged [except for] return flows from irrigated agriculture." 401 KAR 5:050, § 1(34) (1993).

[63] For an enlightening discussion of treatment technologies available for petroleum contamination for a UST, particularly where groundwater contamination is present, see Gauthier, *supra* note 39, at 272-76.

[64] *See* ENVIRONMENTAL PROTECTION AGENCY, MODEL NPDES PERMIT FOR DISCHARGES RESULTING FROM THE CLEANUP OF GASOLINE RELEASED FROM UNDERGROUND STORAGE TANKS (1989).

[65] *See id.* at § 4.2.1 (discussing air stripper technology).

[66] 401 KAR 50:010, :030, :035 (1993).

[67] 1990 Ky. Acts ch. 370, § 5.

ble to participate in the [Petroleum Storage Tank Environmental Assurance Fund] and receive reimbursement from the fund."[68] The KPSTEAF Commission is "attached to the [NREPC] for administrative purposes."[69]

Although not a "regulatory" agency, the regulations promulgated by the KPSTEAF Commission are as important as those of any agency because these regulations relate to whether monies in the KPSTEAF will assist owners or operators with the costs of the remediation of any contamination at a UST facility. In general terms, these regulations provide the guidelines for remaining eligible for assistance from the KPSTEAF.[70]

7. Local Ordinances

Finally, for those who are concerned that the foregoing layers of regulation will not suffice, there is solace in the fact that a local government entity might regulate the USTs themselves or the materials within the UST, the remediation of the environment for release of these materials, the emergency response to releases or threatened releases, and the discharge of waters into the municipal storm or sanitary sewer systems.[71]

III. THE "OWNERSHIP" PROBLEM

The purpose of the foregoing discussion was to show that there are significant risks associated with the ownership of a UST. Unfortunately, in many cases, it may not be clear whether one is or is not the owner of a UST. The fundamental problem associated with determining whether one is an owner under the UST regulations is that the term "owner" is not defined by these regulations. The definition of "owner" under title 40, section 280.10 of the Code of Federal Regulations, which is made applicable in Kentucky by the provisions of title 401, section 42:011 of the Kentucky Administrative Regulations, includes any person who "owns" a UST system in use or brought one into use on or after November 8, 1984 and, for UST systems no longer in use on November 8, 1984, any person who "owned" such UST system im-

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[68] KRS § 224.60-130(2)(b) (Michie/Bobbs-Merrill 1991).

[69] KRS § 224.60-130(2)(g).

[70] 415 KAR 1:040 (1993).

[71] LEXINGTON - FAYETTE URBAN COUNTY, KY., CODE OF ORDINANCES ch. 16 (1993).

mediately before the discontinuation of its use.[72] Thus, the definition of the term "owner" is rather circuitously drafted, utilizing the terms "owns" and "owned" without defining either of those terms.[73]

Upon the issuance of the UST regulations, UST owners suddenly became subject to a notification requirement.[74] Following a history of regulatory disinterest regarding the ownership of USTs—in fact, history had allowed the subject of ownership to remain relatively ignored—the issue was suddenly thrust into the forefront of regulating an industry. Likewise, it was thrust into the forefront of the concerns of the regulated industry.

Prior to the promulgation of these regulations, there had been no registration requirement for the ownership of USTs. In addition, the ownership of the USTs was not required to be recorded in writing by any substantive law. In essence, the documentation of ownership of a UST was left to the caprice of private parties. To further complicate the issue of ownership of a UST, the petroleum industry has historically been marked by frequent and numerous mergers and other transactions in which large numbers of gasoline retail facilities changed hands. The industry has likewise engaged in frequent transfers of individual gasoline retail facilities. The documentation of both types of transfers from the standpoint of individual gasoline retail facilities was scanty in most instances. In combination, these two industry characteristics mean that the ownership history of the great majority of gasoline retail facilities is at best documented by a series of recorded deeds and largely unavailable documents regarding long-forgotten mergers, acquisitions and divestitures. Determining the ownership of USTs, other than the ownership interest which is discernable by inspection of recorded deeds, is in most instances purely an exercise in speculation and conjecture. In short, there is usually little or no documentation from which one can clearly determine the ownership of a UST.

