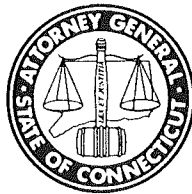


GEORGE C. JEPSEN
ATTORNEY GENERAL



55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of The Attorney General
State of Connecticut

April 8, 2014

Yvonne Bolton
Bureau of Materials Management and Compliance Assurance
Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

Dear Ms. Bolton:

Pursuant to Regulations of Connecticut State Agencies ("R.C.S.A.") § 22a-449(d)-109(e)(2), you, on behalf of the Commissioner of Energy & Environmental Protection, have asked for a written statement from this office that a guarantee or surety bond executed as described in R.C.S.A. § 22a-449(d)-109 is a legally valid and enforceable obligation in the State of Connecticut. Subject to the parameters described below, we have concluded that it is.

By way of background, R.C.S.A. § 22a-449(d)-109(d) requires all owners and operators of petroleum underground storage tank systems ("USTs") that are regulated by R.C.S.A. §§ 22a-449(d)-1 and 22a-449(d)-101 through 22a-449(d)-113 ("Connecticut UST Regulations"), to "demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks" Among the allowable mechanisms for demonstrating financial responsibility are a guarantee, as set forth in R.C.S.A. § 22a-449(d)-109(g), and a surety bond, as set forth in R.C.S.A. § 22a-449(d)-109(i). Pursuant to R.C.S.A. § 22a-449(d)-109(e)(2), "[a]n owner or operator may use a guarantee or surety bond to establish financial responsibility only if the Attorney(s) General of the state(s) in which the underground storage tanks are located has (have) submitted a written statement to the implementing agency that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in that state." The Department of Energy and Environmental Protection ("DEEP") is the implementing agency for the UST regulations in Connecticut.

Under the Connecticut UST Regulations, a guarantee is given to DEEP, "and to any and all third parties, and obligees." R.C.S.A. § 22a-449(d)-109(g). If the owner or operator fails to clean up a release from a UST or fails to pay a judgment or settlement for third party liability resulting from a UST release, the guarantor must, on written instructions from DEEP, fund a standby trust, which the owner or operator has already established. *Id.* A guarantee may be given by

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any of four types of entities: (i) a firm that possesses a controlling interest in the owner or operator; (ii) a firm that possesses a controlling interest in (i); (iii) a firm that is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or (iv) a firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship. R.C.S.A. § 22a-449(d)-109(g)(1). “Substantial business relationship means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued ‘incident to that relationship’ if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.” R.C.S.A. § 22a-449(d)-109(c)(13). The guarantor must meet the Connecticut UST Regulations’ financial test for self-insurance. R.C.S.A. § 22a-449(d)-109(g)(2).

The surety bond allowed by the Connecticut UST Regulations is a performance bond. R.C.S.A. § 22a-449(d)-109(i). If DEEP notifies the surety that the owner or operator failed to do a clean-up, the surety shall either do the clean-up itself or place the bond’s penal sum into the standby trust. *Id.* If DEEP notifies the surety that the owner or operator failed to compensate injured third parties, the surety shall either “perform third-party liability compensation” or place the penal sum in the standby trust. *Id.* “The surety company issuing the bond shall be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury.” R.C.S.A. § 22a-449(d)-109(i)(1).

The Connecticut UST Regulations include a form of acceptable guarantee, R.C.S.A. § 22a-449(d)-109(g)(3), and a form of acceptable surety bond, R.C.S.A. § 22a-449(d)-109(i)(2). These forms are identical to those found in the federal UST regulations, 40 Code of Federal Regulations (“C.F.R.”) §§ 280.96(c) (guarantee) and 280.98(b) (surety bond). When the Environmental Protection Agency (“EPA”) promulgated these regulations, it made clear that it was requiring the statement by the State Attorneys General as to validity and enforceability of the guarantee and the surety bond to insure that the instruments satisfied State law governing contracts and insurance. *See* Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements, 52 Fed. Reg. 12786, 12809 – 12815 (Proposed Rule, Apr. 17, 1987); 53 Fed. Reg. 43322, 43338 – 43340, 43345 – 43346, 43353 – 43354 (Final Rule, Oct. 26, 1988). “By legally valid and enforceable, the Agency [the EPA] means that (1) the instrument satisfies the necessary contractual formalities of the State’s laws; (2) it satisfies the requirements for exclusion from regulation under the State’s insurance laws; and (3) the procedures for drawing on the instrument found in § 280.108 of the

