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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2000 - 06 - UST

In the Matter of the Petition of
LAKE PUBLISHING COMPANY
for Review of a Determination
of the Division of Clean Water Programs,
State Water Resources Control Board,
Regarding Reimbursement from the
Underground Storage Tank Cleanup Fund

SWRCB/OCC File UST-117

BY THE BOARD:

This order concerns a petition challenging a final division decision issued by the Division of Clean Water Programs (Division). Lake Publishing Company (petitioner) seeks review of the Division's decision to deny a portion of petitioner's request for reimbursement from the Underground Storage Tank (UST) Cleanup Fund (Fund). After review of the record, the State Water Resources Control Board (Board) upholds the basis for the Division's decision, but directs the Division to reimburse petitioner based on the grounds set forth in this order.

This petition raises the issue of how the Division should analyze a reimbursement request when an eligible claimant acquires real property at a reduced price and the purchase contract explicitly contemplates the anticipated costs to clean up contamination from a petroleum UST. The Board concludes that the Division must reduce, by the purchase price reduction, any reimbursement from the Fund to an eligible claimant who acquires real property where the purchase price was reduced to reflect the anticipated costs to clean up the petroleum contamination. To this extent, the Board upholds the Division's decision.

This petition also raises correlated issues associated with the purchase price reduction and the relationship between a seller and buyer. Application of the double payment prohibition necessarily means that a seller of real property has borne a portion of the cost to clean up the contaminated property. Because the Fund would otherwise have reimbursed the cleanup costs to the eligible claimant absent the property transfer, someone has incurred corrective action costs that would otherwise be reimbursable from the Fund. The appropriate resolution is to conclude that the Division should regard the buyer of the real property as incurring corrective action costs on behalf of the seller who reduced the sale price. If a seller is otherwise eligible for reimbursement, the Division shall reimburse the seller for eligible corrective action costs up to the amount determined to be a double payment to the buyer. The order expands upon the Division's decision in this respect.

In addition, this petition raises the issue of whether an eligible claimant may assign its rights to reimbursement from the Fund. The Legislature has limited participation in the Fund program to persons meeting certain eligibility requirements. At the same time, California law favors assignments. This order seeks to harmonize these two policy goals by permitting assignments under certain conditions. If these conditions are satisfied, the Division may honor the assignment to another person of an eligible claimant's rights to reimbursement.

I. STATUTORY, REGULATORY, PROCEDURAL AND FACTUAL BACKGROUND

The Board administers the Fund pursuant to the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Act). (Health & Saf. Code, §§ 25299.10-25299.99.) Subject to statutory requirements, owners and operators of petroleum USTs may request reimbursement from the Fund for their corrective action costs incurred cleaning up

contamination from petroleum USTs. (*Id.*, §§ 25299.54, 25299.57.) In addition, the Fund reimburses certain types of compensation that an eligible owner or operator has been ordered to pay third persons. (*Id.*, § 25299.58.)

The Legislature empowered the Board to adopt regulations governing access to and reimbursement from the Fund. (Health & Saf. Code, § 25299.77.) Regulations governing the Fund are codified in title 23, division 3, chapter 18, section 2803 et seq., of the California Code of Regulations.

The Act and Fund regulations prohibit a claimant from receiving a double payment on account of reimbursement for any corrective action or third party compensation cost. (Health & Saf. Code, § 25299.54, subd. (g); Cal. Code Regs., tit. 23, § 2812.2, subd. (b).)[1] To avoid making a double payment when a claimant recovers funds from another source, Fund staff must ascertain whether the other source compensated the claimant for costs that the Fund would otherwise reimburse. (See, Board Orders WQ 98-05-UST, *In the Matter of the Petition of Cupertino Electric, Inc.* (*Cupertino*) and WQ 96-04-UST, *In the Matter of the Petition of Champion/LBS Associates* (*Champion*).) The Board has recognized that a double payment may occur when a claimant buys property on which a UST is located and undertakes the costs of cleanup that would otherwise be borne by the seller. If the claimant receives both a reduced purchase price for the property and reimbursement for the costs that occasioned the reduced purchase price, then the claimant will receive an impermissible double benefit. (Board Order WQ 93-2-UST, *In the Matter of the Petition of Bruno Scherrer Corporation* (*Bruno Scherrer*), at pp. 10-11.)

The Act directs the Board to review a final decision of the Division within 90 days after receiving a petition challenging the decision. (Health & Saf. Code, § 25299.37,

[1] Unless otherwise noted, all further references are to title 23 of the California Code of Regulations.

subd. (c)(8)(B); Cal. Code Regs., tit. 23, § 2814.3, subd. (d).) Fund regulations allow the Board and petitioner, by written agreement, to extend the 90-day time limit for a period not to exceed 60 calendar days. (Cal. Code Regs., tit. 23, § 2814.3, subd. (d).) If the Board does not take action on a petition within either the 90-day period or the 60-day extension period, the Board has continuing jurisdiction to review the petition on its own motion.[2]

Petitioner purchased an office building and construction yard located in Belmont, California from Williams and Burrows, Inc. (Seller) for $1.8 million on February 5, 1988. During purchase negotiations, petitioner became aware that USTs were located at the site. As a result, petitioner negotiated a purchase price reduction because petitioner "surely would not pay the original price for contaminated property." (Letter from Lake Publishing Co. to Dave Deaner, Fund Manager (Oct. 8, 1997).)