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[72] This definition is consistent with the statutory definition of the term "owner." 42 U.S.C. § 6991(3) (1988). This article does not address issues associated with the language of the regulatory definition of "ownership."

[73] This same failure was not present for the definition of the term "operator." The definition of that term is clear. An operator is "any person in control of, or having responsibility for, the daily operation of the UST system." 40 C.F.R. § 280.12 (1992).

[74] 40 C.F.R. § 280.34(a)(1) (1992).

The issue of ownership of USTs is suddenly a topic of substantial interest because of the notification requirement and because of the duties which befall an owner of a UST.[75] While these same duties are imposed upon operators of USTs, the definition of the term "operator" under the UST regulations leaves much less room for argument as to whether one is an operator. In addition, the issue of whether one is an operator is not clouded by the need to speculate on historical facts as is the determination of whether one is an owner of a UST. Determining whether a person is "in control of, or having responsibility for, the daily operation of [a] UST" can be accomplished without resort to facts as ancient as those associated with determining whether one is an owner, of a UST. One need generally only examine contemporaneous facts in order to decide this question. Since the promulgation of the UST regulations, determining whether one is an owner of a UST has become even more critical.

The use of the terms "owns" and "owned" in the definition of the term "owner" is a repetition of the drafting utilized in the definitions employed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). Within that body of law, the term "owner or operator" is defined, among other things, as a person "owning or operating" a vessel, onshore or offshore facility.[76] In at least one case interpreting the circuitous drafting of CERCLA, it was said that owner and operator "have their ordinary meanings rather than unusual or technical meanings."[77]

The only logical conclusion regarding the EPA's failure to define "ownership" in terms of the bundle of rights which will constitute ownership for purposes of the UST regulations is that the ownership of USTs was a question left to state law.[78] Any attempt to redefine the ownership of existing USTs under existing

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[75] *See supra* note 11.

[76] The statutory definition of owners and operators of onshore and offshore facilities leaves an apparently untouched class of facilities: those in outer space. See the humorous speculation of Judge Easterbrook in Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988).

[77] *Id.*

[78] Letter from David W. Ziegle, Acting Director, UNITED STATES ENVTL. PROTECTION AGENCY, OFFICE OF UNDERGROUND STORAGE TANKS, to Bob McEwen, U.S. HOUSE OF REPRESENTATIVES (undated) (on file with the *Journal of Natural Resources & Environmental Law*)(advising that states are not "constrained" by the federal definition of tank owner).

state law would probably be impermissible. Unfortunately, in addition to the unavailability of documentation applicable to a UST, there is no bright-line test for determining ownership. No other species of property is so analogous to a UST that the logic or theory for determining its ownership can be borrowed.[79] Accordingly, one must analyze the problem from several approaches in order to find a rule applicable to USTs which is most consistent with the established rules in other areas of the law. Otherwise, the legal analysis for UST ownership will become an aberration in the law.

Courts may initially be reluctant to apply to USTs those traditional legal principles applied to personal property annexed to real property. The parties to the cases in which fixture theories and other principles were developed and applied were usually attempting to claim ownership of personal property located upon lands owned by another rather than disclaim the ownership of the property. With USTs, the current arguments of the parties will probably be the reverse of those which one might encounter with respect to other, less burdensome property. Liabilities associated with ownership of a UST can easily outweigh the benefits associated with ownership. However, the monetary liability associated with noncompliance should generally develop *after* the USTs are installed.[80] Accordingly, at the time of UST installation, its value should have at least in theory exceeded the liabilities associated with its ownership. Therefore, the rules applicable to more traditional property should also be applied to USTs.[81] Those rules will now be explored.

Ownership of personal property located upon real estate can be separated from the ownership of the real estate itself.[82] In *Columbia Gas, Inc. v. Maynard*, the Kentucky Court of Appeals was faced with the proper valuation of a house which was located on land not owned by the owner of the house. The owner of the house did not have any rental or other kind of contract entitling him to

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[79] The authors have encountered one case which appears to be the factual antithesis of the valuation of a UST: Ellis v. McCormack, 218 S.W.2d 391 (Ky. 1949). It is a case in which a coal slack pile was found to be worthless at the time it was abandoned. A coal strike later made it valuable.