proposed rule [R.C.S.A. § 22a-449(d)-109(s)] will be effective in the State.” 52 Fed. Reg. 12786, 12803 (Proposed Rule, Apr. 17, 1987).

Whether any particular contract, as executed, is a valid contract under State law necessarily turns on the facts of each case. To have a valid contract under Connecticut law there must be, among other things, offer and acceptance, meeting of the minds, consideration, parties competent to contract, and proper subject matter. *See Finlay v. Swirsky*, 103 Conn. 624 (1925). Contracts may be invalid because they are unconscionable, or entered into pursuant to fraud or under duress. *See Hottle v. BDO Seidman, LLP*, 268 Conn. 694 (2004). The presence or absence of these elements in any given case will turn on the specific facts of each transaction; however, assuming that all the elements of a valid contract are in place, and that there are no valid defenses to the contract, the forms of guarantee and surety bond set forth in R.C.S.A. §§ 22a-449(d)-109(g) and 22a-449(d)-109(i), respectively, are valid and enforceable in Connecticut.

Under the Connecticut Unauthorized Insurers Act, an “insurer” is any entity that is “engaged as [a] principal[] in the business of insurance” Conn. Gen. Stat. § 38a-271(a). Among the acts that constitute “doing an insurance business” is “the making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety” *Id.* Thus, an entity that gives a guarantee or surety bond under R.C.S.A. §§ 22a-449(d)-109(g) or (i), will not run afoul of this provision if the entity is a licensed insurer in Connecticut or the guarantee or surety bond is made “incidental to other legitimate business or activity of the guarantor or surety.”

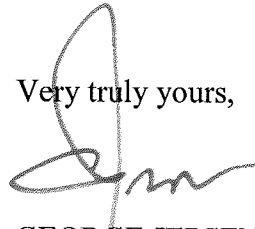
Whether DEEP may draw on the instrument of guarantee or surety bond is a function of whether DEEP is a third party beneficiary entitled to enforce the instrument. Under Connecticut law, the creation of third party beneficiary rights turns on whether “the contracting parties intended that the promisor should assume a direct obligation to the third party.” *Grigerik v. Sharpe*, 247 Conn. 293, 315 (1998) (internal quotation marks and citation omitted). The forms of guarantee and surety bond set forth in R.C.S.A. §§ 22a-449(d)-109(g) and 22a-449(d)-109(i), respectively, make clear that the contracting parties intend the guarantor or surety, as the case may be, to have a direct obligation to DEEP, namely to fund the standby trust on DEEP’s written instruction. Thus, the procedures for DEEP drawing on the guaranty or surety bond are effective in Connecticut.

In conclusion, guarantees and surety bonds executed as described in R.C.S.A. §§ 22a-449(d)-109(g) and 22a-449(d)-109(i), respectively, are valid and enforceable in Connecticut provided: (a) the guarantee or surety contract satisfies the specific requirements of the Connecticut UST Regulations for these

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instruments; (b) the guarantee or surety contract meets all the elements of a valid contract, including the element of consideration, and there are no valid defenses to the contract; and (c) the guarantee or surety contract is either made in this State by an authorized insurer or, if made in this State by an entity other than an authorized insurer, is merely incidental to legitimate business or activity of the guarantor or surety.

Very truly yours,

A handwritten signature in black ink, appearing to read "G. Jepsen", written over a vertical line.

GEORGE JEPSEN
ATTORNEY GENERAL

GJ/ket