New Jersey Law Journal

VOL. 209 - NO 3 MONDAY, JULY 16, 2012 ESTABLISHED 1878

Environmental Law

Uncertain Nature of Liability in A Private Spill Act Suit

By Dennis J. Krumholz

Remarkably, 36 years after adoption of the Spill Act, and 20 years following the 1992 amendment providing an explicit private right of action, it remains unresolved whether the liability of a defendant in a private Spill Act suit is joint and several or merely several. Until this year, the unanimous authority was that the liability of a defendant in a private-party Spill Act claim was not joint and several, but only several. In March, however, the New Jersey Superior Court held that such liability was both joint and several. *North Brunswick Township v. Avery Dennison*, MID-L-5596-09, N.J. Super., Law Div., March 1, 2012.

The Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 et seq., enacted in 1976, establishes, in what is known as "Section 8," that any discharger of a hazardous substance, or any person "in any way responsible" for any hazardous substance, "shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs, no matter by whom incurred.…" Properly read, Section 8 is limited to claims asserted by the N.J. Department of Environmental Protection (DEP) or other government agency. Accordingly, it has been the DEP that has brought claims against private parties either to compel the cleanup of improperly disposed-of hazardous substances or to seek reimbursement for monies that the department has spent to do so. In light of the explicit language, no one has doubted that the liability in these cases is joint and several.

In the 1980s, private parties who were subject to remedial obligations under the Spill Act; its federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and the then-recently-enacted N.J. Environmental Cleanup Responsibility Act (ECRA), began to assert claims against other private parties whom they believed were responsible for the contamination. *Superior Air Products v. N.J. Indus.*, 216 N.J. Super. 46 (App. Div. 1987). The act, however, does not specifically provide for a private right of action. Thus, uncertainty arose whether a private suit was authorized, see *Jersey City Redev. Auth. v. P.P.G. Indus.*, 655 F. Supp.1257, 1262-3 (D.N.J. 1987), thereby diminishing the willingness of parties to undertake and/or pay for site remediation.

To clarify a private party's right to assert a claim, the Legislature amended the Spill Act in 1991 to state that a private party may bring an action against third parties for costs it has expended to remediate a contaminated site. Section 7 of the act provides:

> Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable ... and the contribution defendant shall have only the defenses to liability available to parties pursuant to subsection d. of section 8 of P.L. 1976, c.141 (C.58:10-23.11g). In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate ....

N.J.S.A. 58:10-23.11f.a(2)(a). Section 7, unlike Section 8, does not explicitly address whether the liability of a defendant in a suit brought by a private party is joint and several or just several.

Since 1991, each opinion deciding

Krumholz is chairman of the environmental law group at Riker Danzig Scherer Hyland & Perretti LLP in Morristown.

the issue has held that the liability of a defendant in a private action is several only. *S.C. Holdings v. A.A.A. Realty*, 935 F. Supp. 1354, 1366 (D.N.J. 1996); *Reichhold v. U.S. Metals Refining*, Civ. No. 03-453, 2004 WL 3312831, *7 (D.N.J. Oct. 27, 2004); *Ford Motor Co. v. Edgewood Prop.*, Civ. Nos. 06-1278, 06-4266, 2007 WL 4526594, *7 (D.N.J. Dec. 18, 2007); *Pennsauken Solid Waste Mgmt. Auth. v. Ward Sand & Materials*, CAM-L-13345-91 (N.J. Sup. Ct., Law Div. Sept. 3, 2008). Earlier this year, however, the Law Division addressed the issue in *North Brunswick Township v. Avery Dennison,* and, not being bound by any of the earlier decisions, held that liability is joint and several.

At a minimum, the Legislature simply clarified in Section 7 that a private party was authorized under the Spill Act to bring suit to recover its remediation costs. The language the Legislature used speaks only of "contribution." By its nature, contribution is an action brought by a party which itself has been adjudged to be liable and has paid in damages more than its share. Traditionally, contribution imposes only several liability. *Restatement Second of Torts*, "Contribution Among Tortfeasors," Section 886A; see also *Dunn v. Praiss*, 139 N.J. 564, 575 (1995); *In the Matter of Reading Co.*, 115 F.3d 1111, 1124 (3d Cir. 1997). Thus, if the Legislature intended to allow a private party to bring a contribution claim against other dischargers or parties "in any way responsible for the discharge," then it seems likely that it intended liability to be several only. Given the repetitive use of the word "contribution," it is unlikely the Legislature was being sloppy or unintentional in this respect.

The most pertinent analogy is CERCLA, enacted in 1980 for the similar purpose of addressing liability for the illegal or improper disposal of hazardous materials. Section 107 of CERCLA enables the Environmental Protection Agency (EPA) to bring a cost recovery action against responsible parties for reimbursement of monies EPA has spent to clean up contaminated sites. Congress enacted an amendment in 1986 establishing Section113 of CERCLA, which grants to private parties the right to assert a claim in contribution against other responsible parties. Third Circuit opinions construing Section 107 hold that the liability of defendants is joint-and-several; *New Castle County v. Halliburton N.U.S.*, 111 F.3d 1116, 1120-1124 (3d. Cir., 1997). In contrast, under Section 113, in recognition of the plain "contribution" language, the Third Circuit has imposed several liability only. *New Castle County*, 111 F.3d at 1121.

