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Recent Spill Act Opinion Is Clear, But Leaves Unanswered Questions

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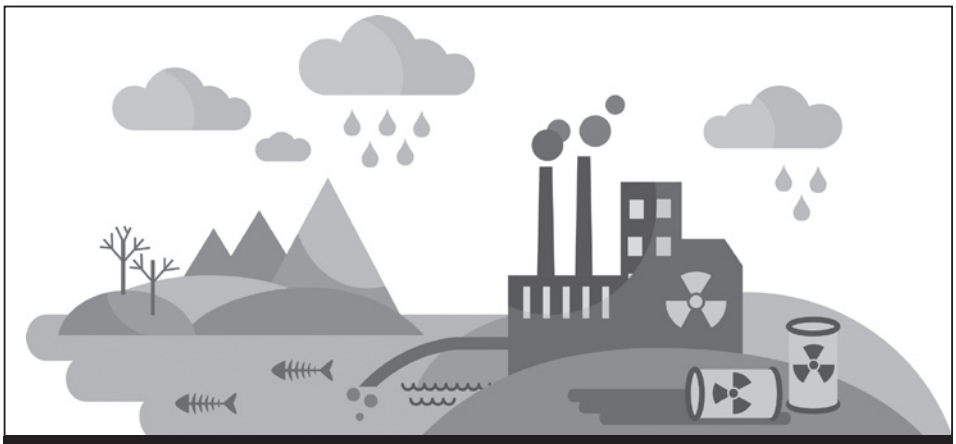

One issue the court left open for another day is the treatment of the DEP's approval of remediation costs.

Magic Petroleum Corp. v. Exxon Mobil Corp., A-46-12, decided July 28, presented the Supreme Court of New Jersey with the opportunity to consider the interplay in the site remediation process between the New Jersey Department of Environmental Protection (DEP) and the courts. As anticipated, the court reaffirmed that the courts are the proper forum to adjudicate liability among potentially responsible parties in a contribution action brought pursuant to the New Jersey Spill Compensation and Control Act (Spill Act). The opinion is clear and concise, but left unanswered several important practical concerns.

In *Magic*, the trial court dismissed without prejudice a Spill Act contribution action brought against a neighboring property owner whose contamination allegedly had migrated onto the plaintiff's property. Notwithstanding completion of discovery, including the exchange of expert reports, the defendant moved either to stay the proceedings or for dismissal without prejudice until the DEP completed its investigation on the plaintiff's property. Applying the doctrine of primary jurisdiction, the court reasoned it would be more prudent to allow the DEP to delineate the contamination and establish a remediation plan before the court adjudicated whether and, if so, to what degree the defendant was responsible for contaminating the plaintiff's property. Accordingly, the Law Division dismissed the case without prejudice.

On review, the Appellate Division affirmed. In applying primary jurisdiction, the court held that "the scope and nature of [the] liability [of the parties] must be determined…" "prior to adjudicating the[ir] possible liability…." It observed specifically that "only the DEP can define the contaminants, determine the extent of the discharge, [and] identify the authorized forms of investigative testing and the permissive methodology of cleanup," holding that these determinations need to precede initiation of a contribution action and the resulting judicial allocation of liability. Importantly, the Appellate Division also affirmed dismissal because the plaintiff had not yet obtained "written approval from the DEP of the investigation and proposed remedial action," a prerequisite under the Spill Act for the "proper [ ] determin[ation]" of contribution liability.

The Supreme Court reversed the Appellate Division and remanded the case, holding that "primary jurisdiction is not applicable in the setting of this contribution claim." The court allowed the contribution plaintiff to bring its claim and obtain an equitable allocation of liability before completion of the investigation and remediation of its site, determining that the right to obtain contribution does not depend on completion of this work. Similar to the Appellate Division ruling, the court held that a party could not obtain judgment for the costs it had expended on remediation unless and until the DEP approved them in writing.

The Supreme Court rested its holding on several lines of reasoning, certain of which are more persuasive than others. First, the court explained that, because the DEP may bring a Spill Act claim against a responsible party before determining the full extent of contamination, a private entity should be able to proceed likewise in contribution. While there is no explicit support for this proposition in the Spill Act, it makes good sense and is consistent with the practice applied to cost recovery actions in federal court brought pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the federal analog to the Spill Act.

Second, the court reasoned that the Spill Act provides the courts, not the department, with jurisdiction to adjudicate Spill Act contribution claims. While this assertion certainly is true, neither the litigants nor the courts below had suggested to the contrary; the question presented was not whether exclusive primary jurisdiction vests authority with the DEP to adjudicate a Spill Act contribution claim—it doesn't—but whether judicial allocation should abide the DEP's determination of certain environmental facts.

The third basis of the court's holding is that "contribution claims do not necessitate the expertise of the DEP," stating that "assigning liability is a matter within the

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conventional experience of judges." This proposition, a corollary of the principle that jurisdiction to allocate liability rests with the courts, also is true as courts frequently are called upon to weigh complex scientific considerations. Yet this proposition similarly was never contested below, where both the litigants and courts recognized that the courts are the proper forum to ascertain liability. Rather, both the trial and appellate courts simply held that it made more sense to allow the DEP to determine certain environmental facts—which contaminants need to be remediated, how far they extend and what cleanup method is most appropriate—before allocating contribution. Those courts reasoned—explicitly at the trial court, implicitly in the Appellate Division—that liability is best allocated based on the fullest environmental record possible. The Supreme Court reasoned, however, that courts may allocate liability based on expert testimony, "a trial component with which judges are intimately familiar."

