

## Environmental Law

### Across the Great Divide: The Statute of Limitations Debate Under the Spill Act

State appellate court needs to heal the rift

By Dennis J. Krumholz and Jaan M. Haus

A curious divide has developed in recent years between New Jersey State and federal courts regarding whether a limitations period is applicable to a private party contribution action under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11. Despite this difference of opinion, the state legislature has not addressed the issue, and no case has presented the issue to the Supreme Court of New Jersey. Resolution of this question would eliminate a source of uncertainty for litigants and their counsel, as well as reduce forum shopping based on the applicability of a statute of limitations.

#### State Court Treatment

In 1999, the Appellate Division held that a private contribution action brought

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under the Spill Act is not subject to a statute of limitations. *Mason v. Mobil Oil Corp.*, 1999 WL 33605936 (N.J. App. Div.). The *Mason* Court based its holding on two separate grounds: first, that the contribution defendant under the act is strictly limited to the defenses provided by N.J.S.A. 58:10-23.11.g.d of “an act or omission caused solely by war, sabotage, or God, or a combination thereof”; since no statute of limitations is included among the enumerated defenses, none was found to be available. The Court also relied on its decision five years earlier in *Pitney Bowes v. Baker Indus., Inc.*, 277 N.J. Super. 484 (App. Div. 1994). In *Pitney Bowes*, the Court had determined that the statute of repose — which bars after 10 years any action for damages for injury from unsafe improvements to real property, N.J.S.A. 2A:14-1.1 — and the Spill Act’s private right of contribution were in conflict. In resolving the difference, the Court held that to superimpose the statute of repose on the Spill Act would “significantly and unjustifiably” compromise the act by exempting from liability a class of persons plainly intended to be liable, that is, polluters. According to the opinion, the legislative

purpose of the contribution provision was to encourage prompt remediation by a responsible party who might otherwise hesitate to foot the bill without a right of contribution from other responsible parties. The *Pitney Bowes* Court believed this purpose was reinforced by the “broad net” cast in the act to capture all responsible parties and hold them strictly liable. The *Mason* Court determined that the same reasoning that applied to the statute of repose in *Pitney Bowes* applied a fortiori to a statute of limitations, resulting in the conclusion that none is applicable to a Spill Act claim.

While *Mason* is not controlling authority as an unpublished decision and *Pitney Bowes* addresses only a related subject, these decisions remain compelling precedent in state court nonetheless. For example, in 2008, in *Pensauken Solid Waste Management Auth. v. Ward Sand & Materials Co., Inc.*, Docket No. L-13345-91, Superior Court of New Jersey, Law Division, a Special Master was confronted with whether the general six-year statute of limitations for tortious injury to real property set forth in N.J.S.A. 2A:14-1 applies to a private contribution action under the Spill Act. Following *Mason* and *Pitney Bowes*, the Master determined that no limitations period applied to a private contribution action under the Spill Act. The Special

Master was not persuaded by defendants' reliance on *Montells v. Haynes*, 133 N.J. 282 (1993), which held that in the absence of an explicit statute of limitations, New Jersey courts are directed to select a limitations period from among those for actions seeking comparable relief at common law.

### Federal Court Treatment

In marked contrast to their state court colleagues, federal judges sitting in New Jersey have held consistently that a six-year statute of limitations applies to a private contribution action brought under the Spill Act and to similar claims where no explicit limitations period is presented. The United States District Court for the District of New Jersey first confronted this issue in *Kemp Industries v. Safety Light Corp.*, 1994 WL 532130 (D.N.J. Jan. 25, 1994). After observing that the Spill Act lacks an explicit statute of limitations for a private contribution action, the *Kemp* Court concluded that an analogous limitations period must be selected from among those statutes of limitation available for actions seeking comparable relief at common law.

