



New Jersey Courts Remain Firm on Liability for Pollution but Require Proof of Defendants' Responsibility for Contamination

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Introduction

Review of environmental law decisions issued this past year by New Jersey and local federal courts reveals continuing staunch adherence to traditional statutory strict liability principles. Consistent with well established Supreme Court of New Jersey authority, courts continued to construe strictly the liability provisions of environmental statutes and to limit the availability of affirmative defenses provided thereunder. On the other hand, perhaps in an attempt to soften the results that often flow from this severe liability scheme, courts in several opinions undertook a somewhat more searching inquiry into whether plaintiffs had met their burden of proof in establishing defendants' liability.

Historically, beginning with its 1983 landmark decision in N.J. Department of Environmental Protection v. Ventron Corp., 94 N.J. 473 (1983), the Supreme Court of New Jersey has remained steadfast in holding liable, under strict liability theories, defendants charged with responsibility for environmental contamination. Two years ago, the State's lower courts initiated a modest retreat from the mechanistic application of strict liability and re-introduced negligence elements into the liability analysis. Most notable in these decisions was the courts' deeper examination into the circumstances under which defendants were being charged with liability. As a result, parties alleged to be responsible for contamination, and who appeared to fall under the broad liability net cast by New Jersey environmental statutes, escaped liability. See "New Directions in Environmental Law" by Dennis J. Krumholz, published in the *New Jersey Law Journal*, October 27, 1997, Vol. 6, No. 43.

In two decisions last year, however, the Supreme Court again reiterated its firm stance on liability for

environmental contamination by holding strictly liable parties who had somewhat limited ownership or control over property where a discharge of hazardous substances occurred. Marsh v. N.J. Department of Environmental Protection, 152 N.J. 137 (1997) and N.J. Department of Environmental Protection v. Alden Leeds, Inc., 153 N.J. 272 (1998). In the Marsh and Alden Leeds decisions, the Supreme Court firmly rejected the substitution of a fault standard in place of strict liability. See "Supreme Court of New Jersey Remains Firm on Liability for Pollution" by Dennis J. Krumholz, published in *The Metropolitan Corporate Counsel*, November 1998.

Taking their lead from the Supreme Court's demonstrated commitment to impose strict liability upon those who own or are in control of property from which harmful pollutants escape and cause harm, this past year New Jersey and local federal courts again have broadly construed liability under environmental statutes and narrowly interpreted affirmative defenses. However, in an effort to temper or avoid the sometimes painful results which arise from imposition of strict liability, several opinions this year found plaintiffs unable to factually support their claims with sufficient proof of defendant's responsibility.

Strict Liability Remains The Rule

In High Tech Fuels, Inc. v. 157 Gould Avenue Associates, Docket No. A-6937-96T1, A-7060-96T1 (App. Div. Jan. 12, 1999), the Appellate Division affirmed the decision of the trial court holding defendants, including the shareholder of the site owner and operator, liable under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. Upon finding that the shareholder was a "hands-on" operator of the gas station, whose activities included pumping gas and measuring gas levels in the on-site storage tanks, and coupled with the fact that the shareholder drained the corporate site owner of its major assets, the trial court determined that it was appropriate to pierce the corporate veil and impose personal liability on the shareholder.

The Appellate Division, in affirming the trial court's decision, found that it was not necessary to pierce the corporate veil in order to impose personal liability upon the shareholder. Given the shareholder's daily involvement in the operation and management of the property, his status as sole shareholder and receipt of money when he sold the property, the shareholder defendant was determined to be a "responsible party" under the Spill Act. Following last term's Supreme Court decision in Marsh, the High Tech Fuels court found that ownership or control over the property at the time of a discharge was sufficient to hold that party responsible for the discharge of hazardous substances.

