

MUSTFA Fund Loses In Court Of Appeals, Again

In a brief, unpublished opinion addressing only procedural issues, the Michigan Court of Appeals reversed and sent back for further consideration the Wayne County Circuit Court's decision affirming the denial of a claim by Coca-Cola Enterprises, Inc. (Coca-Cola) and Michigan Consulting & Environmental, Inc. (MCE) for reimbursement from the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund for costs they incurred in cleaning up an underground storage tank (UST) release site. This is the second appeal the MUSTFA Fund has lost on the same issue. The Michigan Court of Appeals prior decision in *Ford Motor Co. v. Dept. of Env'tl Quality* is discussed in the August 2000 *Michigan Environmental Compliance Update*.

The MUSTFA Fund was established for reimbursing UST owners and operators for certain expenditures incurred in cleaning up petroleum released from USTs. To obtain reimbursement, a UST owner or operator is required to submit a claim to the MUSTFA Fund administrator of the Michigan Department of Environmental Quality (MDEQ) documenting its expenses under the MUSTFA statute, Part 215 of the Natural Resources and Environmental Protection Act. The MUSTFA Fund has not accepted new claims since June 25, 1995.

Coca-Cola and MCE filed claims for reimbursement with the MUSTFA Fund. After the MUSTFA Fund administrator denied their claims, Coca-Cola and MCE filed an administrative appeal with the MUSTFA Fund Policy Board, which denied the appeal because it was not filed within the 14-day period mandated by Part 215. Coca-Cola and MCE subsequently brought an action in the Wayne County Circuit Court alleging multiple theories based upon the MUSTFA Fund's alleged arbitrary application and enforcement of the 14-day period for filing administrative appeals. The trial court held that the MUSTFA Fund had properly applied the 14-day rule and that Coca-Cola and MCE were on notice that their claims were required to be filed within the 14-day period.

The Court of Appeals initially dealt with the MUSTFA Fund's challenge to MCE's standing to be a party in the case. Part 215 provides that an appeal may be filed by the "owner or operator" who submitted the claim. Part 215 further provides that the terms "owner" and "operator" both include "a person to whom an approved claim has been assigned or transferred." The court observed that an appeal, therefore, could be brought by an environmental consultant to whom a claim had been transferred. The court rejected the MUSTFA Fund's challenge because the Fund had not shown that MCE was prohibited from filing an appeal.

The court next considered with the challenge to the MUSTFA Fund's application of the 14-day appeal period. Coca-Cola and MCE did not dispute that they failed to comply with the statutory time period. They contended, however, that the MUSTFA Fund had a longstanding practice of not enforcing the 14-day rule and that they relied on the MUSTFA Fund's practice of accepting late appeals. Coca-Cola and MCE presented factual evidence that the MUSTFA Fund had not enforced the 14-day appeals period in the past. The trial court held, however, that an August 10, 1995, letter sent by the MUSTFA Fund to "affected parties" provided fair warning that the 14-day period would be prospectively applied to Coca-Cola's and MCE's claims.

The Court of Appeals disagreed with the trial court's determination that the August 10, 1995, letter provided sufficient notice to claimants that the MUSTFA Fund was changing its policy regarding enforcement of the 14-day appeal period. The court opined that, although the letter referred to the statutory 14-day appeal period, nothing in the letter purported to advise recipients that the MUSTFA Fund intended to change its policy on enforcement of the requirement. The court, therefore, held that the letter did not constitute fair notice that the MUSTFA Fund would no longer adhere to its past practices and begin enforcing the 14-day appeal period.

The court also rejected the MUSTFA Fund's argument that it had also provided fair notice of the change through the Fund's telephone information line and Internet site because the Fund did not disclose the contents of those notices to the court, thus rendering it impossible for the court to determine whether the notices provided fair notice of the policy change.

Coca-Cola Enterprises, Inc. v. Dept. of Environmental Quality, No. 214315 (Mich. App., Aug. 1, 2000).

This article was prepared by Brian J. Negele, a partner in our Environmental Department, and previously appeared in the October, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.