Under the terms of the purchase agreement, Seller agreed to remove six USTs that were located on the property and to deliver the property to petitioner in a clean condition. (Addendum to Purchase Agreement and Deposit Receipt (Addendum) (Dec. 2, 1987), ¶ 7.) The Addendum further provided that:

> "If Seller has not performed the above [removal and cleanup] requirements prior to Close of Escrow, then an amount of funds shall be retained by the Escrow Company equal to the amount of funds required for the removal of such underground storage tanks and curing of such soils problems." (*Ibid.*)

Once Seller removed the USTs and completed the cleanup, the escrow company would release the funds to Seller. (*Ibid.*) The parties negotiated this provision to ensure that funds would be available for the corrective action work, and to account for the Seller's liquidity problems.

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[2] See, *Cupertino, supra*, at pp. 3-4 (discussing an agency's continuing jurisdiction pursuant to *California Correctional Peace Officers Ass'n* v. *State Personnel Bd.* (1995) 10 Cal.4th 1133 [43 Cal.Rptr.2d 693, 899 P.2d 79], and the Board's discretion to consider a petition on its own motion as authorized by California Code of Regulations, title 23, section 2814.2, subdivision (b)).

(Request for Final Division Decision from David Lake, Lake Publishing Co. to Harry M. Schueller, Division Chief (Nov. 21, 1997).)

Seller failed to perform the UST removal and cleanup by the close of escrow, February 5, 1988. In the final escrow statement, petitioner and Seller agreed to set aside $80,000 of the purchase funds to pay for UST removal and cleanup. (Addendum to Escrow Instructions, ¶ A.) The escrow instructions provided that if the $80,000 had not been released in accordance with the Addendum to the purchase agreement (i.e., if Seller failed to remove the USTs and clean up the property) by June 1, 1988, then the escrow company would remit the funds to petitioner.

The USTs were removed on March 25, 1988. At that time, the parties discovered petroleum contamination from one of the six USTs. Because the Seller did not deliver the property in a clean condition, the escrow company remitted $80,000 to petitioner pursuant to the amended escrow instructions.

Petitioner applied to the Fund in October 1992. In October 1997 Fund staff concluded that petitioner would receive a double payment if the Fund reimbursed petitioner's corrective action costs because petitioner had already received an $80,000 discount on the property that was intended to pay for the costs of UST removal and cleanup. Pursuant to *Champion* and *Cupertino*, Fund staff allocated $37,048 of the $80,000 purchase price reduction towards ineligible costs ($5,000 for the deductible, $624 in ineligible corrective action costs, and $31,424 for the UST removal). Fund staff then determined that petitioner must use the remaining $42,952 of the escrow proceeds for corrective action before the Fund could begin reimbursing petitioner.

The Chief of the Division upheld the Fund staff's decision in a Final Division Decision dated December 23, 1997 (Decision). The Division Chief determined that Seller had paid petitioner for the costs of cleanup by accepting a reduced purchase price for the property. Petitioner timely submitted a petition for review to the Board. As part of its petition, the petitioner submitted an assignment of rights to Fund reimbursement executed January 14, 1998, by the Seller in favor of petitioner. (See Letter from Robert Burrows, Williams & Burrows, Inc. to David S. Lake, Lake Publishing Co. (Jan. 14, 1998).)

The petitioner challenges the Division's decision. The petitioner contends that the Division misconstrues the purposes of the escrow agreement. Petitioner maintains that the $80,000 in escrow funds paid to the petitioner represented liquidated damages for Seller's failure to remove and to clean up any release from the USTs. As a result, petitioner contends that the liquidated damages do not represent a potential double recovery, but instead, a penalty to Seller for nonperformance. In the alternative, petitioner argues that $80,000 represents a payment by Seller for corrective action costs. Because Seller has assigned any reimbursement rights it may have to the buyer, the petitioner contends it may recover any reimbursement Seller is entitled to receive.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner maintains that the Division misconstrued the provisions of the escrow agreement governing the $80,000 payment. Petitioner contends that the Board should not consider the $80,000 as compensation to the petitioner to pay for corrective action costs because the $80,000 actually constituted a liquidated damage penalty for nonperformance by the Seller. As a result, petitioner maintains that the Board should not consider the $80,000 as

compensation for corrective action and should not reduce petitioner's reimbursements from the Fund.