[80] These liabilities are created in two ways: for tanks installed prior to the advent of regulation, the regulations themselves create an additional cost; for all tanks, the passage of time increases the risk of a release due to a malfunction.

[81] For instance, in Standard Oil v. Dolgin, 115 A. 235 (Vt. 1921) the entity which installed the tank sought its return on a bailment theory.

[82] Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky. Ct. App. 1975).

possess or to purchase the land. In what is purely dicta, the Court noted that "*[o]rdinarily*, of course, *a permanent structure becomes a part of the real estate*, but in this instance, the *landowner disclaimed* any *ownership* interest in the building, so they [sic] must be considered as moveable personal property."[83] Unfortunately, the language quoted above appears in the court's description of the facts of the case. The court may have been merely making an observation with respect to the transactions generally structured by individuals rather than commenting on the law.

A. Fixtures

Any analysis of the ownership of a UST must be cognizant of its nature. A UST and its associated piping are items of personal property which have been annexed to the real estate by burial. All petroleum USTs must be covered with a minimum of two feet of earth or one foot of earth on top of which is placed a slab of reinforced concrete not less than four inches thick.[84] When the USTs are, or are likely to be, subjected to traffic, they must be protected against damage from vehicles passing over them by at least three feet of earth cover or eighteen inches of well-tamped earth plus either six inches of reinforced concrete or eight inches of asphaltic concrete.[85] Thus, the USTs have been rather thoroughly "annexed" or "attached" to the real estate upon which they are located. The question then becomes whether the UST is a "fixture."

The general test for whether personal property is a "fixture" is: (1)annexation to the realty, either actual or constructive; (2)adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and most importantly, (3)intention of the parties to make the article a permanent accession to the freehold, with title to the article in the one owning the freehold.[86] Fixtures are defined as "goods [which] . . . become so related to particular real estate that an interest in

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[83] *Id.* at 5. This statement might be used to support the position that a permanent structure is considered to be a part of the real estate unless the landowner affirmatively disclaims interest in the structure. This position only begs the question as to what is a "permanent" structure.

[84] NFPA, FLAMMABLE AND COMBUSTIBLE LIQUIDS CODE § 2-4.2 (1990).

[85] *Id.*

[86] Tarter v. Turpin, 291 S.W.2d 547 (Ky. 1956).

them arises under real estate law."[87] While the perfection of security interests in fixtures is governed by the provisions of the Uniform Commercial Code (UCC), the UCC "does not prevent creation of an encumbrance upon fixtures pursuant to real estate law."[88] Thus, the preservation of a security interest in fixtures can be accomplished either through the filing of a fixture filing[89] or through the filing of a mortgage.[90]

1. Intent of the Parties as Evidenced by Their Efforts to Preserve a Claim to Property

In analyzing the intent of the parties with respect to whether the USTs were intended to be considered as "fixtures," it should be remembered that "[p]roperty belongs . . . to the person as long as he has a right to it and the power . . . to enforce and protect that right."[91] A person claiming ownership of a UST installed on real property owned by another would be required to show that when the UST was installed, the intent of the parties was that ownership of the UST was to remain with that claimant. This intent is clear where the party claiming ownership of the UST has retained those rights necessary to protect his interest.[92] When the landowner has granted the right to enter upon the property for the purpose of removing the UST, the intent of the parties is clearly reflected. Likewise, the failure of the parties to make provision for this right might be indicia that the UST was intended to be a fixture and that its ownership vested with the landowner at the time of its installation. Although the law might imply this right, the failure to preserve the right and the nature of the UST as a reusable item may constitute evidence of intent.[93]

Two very important provisions of the UCC for purposes of analyzing the question whether a particular transaction was intended to be a fixture filing are chapter 355, sections 9-313(4)-(5) of the Kentucky Revised Statutes. Both sections provide that a

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[87] KRS § 355.9-313(1)(a) (Michie/Bobbs-Merrill 1992).

