



# Supreme Court of New Jersey to Decide Power of Private Parties to Compel Cleanups

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The Supreme Court of New Jersey will soon decide whether private parties who have not incurred any remedial costs may use the Environmental Rights Act, [N.J.S.A. 2A:35A-1 et seq.](#), to compel responsible entities to perform environmental cleanups under the New Jersey Spill Compensation and Control Act, [N.J.S.A. 58:10-23.11 et seq.](#) (the “Spill Act”). See [Dalton v. Shanna Lynn Corp.](#), Docket No. A-4846-12 (App. Div. Nov. 6, 2015), [certif. granted](#), 223 [N.J.](#) 406 (2015). Traditionally, New Jersey courts have allowed the NJDEP to compel site cleanups without incurring costs, but have only allowed private parties to recover cleanup costs from potentially responsible parties through “contribution actions” after actually incurring some costs. If the Supreme Court allows these private entities to force potentially responsible parties to remediate environmental contamination, it would expand the universe of parties who may make a responsible entity perform a cleanup. It could also give parties additional leverage in actions over responsibility for cleanups, especially because the Environmental Rights Act allows “reasonably successful” parties to recover counsel and expert witness fees. [N.J.S.A. 2A:35A-10.](#)

In the case at hand, [Dalton v. Shanna Lynn Corporation](#), the party seeking to compel remediation purchased commercial property in 1988. Immediately following closing, the seller learned of environmental contamination emanating from an underground oil tank, but chose not to disclose this information to the purchaser. The purchaser discovered the contamination more than a decade later during reconstruction of the building on the property, but chose not to remediate it. The purchaser instead filed suit against the seller seeking, among other things, to compel the seller to perform the cleanup. The purchaser specifically argued that, even though it had not incurred cleanup costs, the Environmental Rights Act gave it the authority to compel remediation in accordance with the Spill Act. The Appellate Division, however, refused to allow the purchaser to maintain this cause of action against the seller on the grounds that the Spill Act only authorizes a private contribution cause of action against a

potentially responsible party if the party seeking contribution has incurred remedial costs.

As the Appellate Division noted, the Spill Act provides a private right of action, which is known as a contribution action, and which authorizes private parties who have incurred remedial costs to recover these costs from responsible parties. N.J.S.A. 58:10-23.11f(a)(2)(a). While New Jersey courts have allowed contribution actions to proceed prior to the completion of remediation, see Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 411-12 (2014), plaintiffs nonetheless have been required to demonstrate that they have incurred some remedial costs to maintain such an action. Bonneview Homeowners Ass'n v. Woodmont Builders, LLC, 665 F. Supp. 2d 437, 504 (D.N.J. 2009).

In papers filed with the Supreme Court, the purchaser in Dalton has argued that it is not seeking contribution from the seller and, therefore, plaintiff should not be required to demonstrate that it has incurred cleanup costs. Instead plaintiff is seeking through the Environmental Rights Act to obtain a judgment of specific performance to compel seller to perform the cleanup. The purchaser contends that it is entitled to do so because the Environmental Rights Act authorizes private plaintiffs to enforce the environmental statutes, including the Spill Act.

While there are some flaws in its argument, the purchaser asserts that the public interest requires allowing private parties to seek this relief under the Spill Act because, without the fee shifting provisions of the Environmental Rights Act, most private parties would not be able to afford the attorneys and experts necessary to pursue environmental litigation. The purchaser specifically focuses on residential homeowners, who it claims do not have the resources to compel potentially responsible parties to cleanup environmental contamination. Creating the possibility that parties can recover counsel and expert fees if successful, likely would allow more parties with limited resources to bring environmental claims.

As a final matter, it is important to note that, even if private parties may compel others to perform remediation, these private parties still may have limited control over the manner and timing of such remediation. Private parties often want to control the manner and timing of remediation because of the impact contamination can have on the sale and use of real property. Nonetheless, under current New Jersey law, Licensed Site Remediation Professionals (“LSRPs”) are responsible for overseeing the day-to-day aspects of the remediation by a responsible party, and the NJDEP has limited authority over cleanups that proceed in accordance with the generous statutory deadlines. Because of this, even if private parties can force others to perform cleanups under the Environmental Rights Act, they likely will not have the authority to control the actual mechanics of such remediation. As a result, although the Supreme Court’s upcoming decision in Dalton may have a substantial impact on environmental litigation in New Jersey, the practical results may be more limited.

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