In Mason v. Mobil Oil Corp., Docket No. A-885-98T1 (App. Div. Jun. 8, 1999), the Appellate Division narrowly interpreted the defense provisions of the Spill Act to hold that there is no statute of limitations for a Spill Act contribution claim. After finding that plaintiffs were entitled to contribution pursuant to N.J.S.A. 58:10-23.11 f(a)(2), the court held that defendants were entitled only to those defenses specifically provided by statute ? "an act or omission caused solely by war, sabotage, or God, or a combination thereof" See N.J.S.A. 58:10-23.11 g(d).

Relying entirely upon its earlier decision in Pitney Bowes, Inc. V. Baker Indus., 277 N.J. Super. 484, 488 (App. Div. 1994), the Appellate Division held that the effect of the contribution provisions of the Spill Act is to abrogate the statute of limitations defense against a statutory claim for contribution. The holding in Mason aptly illustrates the rigorous adherence of our appellate courts to the strict liability provisions of the Spill Act and their reluctance to allow respite under the law to parties against whom liability for contamination is asserted.¹

The United States District Court for the District of New Jersey examined the "innocent landowner" defense under the Comprehensive Environmental Response Comprehensive Liability Act ("CERCLA") in Grand Street Artists v. General Electric Company, 28 F. Supp. 2d 291 (D.N.J. 1998). There, plaintiff Grand Street Artists, a partnership comprised of 17 ownership interests, purchased a building in Hoboken. Each of the 17 partnership interests was to obtain ownership to an individual unit following conversion of the building to condominiums. After the partnership purchased the property, but prior to purchase by the partners of their individual units, the partners became aware of the presence of mercury at the property. While it was believed initially that remedial steps could be taken to contain the contamination, the individual unit owners ultimately were forced to evacuate their condominium units and be permanently relocated.

The individual unit owners sought a declaration from the court that each was entitled to assert the "innocent landowner" defense and, accordingly, were not liable under CERCLA in their capacity as current site owners. As non-labile parties, the owners would have been able to pursue a cost recovery claim against the responsible parties for the full amount of damages rather than be limited to a claim for contribution. The "innocent owner" defense to liability under CERCLA applies in the limited circumstance when a landowner acquires property without knowledge or any reason to know about the presence of contamination.

The court in Grand Street Artists looked to the plain meaning of CERCLA to determine the relevant date for assessing knowledge of the contamination. The Court rejected the owners' argument that the date the partnership purchased the building, when the partners had no knowledge of the presence of mercury, should be the operative date for determining knowledge of contamination. Instead, the court held that the date each individual unit owner acquired its unit, i.e., following their learning of the contamination, was the correct date for determining their knowledge. The court acknowledged that strict application of CERCLA under these circumstances appeared to lead to an inequitable result because it was clear that it was the intent upon purchase of the building by the partnership that the individual units thereafter would be sold to the partners themselves. However, in reiterating its unwillingness to deviate from the judicial policy of narrowly construing affirmative defenses under the statute, the Court nonetheless hinted that equitable factors would be considered carefully during adjudication of plaintiffs' contribution claims. While Grand Street Artists thus further illustrates adherence to a strict liability approach, it also suggests the willingness of courts to carefully scrutinize facts in an effort to fairly apportion liability.

Defendants' Liability Must Be Proven With More Than Mere Speculation

While continuing to scrupulously apply strict liability principles and limit legal defenses, several courts this term carefully scrutinized whether plaintiffs were able to prove their cases against defendants with more than speculation or hypothesis. While certainly not a retreat to fault-based liability, courts in several cases excused defendants from liability where plaintiffs had not factually supported their allegations. Thus, courts made a point of carefully examining the facts, including the bases of expert opinions, before having to apply strict liability precepts.

For example, in Bitar v. M.R.W., Inc., Docket No. A-6802-96T1 (App. Div. July 31, 1999), the Appellate Division upheld the grant of summary judgment on behalf of defendant dry cleaner where plaintiff's expert "provided supposition as to how and why contamination might have come to plaintiff's property, but actual testing to support [the expert's] hypothesis was not done." In the absence of technical evidence establishing that contamination originated at the dry cleaner, plaintiff was unable to support its claims and, as a result, defendant dry cleaner was held not liable under the Spill Act.