The district court in recent years has further solidified its approach on this subject. In *Champion Laboratories, Inc. v. Metex*, 2005 WL 160692 (D.N.J. July 8, 2005), the Court recognized the well-established principle that in the absence of controlling New Jersey law, the District Court is obligated to predict how the Supreme Court of New Jersey would rule, and it relied on *Montells* in holding that a six year statute of limitations applies to a private contribution action under the Spill Act. Four years later, in *Reichhold v. United States Metals Refining Company, et al.*, 655 F.Supp. 2d. 400 (2009), the Court simply relied upon these federal precedents without elaboration to apply a similar limitations period.

### Analysis

The reasoning and holdings of our state courts are worthy of reconsideration. For example, the *Mason* court was correct — as far as it went — that the Spill Act provides an explicit list of available defenses, omitted from which is a statute of limitations. A

closer reading of the act, however, reveals that these are substantive defenses; nowhere does the Spill Act bar the use of procedural defenses. Surely it would be absurd to conclude, for instance, that a defendant on whom a complaint has not been served properly is liable in contribution because the Spill Act lacks the procedural defense of improper service of process explicitly granted under the court.

The assertion is overstated that the imposition of a statute of limitations on a Spill Act contribution claim would compromise the act by exempting polluters from liability. A six-year limitations period merely would require a plaintiff to act with reasonable dispatch, providing him with ample time to locate responsible parties while avoiding the expense and potential ineffectiveness and, indeed, prejudice, of stale litigation. In fact, application of a six-year limitations period would effectuate the goals of the Spill Act by promoting prompt remediation by responsible parties seeking redress in contribution.

An examination of the federal equivalent 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 applying a statute of limitations to an environmental contribution claim. As does the Spill Act, CERCLA provides that the only defenses available 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). Notwithstanding, a private contribution action brought under CERCLA is subject to a three-year limitations period, 42 U.S.C. § 9613(g). Congress was obligated to include a limitations period in CERCLA in the absence of a general federal statute of limitations, but such is not the case in New Jersey where the general limitations statute, N.J.S.A. 2A:14-1, may be relied upon for this purpose. A contribution claim brought under the Spill Act, which seeks redress from the same wrongs and is subject to similar substantive defenses as CERCLA, should, like a CERCLA claim, also be subject to a limitations period. Indeed, a private claim under the Spill Act is often brought as a pendent claim in a federal CERCLA contribution action. The differing interpretations applied in state and federal

court plainly could result in inconsistent outcomes, and also thereby promote forum shopping.

The *Mason* and *Pennsauken* courts rely substantially on the *Pitney Bowes* decision without acknowledging a significant difference between the issues presented. In *Pitney Bowes*, the court 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, could impair the effectiveness of the Spill Act's contribution provision because a statute of repose is not subject to the discovery rule. A statute of limitations, by contrast, is subject to the discovery rule; as observed by the *Kemp* court, "the date upon which Plaintiff's Spill Act claim accrued, was, for limitation purposes, the date upon which Plaintiffs learned or reasonably should have learned, the existence of that state of facts which may equate in law with a cause of action for contribution under the Spill Act." Therefore, the concern that drove the conclusion in *Pitney Bowes* is absent in a Spill Act contribution action because, pursuant to the discovery rule, a cause of action for contribution generally will not accrue until the plaintiff has or should have discovered that he has been harmed by a third party.

Statutes of limitation serve several important equitable functions in our judicial system. They promote the timely and efficient litigation of claims, provide repose for defendants, and stimulate a plaintiff's action by penalizing dilatoriness. Strict application of a limitations period may be avoided, however, where justice so requires, indeed, application of the "discovery rule" balances the noted judicial interests with the remedial function of the Spill Act. As in *Montells*, where a statute does not explicitly contain a statute of limitations, the court may apply the most analogous limitations period. A more sensible reading of the act, and one which comports more clearly with general practice, would apply this limitations period, rather than none at all, to a private claim for contribution of cleanup and removal costs. In the absence of a legislative fix, one can only await the decision of a state appellate court to heal this rift. ■