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Is Time Never Up for Spill Act Claims?

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Tucked into two of the final three paragraphs of an unpublished June 1999 decision by the Superior Court of New Jersey, Appellate Division, is an alarming holding concerning contribution claims brought under the Spill Compensation and Control Act, N.J.S.A 58:10-23.11 *et seq. Mason v. Mobil Oil Corp.*, No. A-885-98T1.

According to the June opinion, a cause of action for contribution for environmental cleanup and removal costs under the Spill Act, N.J.S.A. 58:10-23.11 et seq., is not subject to a statute of limitations. *Mason*, slip op. at 8. Unless this decision is modified either by judicial or legislative action, this holding will have wrested a fundamental right to security from stale claims from Spill Act contribution defendants.

The facts in *Mason* are as follows: In 1985, the plaintiffs purchased property upon which there had been a gasoline station. The plaintiffs alleged that they had been assured by their grantor that the underground tanks had been removed properly. Id at 2.

In January 1990, plaintiffs contracted to sell the property, but the prospective purchaser exercised its right to terminate the contract based upon the finding by its environmental consultant of gasoline contamination at the property. Id. at 3. Plaintiffs were advised by their attorney of these findings by letter dated April 17, 1990. Id.

In March 1996, plaintiffs filed a complaint against the grantor, three prior owners, the attorney who had represented plaintiffs when they had bought the property, and various John Does. Plaintiffs initially represented themselves. However, for reasons not specified in the opinion, they retained an attorney sometime after filing the complaint.

Counsel filed an amended complaint in October 1996, naming additional defendants and asserting additional claims. Id. at 4. One of the new defendants was Mobil Oil, against whom the amended complaint sought recovery of losses

under various legal theories, including contribution for cleanup costs pursuant to the Spill Act. Id.

Mobil successfully moved at the trial court for summary judgment on all of the claims against it on the basis of the general six-year statute of limitations provided by N.J.S.A. 2A:14-1. Id. The company argued that October 1996 - the date Mobil was named as a defendant, was greater than six years after April 17, 1990, the date plaintiffs learned of the presence of contamination on their property.

The Appellate Division agreed with the lower court's determination that, pursuant to the discovery rule, plaintiffs' action accrued on April 17, 1990. Id. Using this date, the court noted that a six-year statute of limitations would end April 17, 1996; on this basis, and with the exception of plaintiffs' claim for contribution under the Spill Act, the *Mason* court affirmed dismissal of all claims against Mobil. Id. at 8.

In its discussion of the non-contribution claims, the court voiced disapproval of plaintiffs' dilatory conduct, making statements such as, "[w]e are constrained to note the lack of plaintiffs' diligence here," and "*t is no answer for plaintiffs to say they were unrepresented.*" *Id. at 7. The court also seems reverent to the right of a defendant to be free, at some point, from the threat of litigation: "[t]he concept of relation back after the running of the statute of limitations runs counter to the principles of repose on which the statute is based." Id.*

Court Makes an About-Face

Surprisingly, the court then performed a startling about-face regarding the Spill Act contribution claim. It observed that "[c]ontribution to remediation stands on a different footing altogether," and concluded that the general six-year statute of limitations does not apply to a Spill Act contribution claim. Id. at 8.

The *Mason* court reasoned, first, that the contribution defendant is entitled only to the defenses of "an act or omission caused solely by war, sabotage, or God, or a combination thereof" provided by N.J.S.A. 58:10-23.11g.d. Then, relying upon its earlier decision in *Pitney Bowes, Inc. v. Baker Indus., Inc.*, 277 N.J. Super. 484 (App. Div. 1994), the *Mason* court held that the effect of the Spill Act's provisions "was the abrogation, in private contribution actions, of the defense that a statute of repose...barred the action," the *Mason* court held that the same reasoning applied a fortiori to a statute of limitations. Id. at 8-9. (In Pitney Bowes, the Appellate Division held that the effect of the Spill Act's provisions "was the abrogation, in private contribution actions of the defense that a statue of repose ... barred the action.")

Thus, the court not only rejected Mobil's argument that a six-year statute of limitations applied, but it held that no limitations period at all applies to contribution claims brought under the Spill Act.

The Appellate Division's reasoning and holding in *Mason* is flawed for several different reasons. The court failed to appreciate that:

- the Spill Act's specific defenses do not preclude a statute of limitations defense;
- application of a six-year limitations statute to private contribution claims would promote efficient operation of the statute;
- the Pitney Bowes decision is clearly distinguishable; and
- allowing such claims to be asserted without any statute of limitations would run contrary to formidable policies underlying limitations periods.

Of course, the *Mason* court is correct that N.J.S.A. 58:10-23.11g.d(1) provides an explicit list of defenses available to Spill Act defendants. Properly read, however, these defenses are substantive defenses, or defenses that allege that a claim has not arisen. This provision operates to prevent assertion of other defenses based upon, for example, acts of vandals, third party obligations, or divisible harm.

The Spill Act does not, however, forbid use of procedural defenses, or defenses alleging that a claim has been extinguished. Surely it would be absurd to conclude, for instance, that a defendant on whom a complaint had not been served properly was liable for contribution to a plaintiff because the Spill Act had eliminated the procedural defense of improper service of process. A sensible reading of the statute would not impute such a drastic departure from the established right to procedural defenses.

Incorrect Interpretation

Examination of the federal cousin of the Spill Act, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. ?9601 et seq. (CERCLA), reinforces the good sense of this interpretation. As with the Spill Act, CERCLA provides that the only substantive defenses available to defendants are an act of God, act of war, act or omission of a third party, or a combination thereof. 42 U.S.C. ?9607(b).

