Recent Appellate Division Decision Expands Private Party Remedies Under New Jersey Spill Act and Demonstrates Condominium Owners' Potential for Environmental Liability

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The New Jersey Appellate Division's recent decision in *Matejek v. Watson* was notable in two respects. First, it provides a private party an order compelling another party to participate in an environmental investigation without proving liability, something not previously allowed under New Jersey's Spill Compensation and Control Act (Spill Act) or its federal counterpart, the Comprehensive Environmental Response, Cleanup and Liability Act (CERCLA). From a plaintiff's perspective, this gives the Spill Act a significant advantage over CERCLA and could spawn an increase in Spill Act litigation. Second, the decision introduced condominium owners to the wonderful world of environmental liability under the Spill Act.

Facts of the Case

This dispute between the owners of neighboring condominium units stems back to 2006, when oil was reported floating on a tributary to Royce Brook in Hillsborough. The New Jersey Department of Environmental Protection (NJDEP) responded by removing the underground storage tanks for five adjoining condominium units. According to the trial court's unpublished opinion, each of the five tanks was found to have holes when they were removed. In addition, NJDEP subsequently "charged each of the five units for the cost of cleanup and placed a lien on those properties which did not fully pay the amount." NJDEP subsequently returned to the site to confirm that the oil sheen was no longer present, but did not issue a "no further action" letter or otherwise close the file.

Seven years later, the owners of one of the affected condominium units sued the owners of the remaining four units under the Spill Act to require them to participate and share equally in an investigation and, if necessary, remediation of the property. Those same owners later amended their complaint, adding, among other parties, the Condominium Association. The amended complaint sought a judgment against the Association requiring it to grant access to portions of the properties in question considered to be common elements of the Association in order to facilitate any investigation, testing or remediation work required by the NJDEP. The amended complaint did not seek monetary damages against the Association.

Trial Court Ruling

In its unpublished opinion, the trial court, Chancery Division, found that the open NJDEP case file was a "cloud on the title" to all five condominium units because their owners would have to disclose the oil spill and open case file in the event they were to sell their unit. The trial court further concluded that the plaintiffs had no "adequate remedy at law" because there was "no site-specific, detailed proof that further contamination remained" and therefore plaintiffs "could not take advantage of the Spill Act contribution." Finally, the trial court ruled that the NJDEP's removal of all five underground storage tanks was sufficient to impose an obligation on the owners of all five condominium units to participate in the investigation process "so that a determination may be made whether additional remediation is required, or if an RAO [Remediation Action Outcome] may be issued." Since no "site-specific detailed evidence of contamination" existed at the time, the court denied any claims for participation in the cleanup. Upon completion of the investigation, the litigation would end for any unit owner found to not have contamination on its property.

The trial court did not find that the Association had to contribute to the costs of any remediation, despite one of the unit owners attempting to assert such a claim. The trial court found that as the Association's regulations stated that the underground oil tanks were the sole responsibility of the unit owners, the Association was not liable for any potential remediation.

Appellate Division Ruling

On appeal, the New Jersey Appellate Division affirmed the trial court's decision. According to the Appellate Division opinion, the trial court recognized that the plaintiffs lacked evidence that the defendants caused the contamination to which NJDEP had responded, but found that this did not preclude imposition of an equitable remedy that might lead to the discovery of such evidence. The trial court also recognized that new litigation might be initiated in the future if an investigation revealed the need for remediation and the parties could not agree upon an allocation of costs.

The Appellate Division acknowledged that "plaintiffs' suit varies from what the Legislature likely anticipated when authorizing a private cause of action for contribution [under the Spill Act]." The Appellate Division reasoned that the Spill Act's general approach had subsequently been altered by the 2009 enactment of the Site Remediation Reform Act (SRRA), under which "the burden of completing a cleanup fell to private parties through retention of [a Licensed Site Remediation Professional ("LSRP"]." The Appellate Division agreed with the trial court that requiring the plaintiffs to bear the expense of the investigation and remediation and then sue the owners of the four other condominium units would leave "plaintiffs with no adequate remedy at law" and that a court may use its equitable powers to "provide a remedy that fairly and justly alleviates the inequitable burden that a narrow interpretation of the Spill Act would impose."

Potential Implications for Spill Act Claims

The Appellate Division's decision significantly changes a private party's right to contribution under the Spill Act, sending private contribution actions into uncharted territory. The statute was first enacted in 1976 and was amended in 1991 to allow a private party to recover cleanup and removal costs from a person responsible for a discharge of hazardous substances being remediated. Its federal counterpart, CERCLA, was enacted in 1980 and has allowed a private right of recovery from the beginning. Both statutes define the circumstances under which a person is strictly liable for cleanup costs incurred to investigate and remediate contaminated property, and create a government right to recover from a responsible party that is significantly more powerful than the rights granted to a private plaintiff. Under both statutes, the government is authorized to issue an order requiring the responsible party to investigate and remediate the contamination. Failure to comply leaves the responsible party subject to a potential treble damages award and fines. The government is also authorized to perform the investigation and remediation and then recover its costs from the responsible party.