Findings: The petitioner's contention does not have merit. Regardless of whether the $80,000 is denominated "liquidated damages," the money would still constitute a double recovery. Liquidated damages reflect the parties' attempt to estimate the damage to petitioner (i.e., the cost to clean up the contamination) resulting from nonperformance by Seller. The Board considers the $80,000 price reduction compensation for corrective action costs.

A question of double payment arises when a claimant receives a reduced purchase price for contaminated property and seeks reimbursement from the Fund to clean up the property. The Board initially addressed this problem in *Bruno Scherrer:*

> "Buyers in the position of petitioner who undertake to pay costs which otherwise must be borne by the seller normally obtain an adjustment in the price which would otherwise be charged to the buyer. If there is such an adjustment in price, and claims against the Fund by the purchaser are allowed, the result appears to involve a double benefit to the purchaser who receives both a reduced purchase price and reimbursement for the costs which occasioned the reduced purchase price." (*Bruno Scherrer, supra*, at pp. 10-11.)

Petitioner's claim presents this very issue, and the Board sees no reason to reevaluate this straightforward legal proposition. The $80,000 of the purchase price that reverted to petitioner to pay removal and cleanup costs constitutes a potential double benefit to petitioner.

In effect, petitioner argues that the escrow funds belonged to him and not to Seller (i.e., petitioner did not receive a payment for corrective action from another source, but instead used his own money for corrective action). Ownership of the escrow funds, however, is not at issue here. It appears that petitioner may misunderstand how the issue of double payment arises in the context of a real estate transaction. Typically, double payments occur when a claimant receives funds from another source for its corrective action costs. Here, Seller did not make a

direct cash payment to petitioner. Nonetheless, a question of double payment arises when a claimant receives a reduced purchase price for contaminated property and seeks reimbursement from the Fund to clean up the property. (See, *Bruno Scherrer, supra*, at pp. 10-11.)

Petitioner has explained that the escrow was established with its money to assure Seller, who had the responsibility for contracting for UST removal and cleanup, that funds would be available for the work. (Request for Final Division Decision from David Lake, Lake Publishing Co. to Harry M. Schueller, Division Chief (Nov. 21, 1997).) Petitioner also has noted that it pressed for a reduced purchase price when it became more aware of the potential financial problems associated with USTs and the possibility that Seller would file for bankruptcy. (*Ibid.*)

Thus, petitioner was aware of the presence of the USTs, the likelihood that the USTs may have contaminated the property, and the potential financial problems associated with USTs. Petitioner has acknowledged that it considered these factors when it negotiated with Seller for a reduced purchase price. (*Ibid.*) In addition, the parties intended the $80,000 in reduced purchase price to be used for the UST removal and cleanup. If the Fund reimbursed petitioner for its cleanup costs — for which the $80,000 was also intended — then petitioner would receive a windfall because it would receive both a discount on the purchase price of the property and Fund reimbursement for the costs that occasioned the discounted price.

Petitioner maintains that the $80,000 in escrow funds constituted liquidated damages for Seller's failure to perform according to the purchase agreement. Whether or not the $80,000 was a liquidated damage does not alter the Board's analysis.[3] The term "liquidated damages" denotes a specific sum fixed by the parties to a contract that is to be paid to satisfy a loss or injury arising from a breach of the contract. (See Civ. Code, § 1671 (establishing the

[3] Petitioner concedes that the contract does not specifically refer to the $80,000 in reverted escrow funds as liquidated damages. For purposes of this analysis, but without considering the merits of the issue, the Board accepts petitioner's assertion that the $80,000 was a liquidated damage.

validity of liquidated damages provisions).) The sum must represent a reasonable attempt to anticipate the losses that may be suffered in the event of a breach of the contract. (*Weber, Lipshie & Co.* v. *Christian* (1997) 52 Cal.App.4th 645, 656 [60 Cal.Rptr.2d 677].) Even if the parties contracted for the payment of liquidated damages, the question of double payment would still exist because the parties intended the money to satisfy petitioner's injuries arising from Seller's failure to clean up the site. In other words, the parties intended the money to pay for petitioner's cleanup costs. These are the same costs that the Fund would otherwise reimburse. The $80,000 represents a potential double payment to petitioner if the Board were to reimburse petitioner for all eligible corrective action costs.

2. Contention: Petitioner contends that if the Division correctly determined that the escrow funds actually belonged to Seller, then Seller has the right to reimbursement from the Fund. To this extent, the Seller would have paid for corrective action through a lower sale price. Petitioner maintains that the amount the Division determines to be a double recovery for the purchaser would be the amount of corrective action paid by Seller.

Findings: The Board has not had occasion to consider this issue before, but in light of the Legislature's enumerated goals and subject to eligibility requirements elsewhere in the Act, the Board finds that an otherwise eligible seller of real property may submit a claim or join the purchaser's claim and seek reimbursement for the costs the Fund determines would otherwise be a double recovery to the purchaser. To comport with the Act, any reimbursement pursuant to this analysis cannot result in the Fund reimbursing more than it would have reimbursed had there only been one eligible claimant who owned the Belmont property throughout the UST operation, discovery, removal, and cleanup phases. Fund staff should

reimburse the eligible seller and the eligible buyer together the amount that would have been reimbursed to a single eligible claimant if there had been no real property transaction.