The court's final stated reason for reversing the decision of the Appellate Division is probably the most consequential: to foster prompt site remediation. Allowing a plaintiff to pursue other responsible parties early in the site remediation process incentivizes other responsible parties to participate earlier as well, thereby facilitating more and faster clean-ups. The alternative—to require a plaintiff to complete and pay for the remediation before being able to seek contribution—not only unfairly burdens that party, but also results in much slower remediation, or none or all, since many responsible parties lack the resources to perform it. This appears to have been the case with the plaintiff in *Magic*. Pragmatism thus guided the court's thinking.

Interestingly, the court adopted a four-part test from an Appellate Division opinion as the basis for determining primary jurisdiction. Implicit in that test is an acknowledgment that primary jurisdiction is an equitable doctrine rather than black-letter law. *Alliance for Disabled in Action v. Continental Properties*, 371 N.J. Super. 398 (App. Div. 2004), citing *Boldt v. Correspondence Management*, 320 N.J. Super. 74 (App. Div. 1999). The court expressed its holding in broad prescriptive terms—that a Spill Act contribution action may be brought "before the final tally of cleanup costs." Unaddressed was whether the discretion afforded a trial court under primary jurisdiction would warrant deferral of certain issues to the DEP before adjudicating liability. In *Magic*, neither the trial court nor the Appellate Division held, as the opinion suggests, that the "final tally" of costs was needed before the plaintiff's contribution action would be allowed to proceed; rather, each court below believed it was important to first obtain the DEP's views on environmental issues, not the cost of remediation. The importance the court ascribes to the prompt cleanup of contaminated sites no doubt motivated it to express its holding in broad terms.

One important practical issue the court commented upon is whether liability in a Spill Act contribution action is several only or joint and several. In fact, the very first question posed by the court at oral argument was whether counsel saw a difference between the joint and several liability applicable in an action brought by the DEP pursuant to the Spill Act, when compared with a Spill Act private cause of action which is "probably only for several liability." The question was noteworthy as the issue was not raised at either the trial or appellate level.

In *NJDEP v. Dimant*, 212 N.J. 153 (2012), the court conflated the cost-recovery and contribution sections of the Spill Act, an imprecision that has led at least one court to conclude that liability in a contribution action is joint and several, rather than only several. See, e.g., *Allwood Investment Co. v. Jogan Corp.*, PAS-L-1847-10 (Law Div. 2013) (unpublished). To the contrary, the vast majority of courts that have addressed this issue have determined that liability in a Spill Act contribution action is several only, a determination with which the *Magic* court apparently agreed. The court was no more definitive than that, however, no doubt because the issue was neither addressed below nor necessary to the outcome. As the *Jogan* decision illustrates, however, resolving this question is essential to the parties and courts who litigate Spill Act contribution actions.

One issue the court left open for another day is the treatment of the DEP's approval of remediation costs. First, the court held that DEP written approval of remedial costs is not a prerequisite to the filing of a contribution action. In so doing, the court again distinguished allocation of liability from recovery of costs, reasoning implicitly that the court is capable of allocating responsibility absent a determination of approved costs and explicitly that "mandating written approval prior to the filing of a contribution claim would thwart…expeditious and efficient remediation." This reasoning is consistent with the already stated ideas that prompt allocation is within the competence of the courts and will foster site remediation.

Yet the opinion goes on to state "it is clear that [the Spill Act] limits clean up and removal costs to only those costs approved by the DEP" and observes that "dischargers are required to have written approval for the actual expenses that they incur for the purpose of remediation in order to seek contribution for those expenses…." In so stating, the court failed to grapple with the argument of the amici that the provision in question was enacted before the Spill Act amendment which allowed a private cause of action, and thus should not be read quite so prescriptively. More importantly, the court effectively ignored the recent enactment of the Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq. This statute eliminates the oversight of the DEP in favor of Licensed Site Remediation Professionals (LSRPs) in all but a small minority of site remediation cases. Thus, as a practical matter, the DEP no longer conducts its own site investigations, as it was poised to do on the Magic Petroleum property, nor does it approve the preparation of investigatory or remedial plans. Most significantly, the DEP no longer approves the costs of remediation; it relies instead on the LSRP to determine the anticipated cost, and neither the DEP nor the LSRP approves the "actual expenses" that have been incurred by a remediating party. The court's failure to address the impact of this recent amendment is perhaps understandable in that the issue was not raised below, but it was squarely identified in the petition for certification, the briefs of the amici, at oral argument and even in the opening pages of the opinion.

In remaining silent, the court left to future cases how to address this element of private Spill Act actions. The court, however, failed to direct the trial court on remand to consider either the need for such DEP approval or whether the determination of the LSRP substitutes for that of the department. That failure introduces uncertainty into the determination of actual remedial costs. Courts often need to decide how much guidance to provide litigants, counsel and lower courts in an opinion. By not addressing the continuing role of DEP approval, the court left that issue open for future litigation.■