Appellate Division Clarifies Statute of Limitations Under Spill Act

Rules That Failure to Follow Up on Early Clue of Environmental Problem Reduces Landowner's Remedy Against Polluters

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In a decision rendered August 23, 2013 in *Morristown Associates vs. Grant Oil Company*, the New Jersey Appellate Division has ruled that New Jersey's general six-year statute of limitations applies to claims for contribution under the New Jersey Spill Compensation and Control Act ("Spill Act").

As amended in 1991, the Spill Act allows anyone who cleans up soil or groundwater contamination to obtain reimbursement from any person that caused the contamination through the discharge of hazardous substances. The Spill Act does not, however, specify a time limit on when these "contribution claims" can be filed.

The absence of a time-limitation in the Spill Act created an ambiguity as to whether contribution claims are subject to a time limit. On the one hand, the legislature's silence could indicate that it is relying on the default six-year limitation period that applies generally to claims for injury to property, in order to protect the public and the courts from having to deal with claims that are so old that witnesses and evidence are no longer available.

Conversely, it could also be argued that the omission of a limitations period in the Spill Act indicates the legislature's view that the "polluter pays" principle and the need to encourage clean ups are so important that contribution claims should be exempt from the general rule imposing time limits.

The Appellate Court's recent decision resolves this ambiguity in favor of applying the general six-year statute of limitations. The court further confirms that the "discovery rule" applies to Spill Act contribution claims. Developed by the New Jersey courts to keep the statute of limitations from unfairly barring access to a remedy, the discovery rule postpones the start of the limitations period until the injured party discovers or should have discovered the grounds for a claim. Thus, if contamination was created in the 1980's and the landowner could not reasonably have discovered it until 2000, a contribution claim under the Spill Act would not be barred as long as it was filed by 2006.

As the plaintiff in *Morristown Associates* learned, however, the discovery rule expects a landowner to follow up diligently when faced with clues that there may be an environmental issue. The plaintiff had purchased a shopping center in Morristown in 1979, without knowing that one of its tenants had an

underground tank to store heating oil used in its dry cleaning business. The tank's fill and vent pipes protruded out the back of the tenant's building. Although the tank was present in 1993, it was not detected at that time by an engineering company conducting an environmental audit that year in connection with a refinancing.

An officer of the company that managed the shopping center for the plaintiff from 1995 to 2002 testified that he knew about the tenant's oil tank, but did not know of a leak. In 1999, he learned of a leak in an underground storage tank maintained by a different tenant, a supermarket, and hired a company to remove the tank.

The vice president of the company that managed the shopping center for the plaintiff from 1988 to 1995, and again from 2002 through 2003, testified that he did not know about any underground storage tanks on the property. He noticed pipes protruding from the back of the dry cleaner's business, but did not remember thinking they had any significance. He did not discover a problem until notified by a neighbor in 2003 that groundwater wells on the neighboring property had detected an oil contamination issue and that the shopping center appeared to be the source. Photos of the outside wall of the dry cleaner's building, taken in connection with the investigation of the oil tank in 2003, showed extensive staining where the fill and vent pipes protruded. Plaintiff's expert estimated that between 9,400 and 14,670 gallons of heating oil were spilled during the period dating from 1988 to 2003.

The Appellate Division acknowledged that underground contamination is generally not noticeable, and the discovery rule would prevent the statute of limitations from running unless, in the exercise of ordinary supervision over their property, the property owner could or should have discovered the contamination. The Appellate Division affirmed the trial court's determination that the shopping center owner should have discovered the contamination no later than 1999 when the supermarket's underground storage tank was found to be leaking and had to be removed. That discovery proved that the 1993 environmental audit was incorrect.

In its decision, the Court determined that the plaintiff should have "exercised due diligence and supervision over the property to investigate whether underground storage tanks existed in addition to the one that was removed." Moreover, the Court noted that the existence of the protruding pipes and the routine arrival of oil delivery trucks should have also put the plaintiff and its property managers on notice of the existence of the oil tank, which should have led to an inquiry about its condition.

Seeking reimbursement for clean-up costs from its tenants and the oil companies that filled the underground oil tank between 1988 and 2003, the shopping center owner initiated its Spill Act contribution litigation in 2006. This would have been timely if the six-year limitations period had been triggered by the neighbor's notification in 2003. However, given the Court's finding that the contamination should have been discovered in 1999, the shopping center owner's claims were reduced to cleanup costs attributable to discharges occurring during the six years immediately preceding filing of the complaint. It had no remedy with respect to the bulk of the oil discharges, which had occurred from 1988 to 2000.

If you have any questions regarding this decision, the Spill Act or other environmental matters, please contact the author of this Alert, **Daniel Flynn**, or any member of our Environmental Department.