Despite this list, actions brought under CERCLA also are subject to statutory limitations periods. 42 U.S.C. ?9613(g). Congress was obligated to include limitation periods in the statute in light of the lack of a general federal statute of limitations.

Such is not the case in New Jersey, however. Our State's general statute of limitations, N.J.S.A. 2A:14-1, obviates the need for such an explicit provision in the Spill Act. A contribution claim brought under the Spill Act, which seeks redress from the same wrongs and is subject to similar defenses as CERCLA, should, like CERCLA claims, also be subject to a limitations period.

The argument that a statute lacking an explicit limitations period should not have one applied to it was proffered unsuccessfully by the plaintiff in *New West Urban Renewal Co. v. Westinghouse Electric Corp.*, 909 F. Supp. 219 (D.N.J. 1995).

In *New West*, the plaintiff made the argument in an attempt to impose the costs of complying with the Environmental Cleanup Responsibility Act (ECRA) - predecessor of the Industrial Site Recovery Act (ISRA) - on the seller of property purchased ten years before suit was filed. 909 F. Supp. at 227.

Since the state was not bound by a statute of limitations under ECRA, the *New West* plaintiff argued, a private party similarly should not be so bound. Id. The court rejected the argument, explaining that the common law doctrine allowing a sovereign to assert claims without respect to a limitations period was based upon the concept that the sovereign was "too busy protecting the interests of [its] people to keep track of [its] lands and to bring suits to protect them in a timely fashion." Id. "Conversely," observed the District Court, "a private actor...is not charged with maintaining the welfare of any entity other than itself." Id.

Thus, the *New West* court held that a limitations period should be applied to the private claim. Id. at 228. Applying the well established rules that a limitations period should be engrafted upon a statute where none is provided, and that the most appropriate period would be the one applicable to an action seeking comparable relief at common law (see *Montells v. Haynes*, 133 N.J. 282 (1993); *New West Urban Renewal Co. v. Westinghouse Elec. Corp.*, 909 F. Supp. 219, 228 (D.N.J. 1995); *Ridgewood Bd. of Educ. v. N.E.*, 172 F. 3d 238, 251 (3d Cir. 1999)), the *New West* court applied the six-year limitations period associated with a common law environmental tort claim. Id.

Like the claim in *New West*, the statute of limitations which is most closely analogous to environmental contribution claims brought under the Spill Act is the one set forth in N.J.S.A. 2A:14-1, i.e., six years for "[e]very action at law for trespass to real property" and for "any tortious injury to real...property." In fact, the United States District Court for this district already has applied this six-year limitations period to a Spill Act contribution claim. *Kemp Indus. V. Safety Light Corp.*, 1994 WL 532130 at *27, 30 (D. N.J. 1994).

This general statute of limitations has also been applied to the conceptually similar claim of insurance coverage for environmental costs, *Crest-Foam Corp. v. AETNA Ins.Co.*, 320 N.J. Super. 509 (1999), in addition to imposition of ISRA costs in *New West*. Thus, there is support by analogy for application of the six-year statute of limitations to Spill Act private contribution claims.

Application of the six-year statute to Spill Act contribution claims also effectuates the goals of the Act's contribution provision. As stated by the legislature and recognized by the *Pitney Bowes* court, the contribution provision strives to avoid delay and ensure prompt remediation. See Senate Environmental Quality Committee Statement to L.1991,

c.372; 277 N.J. Super. at 487. The six-year statute of limitations provides plaintiffs time to locate defendants, while at the same time avoids the expense and potential ineffectiveness and, indeed, prejudice, of stale litigation.

Thus, with no statute of limitations, a defendant could be called upon to defend cleanup cost claims where the remediation has taken place decades earlier. See *Kemp Indus.*, 1994 WL 532130 at *30. The *Kemp* court recognized that the vast number of Spill Act contribution claims that would ensue from interpreting the private contribution provision to be free from any time bar could not, "absent a legislative expression to the contrary," be presumed to have been the legislature's intention. Id.

The *Mason* court also places tremendous reliance upon its *Pitney Bowes* decision without acknowledging a significant difference between the two cases. *Mason*, slip op. at 8-9. In *Pitney Bowes*, the defendant argued that the ten-year statute of repose should defeat plaintiff's claim because the alleged improper installation of tanks occurred more than ten years prior to institution of the claim. *Pitney Bowes*, 277 N.J. Super. at 486.

The court correctly recognized that application of the statute of repose (which prevents a cause of action from ever arising if suit is not brought within a specified period, *Ebert v. South Jersey Gas Co.*, 157 N.J. 135, 138 (1999)), could impair the effectiveness of the Spill Act's contribution provision because a statute of repose is not subject to the discovery rule. 277 N.J. Super. at 490.

A statute of limitations, by contrast, is subject to the discovery rule. Thus, the concerns addressed in Pitney Bowes are not present in a Spill Act contribution action because, pursuant to the discovery rule, a cause of action for contribution in an environmental case generally will not accrue until the plaintiff has or should have discovered the harm. See *Vispisiano v. Ashland Chem. Co.*, 107 N.J. 416, 428-29, 436 (1987). Accordingly, reliance on the *Pitney Bowes* decision in *Mason* is misplaced.

Analysis

Statutes of limitation represent deliberate mechanisms placed into our judicial system to ensure such fundamental goals as notice to defendants of potential claims, security and stability in human affairs, fairness, and protection from stale claims. Statutes of limitation also penalize dilatoriness and stimulate plaintiffs to activity.

Each of these considerations is essential to the effective operation of the Spill Act's contribution provision, and should not be cast aside. A more sensible reading of the Spill Act, and one which comports with the Legislative intent and general practice, would compel application of the general six-year statute of limitations codified at N.J.S.A. 2A:14-1 to private claims for contribution of cleanup and removal costs.

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