

Decision by a Divided New Jersey Supreme Court Protects Leaky Tank Owner and Insurers from Damages for Two-Year Delay in Addressing Contamination

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The recent New Jersey Supreme Court opinion in *Ross v. Lowitz*, decided by a 4 to 3 vote, holds that insurers are not liable under New Jersey common law for damages caused by their extended delay in remediating property contaminated by their insured.

The background facts are simple. The defendant insured owned residential property on which an underground heating oil tank was found to be leaking in 2003. The homeowner at the time reported the leaky tank promptly to her insurers, which accepted responsibility for the remediation. In 2007, the insurers notified the plaintiffs, who owned a neighboring residence, that oil from the leaky tank had migrated onto their property. No attempt was made, however, to remediate the plaintiffs' property until after plaintiffs initiated the litigation in 2009. The remediation was completed by the insurers without cost to plaintiffs while the litigation was pending.

Although their property was remediated, plaintiffs sought compensation for damages sustained due to the insurers' two-year delay in remediating the contamination. A contract to sell plaintiffs' residence in 2007 fell through when the purchaser learned about the contamination. Plaintiffs ultimately sold the residence in 2011, receiving only 58% of the 2007 sale price. Plaintiffs' claims against the tank owner were based on common law grounds of private nuisance and trespass. Plaintiffs also asserted a damage claim directly against the tank owner's insurers based on a claim that the insurers' delay in conducting the remediation was a breach of the insurers' contractual duty of good faith and fair dealing.

Both claims were rejected by the New Jersey Supreme Court. First, the Court held that private nuisance and trespass claims require a showing of either abnormally dangerous activity or intentional, reckless or negligent conduct that is by itself an actionable basis for recovery. All Justices agreed that an underground heating oil tank is not an abnormally dangerous activity. The dissenters argued that an unreasonable delay in conducting the required remediation is a "failure to act" in the face of an affirmative duty owed to the neighboring homeowner. If the defendants owed plaintiffs a duty to promptly remediate the artificial condition they created, an intentional, reckless or negligent failure to act would support a private nuisance or trespass claim. The majority rejected the contention that defendants had an affirmative duty to promptly remediate the contamination. Consequently, the delay, even if unreasonable, is not actionable.

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Second, the Court unanimously rejected plaintiffs' attempt to recover damages directly from the tank-owner's insurers based on an alleged breach of good faith and fair dealing. The Court noted that the plaintiffs are not listed as insureds on the tank owner's policy or assignees of the insured. The Court also refused to deem the plaintiffs to be third party beneficiaries of the insurance policies based on public policy grounds. Therefore, the neighboring homeowners had no standing to enforce an implied covenant of good faith and fair dealing.

The New Jersey Supreme Court's decision gives responsible parties in New Jersey some breathing room in scheduling contamination, but it would be imprudent to be cavalier about the timing. The majority's conclusion that delay is not actionable is based on a comment in the Restatement of Torts (2d) published in 1979. According to the comment, an owner of a leaky underground storage tank that has impacted a neighbor's drinking water well would have an affirmative duty to promptly empty his tank in order to stop the source of the contamination. However, he would not have an affirmative obligation to "remove the oil already in his land, since it would not be practicable to do so."

Perhaps the prompt removal of contaminated soil was considered impracticable in 1979, but it is considered very "practicable" today after twenty-five years of enforcement of major remediation statutes such as the federal Comprehensive, Environmental Response Compensation and Liability Act of 1980 (CERCLA) and the New Jersey Spill Compensation and Control Act. In fact, the insurers in *Ross v. Lowitz* eventually undertook the remediation, completing the excavation within sixty days of starting work.

In the event that the authors of the Restatement of Torts reconsider its guidance when undertaking a future revision, they may abandon the comment that removal of contamination is not practicable. Similarly, it would not be surprising over the long haul, especially in a case of an egregious delay, to see the New Jersey Supreme Court reconsider its holding in *Ross v. Lowitz* as well.

If you have any questions regarding the issues discussed in this Alert, please contact the author, **Daniel Flynn**, Counsel in the firm's Environmental Department.