Viewing Section 8 of the Spill Act as analogous to Section 107 of CERCLA and Section 7 as analogous to Section 113, and following the CERCLA liability scheme, would lead to the conclusion that liability under Section 7 of the Spill Act is only several.

The federal decisions addressing the nature of liability in a private suit under the Spill Act have based their conclusion that liability should be several on the following: (a) the private right of action is most analogous to an action for contribution under Section 113 of CERCLA, where liability is several only; (b) there is no mention of joint liability in the amendment to the Spill Act; (c) contribution liability traditionally existed on a several basis and the amendment to the Spill Act speaks repeatedly of "contribution;" (d) allowing a private party to bring a cost-recovery action to recover all monies spent could leave open the potential for double recovery, which is prohibited by CERCLA; and (e) to the extent CERCLA and the Spill Act are in conflict, CERCLA may pre-empt the Spill Act; thus, since Section 113 of CERCLA allows several recovery only, interpreting the private suit provision to allow joint and several recovery would create a conflict.

The decision by Special Master (and former United States District Court Judge) Lifland in *Pennsauken* carefully reviews the language of the Spill Act and concludes as well that several liability applies. First, the special master found no private right of action in Section 8, notwithstanding the language "no matter by whom incurred." Thus, a private claim may be asserted solely under Section 7, which repeatedly provides for "contribution." As the special master observed, it is presumed that the Legislature was aware of "its own pre-existing enactments," referring to the New Jersey Joint Tortfeasors Contribution Act, N.J.S.A. 2A:53A-3, which provides for several liability. Since contribution, both traditionally and pursuant to the Joint Tortfeasors Contribution Act, allows several recovery only, a private suit is limited to several liability.

In contrast, the Law Division, in the recent *North Brunswick Township* case, applied a more limited analysis in reaching the opposite conclusion. The court first observed that Section 7 does not explicitly limit a contribution claim to a pro-rata recovery, thus implicitly allowing joint liability. It then rests its holding on the language of Section 8, which requires liability to be joint and several: "to read … [the] [Act] so as to exclude joint and several liability is to conclude that the [Act] is meaningless." The essence of this decision is that the Legislature intended liability under the Spill Act to be joint and several "in all cases," *see U.S. v. Rohm and Haas,* 939 F. Supp. 1142, 1156 (D.N.J. 1996), by necessity thus including private actions. Because the *Rohm & Haas* decision applied Section 8 to a DEP claim, however, the holding should be understood in that context. Also, although not stated in its opinion, the Court may have viewed the plaintiffs as government agencies, in effect applying the liability scheme provided in Section 8.

The better interpretation of the standard of liability to be applied in a private Spill Act suit is that liability is only several, at least where the plaintiff is a responsible party. Section 7 refers to "a right of contribution" when referring to the ability of a third party to bring a claim; in the subsequent section discussing treble damages, it speaks repeatedly and exclusively of "contribution plaintiff" and "contribution defendant," and the Senate Environmental Quality Committee Statement makes similar references. The Legislature purposely used the word "contribution," which connotes only several liability. The other factors supporting this interpretation also make good sense, especially when considering CERCLA's parallel provisions and the many federal cases decided thereunder, holding liability in contribution to be several.

None of these decisions, however, addresses the situation of an innocent private plaintiff. In analogizing to CERCLA, an innocent private party is authorized to bring a cost recovery claim under Section 107, while a culpable party has been restricted to a contribution action under Section 113; Section 7 of the Act draws no such distinction. The Legislature thus

appears to have included both culpable and innocent parties in its authorization of a private suit and, as noted, its repeated use of "contribution" is best interpreted as limiting recovery to several liability, regardless of the plaintiff's innocence.

A different interpretation was suggested and rejected in *Pennsauken*. There, the special master considered whether the phrase "no matter by whom incurred" was intended to allow for a private cost recovery action under Section 8. Absent supportive legislative history, along with the subsequent addition of Section 7, the special master concluded that this phrase provides no such right. In so doing, the decision paid only brief attention to the potential distinction between cost recovery and contribution actions, concluding simply that the Legislature did not intend to establish two private rights of action.

Authority for the proposition that the Legislature created two private rights of action is scant. In Section 7, for example, the right of contribution is established both for dischargers and "persons;" "persons" in this context has not been interpreted and could well refer to a responsible party reluctant to acknowledge its liability. Nor is any support found for the notion that the liability applicable in an innocent private party action is different than in an action brought by a culpable private plaintiff. Thus, liability under Section 7 of the Spill Act, no matter the culpability of the plaintiff, is best understood as several. Presumably, the application of "equitable factors" would consider the parties' relative culpability in ultimately allocating responsibility.

Resolution of this issue is warranted, either by the Legislature or the courts. Clarity as to the liability scheme to be applied would reduce uncertainty among both responsible parties and those parties whose liability is uncertain, thereby reducing litigation and fostering the more rapid remediation of contaminated sites. ■