The Legislature established the Fund to help clean up the contamination that too often has accompanied the underground storage of petroleum. An important legislative goal enumerated by the Legislature is that the Fund should operate efficiently to encourage corrective action in the first instance "by the owner or operator of a leaking underground storage tank." (Health & Saf. Code, § 25299.10, subd. (b)(8).) In fact, efficiency underlies three of the Legislature's findings concerning the Fund. (*Id.*, §§ 25299.10, subds. (b)(1), (7)-(8) and 25299.90, subd. (e) (recognizing the benefits of reimbursing commingled plume claimants jointly).) The Board, therefore, strives to interpret the Act in a manner that promotes the efficient clean up of unauthorized releases, while following the letter of the law.

The Legislature limited the types of costs the Board may reimburse from the Fund. Broadly, the Board can only reimburse claimants for eligible corrective action, third party, and regulatory technical assistance costs. (Health & Saf. Code, §§ 25299.57-.58.)[4] Corrective action encompasses:

> "[A]ny activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies)." (Cal. Code of Regs., tit. 23, § 2804.)

An eligible claimant may receive reimbursement for the costs of implementing a corrective action activity, provided the cost is "reasonable and necessary." (Health & Saf. Code, § 25299.57, subd. (b)(1).) In order to receive reimbursement for a claimed corrective action cost,

[4] Corrective action and regulatory technical assistance costs are the only costs at issue in this order. Neither Seller nor petitioner can be a third party, and thereby trigger a third-party compensation claim because Fund regulations specifically exclude the owners of the real property at which the UST is located. (Cal. Code Regs., tit. 23, § 2804 (defining "third party").)

the cost must have been "incurred by or on behalf of a claimant." (Cal. Code of Regs., tit. 23, § 2812.2, subd. (b); see also Health & Saf. Code, §§ 25299.55, subd. (c) and 25299.57, subd. (b)(1).)

The Board construes section 2812.2, subdivision (b), to allow a purchaser to incur corrective action costs on behalf of a seller through a reduced purchase price. Section 2812.2, subdivision (b) provides that corrective action costs "incurred . . . on behalf of a claimant shall be reimbursable from the Fund." (Cal. Code of Regs., tit. 23, § 2812.2, subd. (b).) Subdivision (b) continues by stating that "[n]o claimant shall be entitled to double payment on account of any corrective action or third party compensation claim cost." (*Ibid.*, see also, Health & Saf. Code, § 25299.54, subd. (g).) The regulation continues by identifying certain circumstances where a person might compensate a claimant, but the compensation would not be considered a double payment (e.g., where the claimant is then obligated to repay the person paying on behalf of the claimant).

A purchase price reduction by a seller does not implicate the double payment prohibition with respect to the seller.[5] Nothing in section 2812.2, subdivision (b), restricts reimbursement to a seller for corrective action costs the seller effectively paid through a reduced purchase price. If a seller funds all or a portion of the corrective action through a purchase price reduction, if a seller is otherwise eligible to submit a claim to the Fund, and if a seller is not receiving compensation from another source that would run afoul of the statutory and regulatory double payment prohibition, the Board sees no reason why the claimant-seller should not be reimbursed the amount of the purchase price reduction that would otherwise constitute a double payment to the purchaser.

[5] In contrast, as the Board has previously observed in *Bruno Scherrer*, a purchase price reduction would amount to a double payment to the purchaser if the Board were to reimburse the purchaser for all corrective action costs. (*Bruno Scherrer, supra*, at pp. 10-11.)

Construing a purchase price reduction to allow reimbursement of a seller is consistent with the Board's prior interpretations of "on behalf of" agreements. The "on behalf of" language in section 2812.2, subdivision (b) originated from the Board's recognition that claimants may not always have funds available to pay for corrective action in the first instance. A person may incur corrective action costs on behalf of a claimant pursuant to an express agreement in place before the costs were incurred. (See, Board Orders WQ 97-06-UST, *In the Matter of the Petition of Quaker State Corporation* (*Quaker State*) and WQ 99-02-UST, *In the Matter of the Petitions of Hollis Rodgers et al.* (*Hollis Rodgers*).) In the case of a purchase price reduction, the express agreement comes in the form of a contract price that is below the fair market value of the property in a clean state. Further, the purchase contract will typically precede the purchaser undertaking corrective action. Hence, the Board's present analysis is consistent with the Board's prior, precedential orders. Moreover, the present analysis affords the parties greater flexibility in managing a site cleanup, thereby promoting the efficiency sought by the Legislature when it enacted the Act.

