



# Bad Tanks Make Bad Neighbors: Appellate Division Approves Equitable Sharing of Costs to Investigate Underground Storage Tank Leak at Condominium

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In a recent decision, the Appellate Division upheld a Chancery Division injunction ordering five neighboring condominium owners to share the costs of investigating a discharge before the plaintiff condominium owner could demonstrate which, if any, of its neighbors contributed to the contamination. Matejek v. Watson, 449 N.J. Super. 179 (App. Div. Mar. 3, 2017). The Appellate Division ratified the trial court's "inventive solution" to the common dilemma of assigning responsibility to investigate pollution where it is not known which party caused it. Although the Matejek courts invoked their equitable powers to require all parties to share in the cost of an investigation and remediation, this decision does not relieve parties seeking contribution under the Spill Compensation and Control Act ("Spill Act") of their burden to ultimately prove the defendant's nexus to the contamination.

In this case, the NJDEP found oil in a stream behind the condominium in 2006. NJDEP responded by removing each of the underground storage tanks from five adjacent condominium units. However, NJDEP did not determine which tank or tanks had leaked and contaminated the stream. To dispel the cloud on their title from NJDEP's open file on the matter, the Matejeks, owners of one unit, sought an injunction compelling their four neighboring owners to share the cost of investigating and remediating the discharge. The Chancery Division agreed with the Matejeks and ordered the parties to hire a Licensed Site Remediation Professional ("LSRP") to investigate and, if necessary, remediate, with the costs shared equally among the five neighbors.

Affirming the injunction, the Appellate Division rejected the objecting neighbors' argument that they could not be

compelled to contribute without proof that the underground storage tank attached to their particular unit had leaked. Despite implicitly agreeing with the defendants' argument that recovery under the Spill Act required proof of a nexus between the discharge and the alleged discharger, see New Jersey Department of Environmental Protection v. Dimant, 212 N.J. 153 (Sup. Ct., Sep. 26, 2012), the court nevertheless "found the circumstances did not preclude imposition of an equitable remedy by which that evidence [of a nexus] might be revealed." The court determined that an injunction compelling all the neighbors to contribute equally to the investigation was appropriate because, without that injunction, the Matejeks would "solely bear the expense of investigation and remediation" before they could seek contribution from their neighbors under the Spill Act. Furthermore, as the trial court noted, the fact that DEP removed each of the neighbors' underground storage tanks sufficiently connected the neighbors to the contamination such that they could be compelled to participate in the investigation.

Despite the court's refusal to require that the Matejeks prove their neighbors' tanks leaked, Matejek does not necessarily deviate from the New Jersey Supreme Court's holding in Dimant, which requires that the plaintiff prove the defendant's nexus to the discharge to recover cleanup costs under the Spill Act. The Matejek court acknowledged the possibility of future litigation depending on the outcome of the investigation. If the investigation exonerates a unit owner, that unit owner would not be liable for remediation and might even recoup its share of the investigation costs.

Matejek continues a trend of courts looking for remedies outside the Spill Act to assist parties beginning the remediation process. For example, in Bradley v. Kovelesky, 2016 WL 4262531 (App. Div., Aug. 15, 2016), the Appellate Division permitted a current property owner to seek an Environmental Rights Act injunction ordering a prior owner to begin remediation. Under the relevant Spill Act precedents, a party beginning remediation must spend its own money before it can obtain contribution from other potentially responsible parties, which can impose significant burdens on parties who take the lead on cleanups. Matejek may mitigate this hardship in certain cases by permitting contribution claims earlier in the cleanup process while reserving a final allocation of liability for a later proceeding after the cleanup reveals the relevant facts about who caused or contributed to the contamination.

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