[88] KRS § 355.9-313(3).

[89] KRS § 355.9-313(4).

[90] KRS § 355.9-313(6).

[91] Messer v. American Eagle Fire Ins. Co., 12 S.W.2d 358, 359 (Ky. Ct. App. 1929).

[92] "A building erected on land *with the privilege of removing it*, must be regarded as personalty and should be sold as personalty." Freeman's Adm'r. v. King, 7 Ky. Op. 8, 8 (1873).

[93] *See* Gulf Oil Memo *supra* note 9 (specifically providing for a right of removal).

perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner in certain instances. Thus, if a party wishes to retain an interest in a UST for the purpose of securing the "performance of an obligation," then he must perfect that interest through a filing. Otherwise, his interest might be subject to the risk of conflicting interests in the real estate. Finally, only when the interest of the secured party "has priority over *all owners and encumbrancers* of the real estate" may he remove the collateral from the real estate.[94] If the UST was to be removed from the property, the party seeking to remove the UST would need to have taken some steps to protect his right to remove the UST from the property. By failing to memorialize and perfect a right to remove a UST from the real estate, an installer of a UST runs the risk that any right of removal will be impaired or foreclosed by either current or subsequent owners of the property, encumbrancers of the property, or lessors of the property. The failure to protect an ownership interest in personal property separate from the real estate itself should be relevant where the owner of the real estate attempts to disclaim ownership of the UST (i.e., attempts to claim that the UST is not a fixture).

In *Stephens v Carter*,[95] a case concluding that USTs were fixtures, the court held that

> It is a well settled principle of common law that everything which is annexed to the freehold becomes a part of the realty. Although ownership of the land and of the chattel is vested in the same person, or when the owners of both concur in a common purpose, the presumption that a chattel is made part of the land by being affixed to it may be rebutted, yet *the evidence must, as it would seem, be in writing, under the statute of frauds, or else consist of facts and circumstances of a nature to render writing unnecessary, by giving birth to an equity or an equitable estoppel.*[96]

Buildings and other improvements placed upon real estate by a lessee may be treated as moveable personal property where such

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[94] KRS § 355.9-313(8) (Michie/Bobbs-Merrill 1992)(emphasis added).

[95] Stephens v. Carter, 98 S.E.2d 311 (N.C. 1957).

[96] *Id.* at 313 (N.C. 1957)(quoting Fleishel v. Jessup, 94 S.E.2d 308 (1956)) (emphasis added); *cf.* Lee Moore Oil Company v Cleary, 245 S.E. 720, 724-25 (N.C. 1978) (distinguishing *Stephens* on the ground that dealings between the owner of personalty and the owner of the realty, and knowledge thereof on the part of a subsequent purchaser of the realty, may be shown by parol evidence).

was the intention of the contracting parties and where such intention *is clearly expressed in contract* of the parties with reference thereto."[97] *Kentucky Farm & Cattle Co. v. Williams* involved an express written agreement that farm structures, which were erected by plaintiff lessee for its sole use and benefit in its farm operation, did not enhance the value of the farm and did not become part of the realty.[98]

2. Intent of Parties as Evidenced by the Nature of Attachment to Realty

In *State Auto Mutual Insurance Co. v. Trautwein*,[99] the court considered whether air conditioners were fixtures which would be included in an insurance policy covering the real estate to which they had been attached. The court concluded that the air conditioners were fixtures. The court focused on the method through which the air conditioners were attached to the real estate and the difficulty of removing them without damage to the real estate. The air conditioners were placed in openings in the wall of each apartment in an apartment building and fastened permanently by screws and rubber seals. The air conditioners "*could not be removed without considerable force and probable damage*" to the property.[100] Unfortunately, the court gave no analysis to the three-part test for determining whether an attached item was a fixture. However, based on the analysis, it would appear that the court was treating the nature of the attachment as an indicia of intent.