Under both statutes, a private party is only allowed to seek reimbursement of cleanup costs incurred and a declaratory judgment for the responsible party's share of future cleanup costs that the private plaintiff may incur. Thus, a court must find a defendant liable under the Spill Act or CERCLA before reimbursement can be obtained by a private plaintiff. Neither statute purports to give a private plaintiff the right granted to governmental plaintiffs to compel a responsible party to conduct an investigation to determine whether remediation is needed. Neither statute purports to impose liability to a private plaintiff when the defendant has not been shown to meet the liability criteria established by the statute. Thus, for more than twenty-five years, a private party seeking contribution under the Spill Act or CERCLA has had to incur investigation or cleanup costs and then seek reimbursement from other responsible parties. Once it had incurred costs reimbursable under the Spill Act or CERCLA and established the defendant's liability, a private party could be entitled to a declaratory judgment with respect to costs that may be incurred in the future.

Interestingly, in *Matejek* the trial court and Appellate Division found that these long-standing Spill Act remedies did not provide the plaintiff with "an adequate remedy at law." The lack of an adequate legal remedy was necessary to set the stage for the equitable relief granted.

Nothing in the 2009 enactment of SRRA purports to change the liability scheme established under the Spill Act. Although an LSRP oversees remediation under the SRRA that was previously overseen by NJDEP, a private party is not responsible for remediation under the SRRA unless it first has liability for that remediation under the Spill Act, the New Jersey Industrial Site Recovery Act, or New Jersey laws and regulations relating to underground storage tanks. An open NJDEP case file for a discharge of oil affecting a property was as much a cloud on the title before enactment of the SRRA as it is after it. The primary innovation of the SRRA was to create a role for LSRPs to supervise private parties in the remediation of contaminated sites under the oversite of NJDEP. The final resolution of a remediation under the SRRA is marked by the issuance of a "Remedial Action Outcome" letter by the LSRP instead of a "No Further Action" letter from NJDEP. This process has expedited the remediation of contaminated sites by alleviating the logjam that had developed due to NJDEP's command and control role in every remediation in the state.

The Appellate Division decision's deviation from the legislative scheme has significant practical consequences that will likely encourage litigation by private parties under the Spill Act. Rather than having to incur remedial investigation costs before seeking contribution, a private plaintiff can ask the court to use its equitable power to compel someone with suspected responsibility for potential contamination to participate in the investigation to determine whether the contamination exists and whether the defendant is liable for the remediation. Moreover, this equitable relief may be granted even if defendant's liability has not been established. The defendant's liability for any remediation that may be needed would not be determined until after the investigation results are obtained. This type of remedy was previously reserved by the legislature for a governmental agency. As a practical matter, the Appellate Division decision substantially enhances a private plaintiff's bargaining leverage in a private remediation dispute in which the defendant's liability is not clear and may depend on the results of the investigation.

Considerations for Community Associations

The trial court's opinion holds that a Condominium Association must provide access to its property if such access is necessary to conduct an investigation or remediation. Therefore, if investigation or remediation of potential contamination from an underground oil tank requires access to the common elements of an Association, the Association should work with the person conducting such investigation or remediation to come to an agreement, in writing, regarding access. Further, if the parties cannot come to an agreement in writing as to access to the common elements, the individual seeking to conduct remediation will be entitled to file a suit against the Association seeking an order directing the Association to grant the individual reasonable access to the common elements.

It should be noted that the Association avoided any monetary liability in this case due to the regulations it had adopted years earlier. It is unclear how the Court would have ruled had the underground oil tanks been considered common elements or limited common elements. However, it would be wise for any Association that has underground oil tanks to review its governing documents to determine whether it has properly protected itself in the manner the Association did in *Matejek*.

Open Questions

Many questions are raised by the Appellate Division's decision. Although a private plaintiff apparently does not have to prove the defendant's liability for remediation in order to obtain the equitable relief, the defendants in *Matejek* had some connection to the cloud on plaintiff's title in that the NJDEP had seen fit to remove all of their underground storage tanks when attempting to stop the release of oil to the tributary. All of the tanks had holes indicating that they were likely to have been leaking.

Going forward, to what extent will a court require a plaintiff to provide support for his suspicion that the defendant is liable before granting an order requiring the defendant to participate in the investigation work? To what extent will the equitable remedy affirmed by the Appellate Division be available to private parties that have no liability for the contamination, but simply want to make someone else undertake an investigation to confirm the absence of contamination? If the tanks were common elements under the Association's governing documents, would the Court have imposed liability on the entire Association

when only the oil tanks of a few of its members were potentially responsible? How will a court fashion liability in the event that underground oil tanks are considered limited common elements under an Association's governing documents, with portions being the responsibility of the Association and portions being the responsibility of the unit owner?

Please contact the authors, **Daniel Flynn** or **Robert J. Flanagan III**, for any questions regarding the issues discussed in this Alert.