In Louis Lefkowitz and Brother, Inc. v. Harleysville Mutual Ins. Co., Docket No. A-280-9755 (App. Div. June 19, 1998), certif. den., 156 N.J. 425 (1998), the Appellate Division rejected plaintiff's expert report connecting the defendant, plaintiff's predecessor in title to industrial property, to groundwater contamination at the site. Once plaintiff's expert report was rejected, the court had no trouble granting summary judgment for the defendant and dismissing the complaint.

Plaintiff's expert report in Lefkowitz relied upon one essential fact, i.e., that contamination of groundwater at the site stemmed from defendant's use of a degreasing shed used to degrease metals as part of its manufacturing process. The expert based its report in part on regulatory records maintained by the New Jersey Department of Environmental Protection ("NJDEP") which characterized two buildings on the property as "degreasing sheds." However, the court found that there was no factual evidence to support this characterization, and it concluded that plaintiff provided insufficient proof that defendant conducted degreasing operations at that location. Moreover, the court found inappropriate the expert's attempt to link the use of the sheds to degreasing operations based merely upon the discovery of volatile organic compounds in the soil and groundwater beneath the sheds.

Because the plaintiff introduced insufficient evidence of defendant's use of the sheds, the court held that no proof existed that defendant's conduct caused the contamination. Upon finding evidence lacking to support defendant's responsibility for a discharge, the court held "[o]wnership of property, alone, under which there is later found contaminated groundwater is not a basis for Spill Act Liability without proof of a discharge which caused the contamination." Accordingly, the Appellate Division held that summary judgment in favor of the defendant was appropriate. What is most significant about this noteworthy opinion is the court's diligent scrutiny of the facts which

underlay the opinion of plaintiffs' expert, and its willingness to reject a claim against a prior landowner where its specific pollution-causing activities could not be proven.

Conclusion

New Jersey and local federal courts this past year continued to unsparingly interpret environmental statutes, including expansive use of strict liability and a constricted interpretation of statutory affirmative defenses. As with several decisions in the recent past, however, many courts appear to be struggling to bring balance to the liability equation by their exacting scrutiny, and sometimes rejection, of plaintiffs' insufficient factual proofs.

¹ The Mason opinion warrants special consideration. The holding that there is no statute of limitations applicable to contribution claims brought under the Spill Act seems to lack support in both law and common sense.

It is a principle of New Jersey law that, where statutes are silent as to the applicable statute of limitations, courts are directed to select a limitations period from among these statutes of limitations for actions seeking comparable relief at common law, including the general six year statute of limitations found at N.J.S.A. 2A:14-1. Indeed, a federal district court has applied the general statute of limitations to bar a contribution claim brought under the Spill Act. Kemp Industries v. Safety Light Corp., 1114 WL 532130 (D.N.J. January 24, 1994).

The language of the Spill Act limiting the contribution defendant to only those defenses available to defendants in government-brought claims would seem to be intended to apply to substantive defenses to liability, and not to a procedural bar such as the statute of limitations. Put differently, the Spill Act limits defenses that a claim has not arisen, such as divisibility of harm or acts of omissions of third parties, but not defenses alleging the extinguishment of the claim, such as a settlement and release or statute of limitations. While CERCLA, the statute to which the Spill Act is most directly analogous, contains a specific statute of limitations, no doubt this provision was included because, unlike New Jersey law, no general federal statute of limitation had been adopted at the time CERCLA was enacted.

Finally, it is folly to allow contribution claims to be brought without time limit after environmental injuries become known and after a party first incurs remedial costs and the claim for contribution accrues. Under Mason, finality has been eliminated, and all incentive to undertake cleanup and assert claims has been removed. Surely this result is not what the legislature intended when it limited the defenses available to contribution defendants under the Spill Act.

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