In *Bank of Shelbyville v. Hartford*,[101] the court indicated that the then "modern rule" in determining whether a particular item was a "fixture" was to examine "the *character of the act by which the structure is put into its place*, the policy of the law connected with its purpose and the intention of [the parties]."[102] In *Finley v. Ford*, the improvements were noted to be removable

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[97] Kentucky Farm & Cattle Co. v. Williams, 140 F. Supp. 449, 452 (E.D. Ky. 1956)(quoting from 27 AM. JUR. § 4 (1980)); *see also* Finley v. Ford, 200 S.W.2d 138 (Ky. 1947)(discussing an express oral contract for the removal of the personalty).

[98] *Kentucky Farm and Cattle Co.*, 140 F. Supp at 450-51.

[99] State Auto Mutual Ins. Co. v. Trautwein, 414 S.W.2d 587, 588-89 (Ky. 1967).

[100] *Id.* at 589.

[101] Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 218 (Ky. 1937).

[102] *Id.* at 218 (Ky. 1937)(citations omitted)(emphasis added). This case provides an excellent discussion of the evolution of the law of fixtures. *See also* Finley v. Ford, 200 S.W.2d 138, 140 (Ky. 1990).

"without injury to the real estate."[103] Thus, they were not fixtures. A similar idea might have been driving the court's analysis in the case of *Terry & Wright v. Crick*.[104] In that case, the court was considering a house which was moved by the father onto the land of his daughter "under some family arrangement."[105] The court noted, without discussion of the three-part analysis, that the "house was situated upon and attached to the tract owned [by the daughter] . . . . [The] house thereby became a part of [the daughter's] realty."[106]

In connection with USTs, where compliance with NFPA 30 is present, the annexation to the subject real estate is quite complete where the UST has been buried and at least two feet of earth or its equivalent has been placed over the structure.[107] The removal of a UST from the subject real estate would require considerable force. In fact, it would require the use of heavy equipment. The removal of a UST from the subject real estate would also involve probable damage as at least a large unfilled pit would remain following removal.[108]

With USTs, there are additional aspects which make it unlikely that removal can be undertaken without considerable participation or at least inconvenience to the property owner. The nature of the annexation includes the regulatory burdens associated with conducting removal of petroleum USTs from the ground because removal requires the approval of the Fire Marshall,[109] over-

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[103] *Finley*, 200 S.W.2d at 139.

[104] Terry & Wright v. Crick, 418 S.W.2d 217 (Ky. 1967).

[105] *Id.* at 219.

[106] *Id.*; *cf.* Kentucky Farm & Cattle Co. v. Williams, 140 F. Supp. 449 (E.D. Ky. 1956); Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky. Ct. App. 1975).

[107] *See supra* notes 76-78 and accompanying text.

[108] For an interesting description of the removal of a UST from the ground, see Northern Natural Gas v. State Board of Equalization, 443 N.W.2d 249, 257-58 (Neb. 1989). There, the court cited Stem Brothers, Inc. v. Alexandria Township, 6 N.J. Tax 537 (1984), which addressed the question of whether certain USTs were fixtures or personal property for purposes of taxation. The court applied an "injury by removal" test, and determined that USTs were personalty rather than fixtures because the USTs could be removed from the realty without harming the USTs and because removal would not cause irreparable harm to the realty. This case is limited as being an interpretation of the treatment of USTs under the tax statute which it construed. Further, the *Northern Natural Gas* Court was not dealing with current standards for removal of a UST from the ground. The court indicated that in 1981, the entire process of removal and backfill could be accomplished in two days and would create no serious hazard or dislocation. This case was overruled in 471 N.W.2d 734 (1991).

[109] *See supra* notes 26-27 and accompanying text.

sight by the UST Branch,[110] and measurement for the presence of a release where contamination is most likely to be present at the UST site.[111] In the event that a release is detected, a "corrective action plan" will be required.[112] These corrective action plans will involve soil and groundwater sampling to determine the vertical and horizontal extent of the contamination.[113] Clearly, this process will be invasive to the real estate upon which the UST is located and may extend to adjacent properties as well. Thus, when a petroleum UST is annexed to the real estate, its removal will be accomplished only by the use of considerable force, probable damage and the burden of substantial oversight by the regulating entities. The very permanent nature by which USTs are attached to the real estate should be given great weight in making a determination of whether they are fixtures.

