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Environmental Law

Tick, Tock: Appellate Court Starts the Clock on Spill Act Contribution Claims

Recent ruling creates conflict, departs from prior decisions

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The recently decided case of *Morristown Associates v. Grant Oil Co.,* 432 N.J. Super. 287 (App. Div. 2013) is, in essence, in conflict with a prior published decision of the Appellate Division. Moreover, it affirmed a greatly expanded interpretation of the "discovery rule" and is in contradiction to the traditional notion of when a contribution claim arises.

The *Morristown Associates* case involved a Spill Act contribution claim for costs to remediate contamination by a landowner against other parties who may have caused the contamination. The court upheld the trial court ruling which applied a six-year statute of limitations to the contribution claim, although no such limitations period is found within the statute. It also upheld the trial court's ruling that the claim was "discovered" once the plaintiff realized that there was an unknown oil tank on the premises, despite the absence of any data indicating that the tank had caused contamination. Additionally, the court accepted the lower court's decision that the contribution claim ripened when the plaintiff first learned of the claim, not when the plaintiff incurred costs of cleanup beyond its fair share.

In *Pitney Bowes v. Baker Industries*, 277 N.J.Super. 484 (App. Div. 1994), the Appellate Division ruled that there was no limitations period associated with the Spill Act and, thus, the 10-year statute of repose, N.J.S.A. 2A:14-1.1, did not bar a claim for Spill Act contribution. In *Pitney Bowes*, the court stated that the Spill Act "strictly limits the defenses available to a contribution defendant" and "there is no provision of any defense available [to a defendant] based on the passage of time."

Although the case involved the statute of repose, the court stated that the only defenses available to a contribution claim under the Spill Act were those enumerated within the statue itself, which defenses do not include a limitations defense. The court also stated that a statute of limitations defense was a "defense" and was not listed within the enumerated defenses.

The court's reasoning in *Pitney Bowes* was followed by the Appellate Division in the unpublished decision of *Mason v. Mobil Oil Corp.,* 1999 N.J. Super. Unpub. LEXIS 7 (App. Div. 1999), wherein the court ruled that the Spill Act limited the defenses available to a contribution defendant to those listed within the statute and, as a limitations defense was not available under the statute, there was no time bar to the claim.

Despite these precedents, the court in *Morristown Associates*, relying on a trio of federal court decisions and state cases (which had applied a limitations period to certain statutes that contained no statute of limitations) found that the six-year limitations period of N.J.S.A. 2A:14-1 was applicable to a Spill Act contribution claim.

Morristown Associates' reliance on the federal cases is misplaced. The first case, *New West Urban Renewal v. Westinghouse Corp.*, 909 F.Supp. 219 (D.N.J. 1995), dealt only with a private-party action brought under the Industrial Site Recovery Act, N.J.S.A. 13:1K-6, et seq. (ISRA). The court in *New West* ignored the fact that a private-party action is not authorized under ISRA and never analyzed whether a time limit was applicable to a Spill Act contribution claim.

Similarly, *SC Holdings v. AAA Realty Co.*, 935 F.Supp. 1354 (D.N.J. 1996), did not involve a Spill Act contribution claim—it dealt with a common-law strict-liability claim for environmental damage—and so the court never discussed whether a limitations period should be applied to a Spill Act claim.

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Finally, the court in *Reichhold v. U.S. Metals Refining Co.*, 655 F.Supp. 2d 400 (D.N.J. 2009), merely cited to the two above-mentioned cases and applied a six-year statute of limitations to a Spill Act claim. The court in *Reichhold* never discussed the language contained within the Spill Act, which limits the defenses available to a defendant. Interestingly, and in total contrast to the ruling in the *Morristown Associates* case, the court in *Reichhold* ruled that the limitations period did not begin to run until a cleanup was actually initiated.

Furthermore, *Morristown Associates'* reliance on state court decisions that had applied a limitations period to statutes that contained no such period was misplaced inasmuch as those statutes, unlike the Spill Act, contained no specific section limiting the defenses available to a defendant for a claim brought under those statutes. As discussed above, the Spill Act specifies that only certain enumerated defenses may be asserted to a contribution claim.