Absent language to the contrary, the Board construes a reduction in purchase price as the expression of a seller's agreement to assume responsibility for a portion of the property's Fund-reimbursable corrective action costs. For the Fund's purposes, a purchaser has agreed to incur corrective action costs on behalf of a seller. The Board is cognizant that a purchase price reduction frequently includes other valuable consideration (e.g., a purchaser's express or tacit agreement to clean up the contamination relieves a seller of contracting and bidding obligations and other inconveniences associated with corrective action, and a seller may receive valuable releases from responsibility and indemnification to insulate it from further responsibility). In this sense, the purchase price reduction typically includes a premium above

the anticipated corrective action costs. Therefore, the purchase price reduction reflects the maximum reimbursement a seller may receive from the Fund.

A seller's reimbursement will be the amount of double payment the Fund staff determine that the purchaser will receive. In light of the Fund's offset procedures as detailed in *Cupertino*,[6] the actual double payment amount to a purchaser will typically be less than the purchase price reduction. The Board believes that calculating a seller's reimbursement based on the double recovery, as opposed to the purchase price reduction, is appropriate. First, the *Cupertino* "hard costs" used to determine the purchaser's double payment are costs associated with the UST that the seller would have borne had it retained the property and that two parties would most likely account for in adjusting the sale price of contaminated property. Second, the offset procedure, as applied in the purchase price reduction context, results in an equitable allocation of costs because the "hard cost" offset compelled by *Cupertino* may be viewed as the premium a seller incurs for not undertaking corrective action itself.

The Board believes the approach outlined in this order reflects the Act's intent and promotes sound public policy. If an eligible seller and an eligible purchaser contract to have the purchaser undertake corrective action, both parties have acknowledged that the most efficient corrective action approach is to have the purchaser undertake the corrective action. The Act establishes a goal of efficient corrective action. The Board can honor the parties' decision and promote efficiency by reimbursing a seller as detailed in this order. Further, if the Board concluded that a seller could not seek reimbursement for its purchase price reduction, the Fund

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[6] In *Cupertino*, the Board detailed the Fund's process for analyzing double payments. First, Fund staff determine the compensation a claimant has received from other sources. When the purpose of the compensation is expressly identified (e.g., $10,000 to compensate claimant for lost business income and $10,000 to compensate a claimant for corrective action costs) the Fund typically honors the express allocation. Where there is no express allocation, the Board has instructed Division staff to analyze the "hard costs" (i.e., the "actual, ascertainable costs to which the settlement money reasonably may be attributed based on the complaint or other demand"). (*Cupertino*, *supra*, pp. 10-11.) The Division staff then utilize the "hard costs" as an offset to reduce the amount of double recovery. (*Id.*, pp. 22-23.)

would recognize a benefit each time contaminated property sold at a reduced price. This could unnecessarily chill the transfer of and needlessly stall remediation of properties the Act was intended to protect.

In the present case, Seller is entitled to reimbursement of up to $37,952 ($42,952 less the statutory $5,000 deductible) for eligible corrective action costs. As explained above, the Board concludes that the escrow instructions provided an $80,000 purchase price reduction to pay for corrective action. This amount constituted the baseline for determining the petitioner's double recovery. Division staff then used the offset process established in *Champion* and *Cupertino* to calculate $37,048 in "hard costs" that could be used to offset the $80,000 price reduction. The amount of double recovery to the petitioner is therefore $42,952. The petitioner must incur $42,952 in eligible corrective action costs before it may be reimbursed under its existing claim. Any eligible corrective action costs in excess of $42,952 may be reimbursed to the petitioner's claim. The Seller may submit a claim for reimbursement of the eligible corrective action costs up to $42,952, which will then be decreased by the statutory deductible.

3. Contention: Petitioner maintains that to the extent the Seller is entitled to reimbursement from the Fund, the Seller has assigned petitioner the Seller's rights to submit a claim to the Fund and to receive any reimbursement from the Fund. Petitioner thereby contends that it is entitled to any reimbursement the Seller would otherwise have received.

Findings: The Division has traditionally not allowed a claimant to assign its rights to reimbursement from the Fund. However, in light of a strong policy in California law favoring the assignment of rights and interests in property, the Board concludes that in certain circumstances a claimant may assign its rights to reimbursement. Any such assignment would be governed by principles the Board has already applied to "on behalf of" agreements. As such,

petitioner may submit a claim to the Fund in Seller's name and as the assignee of the Seller, or consistent with long-standing Fund practice and this order, may have Seller joined on the existing claim as a joint claimant.

The Board has previously addressed the issue of assignments in *Bruno Scherrer*. *Bruno Scherrer* involved a claim submitted by the Bruno Scherrer Corporation (Bruno Scherrer), who leased property at which a UST had previously been operated. The UST had been removed before Bruno Scherrer acquired the property. As a result Bruno Scherrer was not eligible to submit a claim because it was not an owner or operator. Bruno Scherrer purchased the property agreeing to undertake all further corrective action. (*Bruno Scherrer*, *supra*, p. 9.) At some time after purchasing the property and after incurring substantial corrective action costs, Bruno Scherrer received an assignment of rights to reimbursement from the Fund.[7] (*Ibid.*) In the circumstances presented by *Bruno Scherrer*, the Board declined to honor the assignment.