B. Trade Fixtures

Once a determination is made that a UST is a "fixture," consideration should be given to the question of whether the UST is a "trade fixture." Trade-fixture treatment is given to items of "property which a tenant has placed on rented real estate to advance the business for which it is leased and which may, as against the lessor, be removed at the end of the tenant's term."[114] The doctrine of trade fixtures is a doctrine which arises only in the context of the landlord/tenant relationship.[115] In this scenario, the law favors the tenant's right to remove the chattel.[116] Thus, where a tenant installs personal property on the real estate of his landlord, a more liberal set of rules apply to the issue of whether he

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[110] 40 C.F.R. § 280.71 (1992).

[111] 40 C.F.R. § 280.72(a) (1992). For additional guidance regarding sampling methods acceptable to the NREPC's UST Branch, see DIVISION OF WASTE MGMT., NAT. RESOURCES & ENVTL. PROTECTION CABINET, KENTUCKY DEP'T. FOR ENVTL. PROTECTION, UNDERGROUND STORAGE TANK SYSTEM(S) CLOSURE OUTLINE FOR COLLECTION OF SAMPLES AND LABORATORY ANALYSIS FOR UNDERGROUND STORAGE TANK SYSTEM(S) IN KENTUCKY (1992)(on file with the *Journal of Natural Resources & Environmental Law*).

[112] 40 C.F.R. § 280.66 (1992).

[113] Gauthier, *supra* note 39, at 272.

[114] Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 218-19 (Ky. 1937).

[115] "As between landlord and tenant, it has been said, more than in the case of any other relation, the greatest latitude and indulgence are to be allowed in favor of the tenant's claim to have particular articles considered as personal chattels rather than as part of the freehold." Schultz v. Seiler Motor Car Co., 48 S.W.2d 1068, 1069 (Ky. 1932)(citation omitted).

[116] *Id.*

should be allowed to remove the personalty. But within the liberal rules of the landlord/tenant relationship exists an even more liberal set of rules regarding trade fixtures:[117]

> The reason for the rigid enforcement of the rule in the one case and its relaxation in the other . . . . [is that] [w]hen fixtures are annexed to the land by the owner, actual or potential, the purpose is to enhance the value of the freehold, and to be permanent. But with the tenant a different purpose is to be served [because such fixtures are] affixed for the purposes of trade, and not merely for the better enjoyment of the premises.[118]

In *Commonwealth v. Dowdy*,[119] Texaco had leased two USTs to an automobile dealer for one dollar per year. These USTs were appropriately characterized as "trade fixtures." But this holding should not extend beyond the facts of the case.[120] Because the cases interpreting and applying the rules applicable to trade fixtures are dealing with a special subset of rules, they should not be considered the general rule of fixtures. Their application is limited to the situation in which the relationship is a landlord/tenant relationship, and the fixtures are placed on the property by the tenant.

Under the more liberal rules applicable to trade fixtures, a plaintiff railway company was held to have the right to remove a depot building it had constructed on the premises. The building was constructed for the purpose of railway trade, and plaintiff could remove the building at any time *before* plaintiff ceased to operate the railway company.[121]

However, it should be noted that the right of the tenant to remove trade fixtures can be forfeited by failure to remove the personal property.[122] In *McClelland v. Murphy*, the court held that a tenant, having a right to remove buildings at the termination of his lease, loses such right on surrendering the premises

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[117] "There is still an exception of a broader character in respect to fixtures erected for the purposes of trade." *Id.* (citation omitted).

[118] Stephens v. Carter, 98 S.E.2d 311, 313 (N.C. 1957).

[119] Commonwealth v. Dowdy, 388 S.W.2d 593, 595 (Ky. 1965).

[120] This case should be read for the discussion of counsel's closing statement, in which it was advised "the law is a ass—a idiot." *Id.* at 594.

[121] Pennington v. Black, 88 S.W.2d 969 (Ky. 1935).