The *Morristown Associates* court's affirmance of the trial court's ruling that a party is on notice of a claim once it should know about a tank that could cause contamination, flies in the face of the "discovery rule" as applied in environmental cases. Both federal and state courts have held that, at the earliest, the limitations period does not begin to run until the plaintiff has evidence of contamination at its property. *SC Holdings,* 935 F.Supp. at 1368; *Maglione v. Gulf Oil Corp.* 2007 N.J. Super. Unpub. LEXIS 1059 (App. Div. 2007).

The Appellate Division redefined when an action for contribution accrues, finding that a plaintiff's claim accrues "when plaintiff should reasonably have discovered the contamination …." *Morristown Associates,* at 19-21. Under the plain language of the Spill Act, a contribution claim arises only when "one or more dischargers or persons cleans up and removes a discharge of a hazardous substance." N.J.S.A. 58:10-23.11f(a)(2). Thus, it is not the mere discovery of contamination that triggers a claim for contribution, but rather the incurring of costs for remediating the contamination.

In fact, in *Magic Petroleum Corp. v. Exxon Mobil*, 2011 N.J.Super. Unpub. LEXIS 2021 (App. Div. 2011), the Appellate Division affirmed the dismissal of a contribution claim on the grounds that the claim was prematurely filed because the New Jersey Department of Environmental Protection (DEP) had not yet approved the cleanup being proposed. The court explained, "until the DEP agrees the investigation properly identifies the scope of the cleanup and approves the methodology for proper remediation, the court cannot properly determine contribution."

Even federal courts applying a statute of limitations to Spill Act contribution claims have recognized that the limitations period does not begin to run until the plaintiff actually cleans up the discharge. See, e.g., *Kemp Indus. v. Safety Light Corp.*, 1994 U.S. Dist. LEXIS 21466 at *106-108 (D.N.J. 1994) (denying summary judgment based upon statute of limitations for costs because defendant did not indicate when costs were incurred and "a cause of action [for contribution under the Spill Act] can accrue only when a plaintiff has engaged in cleanup….")

Recognition that a claim for contribution under the Spill Act does not accrue until a party cleans up the discharge is also consistent with CERCLA. Unlike the Spill Act, CERCLA provides time limits for filing cost recovery and contribution claims. For example, a plaintiff seeking direct costs under CERCLA has six years to sue, running from the time of the initiation of the remediation. 42 U.S.C. 9613(g)(2). Likewise, a plaintiff seeking contribution as a result of a judgment or order entered against it, has three years *from the date of the judgment or order* to file suit. 42 U.S.C. § 9613(g)(3). In each of these instances, the CERCLA limitations period is linked to the incurrence of cleanup costs by the plaintiff, not the discovery of contamination.

By finding that the time for filing suit starts when a plaintiff should have learned of contamination at its property, the Appellate Division in *Morristown Associates* compounded the potential inequitable results of its decision to retroactively apply a statute of limitations. Not only do parties performing remediation now face a six-year limit for filing their contribution claims, but the clock for filing those claims begins to tick much earlier than previously recognized. Parties can no longer complete the cleanup before they file suit. Instead, they must identify other responsible parties and commence the legal process simultaneously with the cleanup. This may have practical consequences, as parties are diverted away from cleanup and toward litigation. Parties that have been focusing their efforts on cleanup and removal, rather than litigation, with the understanding that they would still be able to recover their costs upon the completion of the remediation, now face the potential dismissal of their claims if *Morristown* remains the law.

While arguments may be made in support of a time limit for filing contribution claims under the Spill Act, the decision in *Morristown Associates* raises substantial concerns about the way in which such a result is effectuated. For years, parties performing cleanups under the Spill Act have operated with the understanding that they could focus their attention on and complete the cleanup before filing suit against other responsible parties. At a minimum, the court in *Morristown Associates* should have imposed the limitations period prospectively only. Moreover, there should be guidance from the courts as to when a claim for contribution arises. ■