The Board rejected the assignment to Bruno Scherrer relying on two principal factors. First, the Legislature limited access to the Fund to owners and operators of USTs. Bruno Scherrer was neither. (*Bruno Scherrer*, *supra*, p.10.) Second, the Board concluded that it would be inappropriate for reimbursement to turn on whether a person had been able to negotiate, after the property's sale, for an assignment from an eligible claimant. (*Id.*, pp. 11-12.) Bruno Scherrer had the good fortune to obtain the assignment after incurring costs. But the Board reasoned it would be unjust to reimburse a person in Bruno Scherrer's position when other responsible parties may be unable to secure an assignment (sometimes for reasons beyond a person's control, such as the death of the eligible claimant). In a footnote, the Board specifically

[7] Although Bruno Scherrer did not disclose the exact date of the assignment, a review of the record indicates that corrective action occurred before the Legislature established the Fund, and yet the assignment specifically referenced the Fund. Therefore, it is reasonable to conclude that the assignment occurred after Bruno Scherrer had incurred the corrective action costs.

preserved the issue of "access to the Fund by persons who bargain for and obtain an assignment of rights from a seller who was a tank owner during the process of purchase of the contaminated property." (*Id.*, p. 10, fn. 2.)

After further consideration of the assignment issue, the Board concludes that *Bruno Scherrer* adopted an unnecessarily strict view of assignments. The Board therefore declines to extend *Bruno Scherrer*, and modifies its holding consistent with the discussion below and consistent with the line of Board orders governing "on behalf of" agreements. Despite these modifications, the Board observes that the outcome in *Bruno Scherrer* would have been identical if analyzed pursuant to the present order. As a result, although the Board has refined its analytical framework with respect to assignments, Bruno Scherrer would still not be eligible for reimbursement.

There is no dispute that California law strongly favors assignments. "Assignment is a term which may comprehensively cover the transfer of title to any kind of property." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts § 921, p. 822.) More narrowly, assignment refers to the transfer of a right to recover money or other personal property. (*Ibid.*) A person may assign a right to recover money or other personal property by a judicial proceeding. (Civ. Code, § 954.) This right is personal property. (*Id.*, § 14, subd. (3).) A "right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." (*Id.*, § 1458.) Further, "[p]roperty of any kind may be transferred, except as otherwise provided by [article 2, chapter 1, title IV, part 4, division 3 of the Civil Code (commencing with section 1044)]." (*Id.*, § 1044.) The sole restriction on transfers in article 2 is that a "mere possibility, not coupled with an interest, cannot be transferred." (*Id.*, § 1045.)

California's courts have broadly interpreted the ability to transfer property and choses in action.[8] Civil Code sections 954 and 1458 "establish the policy of the state, the 'assignability of things [in action] is now the rule; nonassignability, the exception . . . .'" (*Bush* v. *Superior Court* (*Rains*) (1992) 10 Cal.App.4th 1374, 1381 [13 Cal.Rptr.2d 382], citations omitted (upholding assignment of an equitable indemnity claim against concurrent tortfeasors).) The law is replete with cases promoting the free transfer of property and choses in action. (See 1 Witkin, *supra*, Contracts §§ 925, 929, 932, 933, 935, 936, 937, and cases cited therein.) Although there are circumstances when an assignment will not be enforced,[9] the Board does not conclude that as a matter of law a claim to the Fund is nonassignable.

In light of California's public policy favoring the transfer of property and choses in action, at this time the Board will construe the Act in a manner that promotes the public policy favoring transferability of property. An assignment of rights to claim against the Fund involves a hybrid of an assignment of property (i.e., the potential reimbursement from the Fund) and a chose in action (i.e., the ability to pursue a reimbursement from the Fund in a judicial proceeding, which in and of itself is also a property interest). Subject to the limitations enumerated below, the Board will honor assignments from an eligible claimant to another person. The limitations this order places on assignments are informed by the Board's and the Division's substantial experience with "on behalf of" agreements and sound public policy. Despite the conclusions contained in this order, the Board is mindful of its authority to limit the

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[8] A "chose in action" or a "thing in action" is a right to recover money or other personal property by a judicial action. (Civ. Code, § 953.)

[9] In the development of California's law governing assignments, actions "which arise from a wrong done to the person, the reputation, or the feelings of the injured party, and from breaches of contracts of a purely personal nature (like promises of marriage) were deemed to be nonassignable." (*Curtis* v. *Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 504 [86 Cal.Rptr.2d 536].)

assignability of claims in some cases[10] and may invoke this authority where circumstances warrant.