[122] Interests in real property cannot be abandoned. Commmonwealth Dept. of Highways v. Turner, 386 S.W.2d 726 (Ky. 1965). It should be remembered that the doctrine of trade fixtures is a doctrine which treats the property as personalty. Thus, property which is a trade fixture can be "abandoned."

without removing such buildings.[123] The tenant has a "reasonable time" following the termination of the landlord/tenant relationship to remove the property.[124] If not, *then the personal property becomes the property of the lessor*,[125] even where the parties had made a provision in their written lease that the tenant could remove certain oil production equipment "at any time."[126]

C. *Abandonment*

Although real estate cannot be abandoned,[127] it should be remembered that the UST is not "real estate" in the true sense even when it acquires those characteristics of a fixture. If the logic of the case law is applied in a consistent manner, the UST is clearly personalty in those instances in which it is not a fixture. Thus, a UST which is not a fixture might be abandoned. Abandonment generally requires two elements: (1)voluntary relinquishment of possession, and (2)intent to repudiate ownership.[128] The intent may be inferred from the voluntary relinquishment where the facts justify it.[129] Further, the lapse of a long period of time after relinquishment of possession is significant evidence of intention to abandon.[130] In *Ellis v. McCormack*,[131] the abandonment of a "worthless" coal slack pile was found where the owner of the slack pile ceased mining operations upon the property and disposed of other materials without making any mention of the slack pile. Subsequently, when the slack pile was sold, its previous owner was held to have abandoned the property.[132]

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[123] McClelland v. Murphy, 264 S.W. 733, 734-35 (Ky. 1924).

[124] Bain v. Graber, 112 S.W.2d 66, 69 (Ky. 1938).

[125] *Id.*

[126] Kentucky Block Cannel Coal Co. v. Stacy, 98 S.W.2d 61, 63 (Ky. 1936).

[127] *See supra* note 122.

[128] Ellis v. McCormack, 218 S.W.2d 391, 392 (Ky. 1949). It is notable that while these two elements are required under the general rules applicable to the concept of abandonment, the requirements are not normally discussed in trade fixture cases. Thus, it appears that one loses its right to trade fixtures without the voluntary relinquishment and intent required in other cases.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id. Ellis* cites as its authority Kentucky Block Cannel Coal Co. v. Stacy, 98 S.W.2d 61 (Ky. 1936).

D. Bailment

In two cases, the UST was determined to be the subject of a bailment arrangement where the owner of the UST had retained the right to its return. The earliest such case was *Standard Oil of New York v. Dolgin* where the parties had entered into a written lease providing that title to a tank should remain in the supplier of petroleum.[133] After a sale of the property, the purchaser sought to establish its title to the tank. The court, however, indicated that the "written lease [of the tank] created . . . a bailment."[134] The logic of this case was cited approvingly in the case of *Lee-Moore Oil Co. v Williams*.[135] Although the court in the latter case described the two cases as "almost identical," the cases are at least distinguishable in that *Standard Oil* involved a written lease with specific provisions while *Lee-Moore Oil Co.* involved an oral agreement.[136] The cases are further distinguishable on the grounds that in *Standard Oil*, the tank was never intended by the parties to be buried. The UST in *Lee-Moore Oil Co.*, on the other hand, was intended by the parties to be annexed to the real estate. Thus, *Lee-Moore Oil Co.* can be criticized on account of its reliance upon the logic of a case which dealt with a tank which was never intended by the parties to be attached to the realty at all.[137] Indeed, if *Lee-Moore Oil Co.* was a correct recitation of the law, then the doctrine of fixtures would be eviscerated because merely upon the recital of an oral agreement, any personalty attached to realty would be required to be returned to its supplier.

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[133] Standard Oil of New York v. Dolgin, 115 A. 235 (Vt. 1925).

[134] *Id.*

[135] Lee-Moore Oil Co. v. Cleary, 234 S.E.2d 456 (N.C. 1977).

[136] *Id.* at 458.

[137] *Standard Oil of New York*, 115 A. 235 adopted the view that

> the annexation by a bailee to his own real estate of personal property bailed, with or without the knowledge and consent of the bailor, does not change the character of the property, and the bailor may recover it of the bailee's grantee, even though the latter [is] an innocent purchaser, unless the annexation is of such a character that the identity of the chattel is thereby lost, and it cannot be removed without substantial injury to . . . the real estate.

