

CONSTRUCTION LAW

Concepts of Equity Are Applied to NJ's Spill Act

By Vito A. Pinto

On March 3, the Appellate Division of the New Jersey Superior Court upheld a Chancery Court's determination requiring parties to participate in an investigation of contamination despite the fact that there was no evidence linking any of the parties to the contamination. *Matejek v. Watson*, No. A-4683-14T1. In doing so, the appellate court employed principles of equity to expand potential liability under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:23.11 et seq. (the "Spill Act"). The *Matejek* decision, which seems inapposite to other Spill Act jurisprudence, greatly expands the reach of the Spill Act and would require parties to expend

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resources to investigate contamination even when there is no evidence of any nexus to that contamination.

The decision has its genesis in oil contamination discovered in a tributary located in the vicinity of a residential condominium development. The New Jersey Department of Environmental Protection (NJDEP) responded to the threat by removing, at state expense, underground storage tanks from each of the adjoining five condominium units. Once the tanks had been removed, the Department determined that there was no further imminent threat to the tributary and terminated further work on the site.

However, the Department never closed its administrative file and the site remained on the Department's active list. Several years later, the owners of one of the condominium units sought to complete the investigation in order to remove what they deemed a cloud on title. They then brought an action against the other four condominium owners to compel them to equally participate in and complete the investigation (and, if necessary, the remediation).

The Chancery Court, after a bench trial, entered judgment requiring the parties to jointly retain a licensed site remediation professional to complete the investigation.



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The court held that despite the fact that there was no evidence of the precise source of or responsibility for the contamination, the fact that the Department ordered the removal of all five tanks was enough to require that all of the impacted unit owners share in the steps necessary to further investigate the source of the contamination. More bewildering is the fact that the decision did not discuss or make any findings as to which of these five tanks had leaked or been involved in the discharge. Adjoining unit owners Carlos and Jean Gilmore appealed the Chancery Court's determination arguing that the Spill Act didn't require them to participate in a remediation absent evidence that they caused or contributed to the contamination.

The Appellate Division affirmed the decision of the Chancery Court. The court relied heavily on equitable principles and stated that there was a need for a remedy that would "fairly burden all the potential dischargers with an investigation into the actual cause, the remediation of the property if necessary and the fixing of responsibility for the discharge on those truly responsible." *Matejek* at 6. The court acknowledged the atypical nature of its remedy when it stated "[t]o be sure, plaintiffs' suit varies from what the Legislature likely anticipated when authorizing a private cause of action for contribution."

Id. at 4. Nevertheless, the court believed that fashioning an equitable remedy was a far better decision than burdening plaintiff with the entire cost of the investigatory activities. The court stated that "in such circumstances, a court may provide a remedy that fairly and justly alleviates the inequitable burden that a narrow interpretation of the Spill Act would impose." *Id.* at 5. Despite the initial cost sharing, the court confirmed that there would be an opportunity for the reapportionment of costs once the actual cause of the contamination became known. At that time, parties that did not bear responsibility would have an opportunity to seek reimbursement for any costs they incurred in connection with the investigation.

The court's rationale was heavily grounded in concepts of equity. There was no discussion of the definition of a "discharger" or persons "in any way responsible" for a discharge. In fact, the court did not cite any provision of the Spill Act that permitted this remedy other than referring to N.J.S.A. 58:10-23.11x which states that the legislature expressly welcomes a "liberal constru[ction]" of the Spill Act for "the general health, safety, and welfare of the people of this State" and a brief reference to how the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, changed the landscape regarding the implementation

of contribution claims under the Spill Act. Rather, the court stated that "there was nothing in the letter or spirit of the Spill Act that would preclude the issuance of such a remedy." *Id.* at 2. In concluding, the Appellate Division seemed to encourage courts to fashion such a unique remedy but, at the same time, seemed to try to limit the reach of the decision:

Is it not in the best interest of the health, safety and welfare of the people to compel a further investigation? Rather than preclude or render unduly burdensome a greater examination into the situation through the adoption of a narrow interpretation of the Spill Act, we commend the trial judge's exercise of discretion in adopting an inventive solution—the necessity of which was compelled by all the relevant circumstances—in this particular situation.

The decision, however, raises some serious concerns. First, it runs counter to the Supreme Court's decision in *NJDEP v. Dimant*, 212 N.J. 133 (2015), which required a demonstrative nexus prior to the attachment of Spill Act liability. Second, the decision could end up having some unintended effects

upon parties that are ultimately not liable.

In *Dimant*, the Department sued a dry cleaner to recover costs associated with the investigation and remediation of PCE contaminated groundwater found in residential wells. The defendant dry cleaner operated in the vicinity of the contaminated wells and had utilized PCE for a 15-month period. During a single site inspection, Department personnel witnessed an external pipe at the defendant's premises dripping a liquid containing high levels of PCE. On that basis the Department determined the discharge was sufficient to connect the dry cleaner to the contaminated wells. The trial court disagreed, holding that the NJDEP had not met its burden of proof by the required preponderance of the evidence to demonstrate a sufficient nexus between the discharge and the contamination, and held for the dry cleaner.

Before the Appellate Division, the Department continued to argue for a broad interpretation of the Spill Act so that a direct causal connection between the discharge and the contamination was not required. The Appellate Division affirmed the trial court decision, specifically finding that the NJDEP had not met its burden of showing a connection

between the defendant and the discharge. At the Supreme Court, the NJDEP asserted that the Appellate Division had "unsettled the law" by engrafting a common law causation standard onto Spill Act liability. *Id.* at 160. The Department argued, alternatively, that the requisite nexus was definitively established because of the witnessed discharge from the pipe and because the highest concentrations of PCE were directly below the dry cleaner's business.

The Supreme Court disagreed and affirmed the decision below. While the court agreed that a discharge had in fact occurred while the dry cleaner operated because of the witnessed uncontrolled drip of PCE liquid, it was simply not enough to establish liability. The determinative question was not if there was a discharge at the dry cleaners but whether the NJDEP had connected the discharge that did occur to the relief it sought against the dry cleaners. *Id.* at 171. The court further explained that even after finding that a party is responsible for a discharge, a plaintiff must demonstrate a nexus between the discharge and the contamination for which the cleanup and other related authorized costs are incurred. The *Dimant* court confirmed that the NJDEP had failed to connect the

discharge from the dry cleaner to either the soil or groundwater damage. It remains to be seen how lower courts will accommodate the obviously conflicting requirements of *Matejek* and *Dimant*.

The *Matejek* decision could also have the untoward effect of emboldening potentially responsible parties to seek to spread the cost of site investigations to prior owners, neighbors or others before assembling any evidence that these entities could be liable. Parties not liable under the Spill Act may nevertheless be forced to defend themselves by either participating in the investigation or contesting their inclusion in it. This could place innocent parties in the untenable position of having to litigate twice: first when confronted with a demand to participate in an investigation and later to recoup costs against truly liable parties when the facts have been fully developed.

The application of equitable principles to the Spill Act will certainly allow additional options for parties seeking contribution for investigating contamination. Courts will have to closely monitor these situations to ensure compliance with *Dimant* and to prevent an overactive expansion and abuse of the statute.■