In *Bruno Scherrer*, the Board declined to honor an assignment because the Legislature limited the filing of claims to eligible "owners and operators of tanks." (*Bruno Scherrer, supra*, p. 10.) The approach in *Bruno Scherrer* appears overly formulaic because an assignment from an owner or operator results in the assignee submitting a claim in the name of the owner or operator. (See *Construction Financial* v. *Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 173, fn. 1 [61 Cal.Rptr.2d 574] (assignee merely stands in shoes of the assignor and action proceeds in the assignor's name).)

> "It is well settled 'that an assignee of a chose in action does not sue in his own right but stands in the shoes of the assignor. [Citation.] A thing or chose in action would never be assignable if the assignee independently had to meet the requirements already satisfied by the assignor. If he could meet the requirements he would need no assignment; if not he could not use the assignment.' (*Bush, supra*, 10 Cal.App.4th at 1380.)" *Koudmani* v. *Ogle Enterprises, Inc.* (1996) 47 Cal.App.4th 1650, 1659-1660 [55 Cal.Rptr.2d 330].)

On a certain level, it appears the decision in *Bruno Scherrer* may have misconstrued the purpose and effect of an assignment, and to this extent, the Board disapproves that portion of *Bruno Scherrer*.

A person to whom reimbursement from the Fund is assigned steps into the shoes of the eligible claimant. The assignee takes no greater rights than the assignor had. (Civ. Code, § 1459; Code of Civ. Proc., § 368.) "[T]he assignee of a chose in action stands in the shoes of his assignor, taking his rights and remedies subject to any right to offset or other defenses

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[10] Notwithstanding Civil Code sections 954, 1044, and 1458, a person may restrict assignment of its obligations. (*Farmland Irrigation Co.* v. *Dopplmaier* (1957) 48 Cal.2d 208, 222 [308 P.2d 732].) The instrument creating an obligation may expressly provide that it shall not be assigned. (1 Witkin, *supra*, Contracts, § 926, p. 827, and cases cited therein.) The Board issues a quasi-contractual "Letter of Commitment" that obligates the Fund to reimburse eligible costs to the claimant, so long as the claimant remains eligible. In light of California law, the Board has authority to restrict assignment of obligations created pursuant to a "Letter of Commitment."

existing against the assignor prior to actual notice of the assignment." (*In re Marriage of Comer* (1996) 14 Cal.4th 504, 524 [59 Cal.Rptr.2d 155, 927 P.2d 265], citations omitted.) As a result, an assignee of a Fund claim will have to demonstrate the priority and eligibility of the eligible Fund claimant. Offsets that would otherwise diminish the claimant's reimbursement (e.g., insurance and settlement proceeds) will similarly reduce the amount reimbursed to the claimant's assignee. Any fraud or misrepresentation on the part of the claimant or the claimant's assignee will render the claim ineligible for participation in the Fund and potentially subject the assignor and assignee to legal action. In many respects, the Fund staff should treat an assignment as an "on behalf of" agreement, but the process will be streamlined from the claimant and assignee's perspectives because the assignee will be able to proceed without relying on the intermediate submission of documents to the claimant for submission to the Fund.

Consistent with the Board's orders in *Quaker State* and *Hollis Rodgers*, the Board will permit an assignee to submit a claim for eligible costs (1) the assignee incurred subsequent to a written assignment of rights to Fund, or (2) the assignor incurred prior to the written assignment of rights to the Fund. The Board's order in *Quaker State* compels the result in scenario (1) because it requires an express agreement before a person may incur costs "on behalf of" a claimant and receive reimbursement for the costs from the Fund. (*Quaker State*, *supra*, pp. 6-7.) The Act and California's law governing assignments compels the result in scenario (2) because the Act establishes the claimant-assignor's right to reimbursement while the assignment cuts off the rights in favor of the assignee.

When the Division examines a cost associated with an assigned claim, the Division must determine whether the person incurring the cost had the right to reimbursement (either by the Act or by assignment) at the time it incurred the cost. If so, the cost may be

reimbursed pursuant to the valid assignment. Several examples illustrate the application of this rule. The Division could reimburse an assignee for a cost incurred by an assignor prior to the assignment because at the time the assignor incurred the cost it had the right to reimbursement pursuant to the Act. Similarly, the Division could reimburse an assignee for a cost incurred by the assignee subsequent to an assignment because at the time the assignee incurred the cost it had the right to reimbursement pursuant to the assignment. In corollary, the Division could not reimburse a cost incurred by an assignor subsequent to the assignment because at the time the assignor incurred the cost it had already assigned its claim against the Fund and had no surviving right to reimbursement for the subsequently incurred costs. Also, the Division could not reimburse a cost incurred by an assignee prior to the assignment because at the time the assignee incurred the cost it did not have any right to reimbursement under the Act or pursuant to an assignment.