Standard Oil of New York, 115 A. at 236.

Not all courts adopted this reasoning. 8 AM. JUR. 2D *Bailments* § 87 (1980). The other view, and clearly the better view is "the bailor's knowledge of and consent to annexation in such a manner as to indicate that bailed chattel has become a fixture and under conditions that would naturally mislead a purchaser of the realty, will estop the bailor to assert his title against such an innocent purchaser of the realty." 8 AM. JUR. 2D *Bailments* § 87 (1980). KRS § 381.200 (Michie/Bobbs-Merrill 1992) would appear to support the proposition that Kentucky adopts the latter view.

E. Conveyances

A rule with respect to the ownership of a UST must be cognizant of the rules applicable to deeds and the interests they convey. Chapter 381, section 200(1) of the Kentucky Revised Statutes provides that "[e]very deed, unless an exception is made therein, shall be construed to include all buildings and appurtenances of every kind attached to the lands therein conveyed."[138] This statute was the basis of the holding in *Thomas v. Holmes*.[139] Holmes had installed water pumping equipment on property adjacent to his own property. The land upon which the well was located was later conveyed by a deed which reserved to Holmes the right to use the water from the well. Thomas, the owner of the adjoining tract, thereafter removed the pumping equipment and initiated a lawsuit in which, among other things, the ownership of the pumping equipment was in dispute. The court was unclear as to the exact interest asserted by Holmes to the equipment which he had installed; the label placed on the asserted interest was a "proprietary interest." Whatever its nature, the court ruled that the "equipment was a fixture and it passed with the conveyance of the land on which the well was located."[140] In other words, Holmes lost any claim he may have had to the equipment when the land was sold. Holmes, even though he had installed the equipment, "had no legal or equitable right in or to the original equipment on the property or its continued use, or the use of substituted equipment placed there by [Thomas]."[141] Thus, chapter 381, section 200 of the Kentucky Revised Statutes effected a severance of any rights Holmes may have had in the pumping equipment and a transfer of those rights to the purchaser of the property.

In *Wilkins v. Commonwealth*, the court held that

> a conveyance of land, in the absence of anything in the deed indicating a contrary intention, carries with it everything properly appurtenant to—that is, essential or reasonably necessary to the full beneficial use and enjoyment of—the property conveyed,

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[138] KRS § 381.200(1).

[139] Thomas v. Holmes, 206 S.W.2d 969 (Ky. 1948).

[140] *Id.*

[141] *Id.* at 972. This interpretation of KRS 381.200 indicates that the statute has two effects, the combination of which effect a complete transfer of ownership of any buildings and appurtenances attached to the lands conveyed by the deed. The statute is interpreted to (i)convey the right to use the appurtenances *and* (ii)to sever the right of the transferor, and presumably any other party, to interfere with that use.

> and *this principal is equally applicable to a lease of the premises.*[142]

This case involved the right to the use of a basement located under the first floor of a building. The first floor was leased to the tenant who argued that the lease of the first floor carried with it the right to the use of the basement. Although the court enunciated the above rule, it declined to hold that the use of the basement was essential to the lessee's use of the first floor. Thus, the above language is only dictum. This language raises the question of whether the mere lease of real estate triggers the complete application of chapter 381, section 200 of the Kentucky Revised Statutes. The case clearly indicates that a lessee has a right of use of everything properly appurtenant to the full beneficial use and enjoyment of the property conveyed. While not in the text of the case, it would only seem logical that this right should exist throughout the duration of the leasehold estate.

CONCLUSION

While there is no absolute test to determine the issue of whether one is an "owner" of an UST, there are very useful theories which can be applied to the problem. Although few of the theories are initially appealing because they were developed in the scenario of valuable property, it should be remembered that until very recent times, the liabilities associated with UST ownership were not as significant as they have become within the last ten years. Thus, the rules applicable to more traditional property should be relied upon to assist in the analysis of the ownership of USTs.

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[142] Wilkins v. Commonwealth, 234 S.W.2d 966, 969 (Ky. 1950)(emphasis added).