Requiring a conjunction of the right to reimbursement and the incurrence of the eligible costs also addresses one of the Board's primary concerns in *Bruno Scherrer*. In *Bruno Scherrer*, the Board emphasized that reimbursement should not depend on whether a person had the good fortune to obtain from an owner or operator an assignment of rights to reimbursement from the Fund. (*Bruno Scherrer*, *supra*, pp. 11-12.) This was a valid concern in *Bruno Scherrer*, where the assignment occurred after the costs were incurred. It would be arbitrary to allow a person's reimbursement to hinge on the luck of finding an eligible owner or operator after the person incurred costs. In contrast, when an eligible owner or operator and another person structure their obligations in such a way that the other person assumes responsibility with the express expectation of reimbursement from the Fund, the Board should not disregard the parties' intention lightly. Hence, by grafting the principles the Board has established in *Quaker State* and

Hollis Rodgers into the treatment of assignments, this order continues to adhere to some of the Board's concerns in *Bruno Scherrer*.[11]

In addition to the fundamental precept that the incurrence of costs must be coupled with the right to reimbursement, the Board also observes that other provisions governing "on behalf of" agreements will limit assignments. In *Hollis Rodgers*, the Board held that "on behalf of" agreements may not be used to circumvent the priority scheme or to unravel the provisions of a release or indemnity. (*Hollis Rodgers*, *supra*, pp. 20-21.) Similarly, the Board concludes that claimants may not use assignments to circumvent the priority scheme or to unravel the provisions of a release or indemnity. A lower priority claimant may not receive an assignment from a higher priority claimant, except to the extent permitted for "on behalf of" agreements. (See, *id.*, pp. 18-21.) Further, a claimant may not assign the right to reimbursement from the Fund if the assignee has previously released or indemnified the claimant-assignor. (See, *id.*, p. 21.)

The assignments contemplated by this order will further the Act's goals. An assignment of claims against the Fund allows cligible owners and operators to order their affairs in a manner that promotes prompt, efficient cleanup. By affording claimants a flexible mechanism to conduct corrective action and seek reimbursement for the costs, the Board believes that owners and operators unable to finance corrective action themselves will have an additional resource to meet their cleanup responsibilities, without requiring intervention by the Board or other regulatory agencies. At the same time, as outlined above, permitting assignments of claims comports with the language of the Act.

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[11] The Board also notes that if Bruno Scherrer's claim were analyzed pursuant to this order, the result would be the same as the *Bruno Scherrer* order because Bruno Scherrer obtained the assignment after incurring the costs.

In the present case, at the time Seller incurred the corrective action costs through the purchase price reduction, Seller was eligible for reimbursement because it was an eligible owner or operator incurring eligible costs. The Seller-assignor was eligible for reimbursement of the costs it had already incurred at the time it assigned its claim in favor of petitioner. Therefore, petitioner may seek reimbursement for the costs pursuant to the valid assignment of rights. Petitioner may seek reimbursement by submitting a new claim in the name of Seller, identifying the petitioner as the assignee of Seller. Alternatively, petitioner may request that the Seller be joined as joint claimant, and the costs may be reimbursed under the joint claim.

III. SUMMARY AND CONCLUSION

1. Only eligible owners or operators of USTs may file a claim with the Fund.

2. A reduction in purchase price that is intended to offset anticipated corrective action costs represents a potential double recovery to the purchaser if the Board reimburses all the purchaser's corrective action costs.

3. A purchaser of property at which there has been an unauthorized release from a UST incurs costs on behalf of the seller when the purchaser incurs corrective action costs after the seller had reduced the purchase price of the property in recognition of the anticipated corrective action costs.

4. The amount of double recovery the Division determines to be attributable to the purchase price reduction represents the maximum amount of reimbursable corrective action costs incurred by the seller.

5. The Board may reimburse the seller of property with a reduced purchase price the amount determined to be a double recovery to the purchaser, so long as there are eligible corrective action costs to support the reimbursement.

6. Seller and petitioner reduced the sale price of the subject property by $80,000 in recognition of the anticipated cleanup costs, and the Division determined that $42,952 of the price reduction would constitute a double recovery to petitioner.

7. Seller may submit a claim or join petitioner's claim to seek reimbursement of up to $42,952 if Seller can demonstrate eligible corrective action costs that the petitioner incurred on behalf of Seller through the purchase price reduction.

8. A claimant may assign its claim and the Board will reimburse claims assigned, so long as the eligible costs were incurred at a time when the incurring party was entitled to reimbursement.

9. Seller was an eligible claimant at the time of the purchase price reduction, so pursuant to the assignment, petitioner may submit a claim as the assignee of Seller, or may have Seller joined as a joint claimant on petitioner's existing claim.

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IV. ORDER

IT IS THEREFORE ORDERED that the portion of the Decision denying reimbursement of the first $42,952 in eligible corrective action costs under petitioner's existing claim is upheld. It is further ordered that the Division will honor a claim submitted by Seller in recognition of the purchase price reduction and that such claim may be for up to $42,952, subject to proof of the eligible costs claimed. Because Seller has assigned its rights to reimbursement from the Fund, consistent with this order, petitioner may step into Seller's shoes and submit a claim as the assignee of Seller or join Seller on petitioner's existing claim.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 26, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board