New Jersey Law Journal

VOL. 202 - NO 9 NOVEMBER 29, 2010 ESTABLISHED 1878

IN PRACTICE

# ENVIRONMENTAL LAW

# Spill Act Liability for 'Innocent' Owners of Contaminated Property

BY MATTHEW R. CONLEY

Almost immediately after the Spill Compensation and Control Act was enacted in 1976, the legislature and the courts began to struggle with ownership liability issues. That struggle continues today. Recent federal case law has added an additional wrinkle to Spill Act liability for owners of contaminated property. Both current and former owners of industrial or commercial properties should be aware of potential liabilities and methods for limiting those liabilities.

As originally enacted, the Spill Act imposed strict liability for clean-up and removal costs on "any person who has discharged a hazardous substance." 1976, N.J. Laws Ch., 141, § 8c. It was therefore clear that a property owner was not liable without actual participation in the discharge. See *New Jersey Dep't of Envtl. Prot. v. Exxon Corp*., 151 N.J. Super. 464, 473 (Ch. Div. 1977) (rejecting NJDEP's argument that "simple ownership of land, without any affirmative act, is sufficient to assess liability"). However, the Spill Act language and thus the scope of Spill Act liability has been modified and expanded several times since the act's initial promulgation in 1976. Most importantly, the phrase "in any way responsible" was introduced in 1979. Under the Spill Act's current iteration, any "person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs." N.J.S.A. 58:10-23.11g(c)(1). While the phrase "in any way responsible" is not defined in the Spill Act, it has become generally accepted that ownership of property at the time of a discharge is sufficient to subject the property owner to liability. However, it has remained unclear whether and when a party who purchases property after a discharge has occurred can be held liable under the Spill Act.

The Supreme Court provided some clarity on this issue in the seminal case of *New Jersey Dep't of Envtl. Prot. v. Ventron*, 94, N.J. 473, 502 (1983), where the Court held that "[t]he subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible." See also *Tree Realty, Inc. v. Dep't of Treasury*, 205 N.J. Super. 346, 348 (App. Div. 1985) (holding that the phrase "in any way responsible" includes "any owners or controllers of the property at the time of the unlawful discharge.")

Despite the above decisions, the NJDEP amended Spill Act regulations in 1991 to create an innocent purchaser or safe harbor defense for persons who conduct the appropriate due diligence prior to purchasing contaminated property. N.J.A.C. 7:1J-2.7b. Later, in 1993, the Industrial Site Recovery Act ("ISRA") was promulgated. N.J.S.A. 13:1K-6 to -14. Section 44 of ISRA amended the Spill Act to provide for a prospective "innocent landowner" defense to Spill Act liability for conveyances on or after September 14, 1993.

The question therefore arose: Despite Supreme Court precedent indicating that ownership of contaminated property is not enough to establish Spill Act liability; does the post-1993 innocent purchaser defense create affirmative liability for those purchasers who do not satisfy the elements of the innocent purchaser defense?

NJDEP would likely argue that, by enacting the 1993 innocent purchaser defense, the Legislature simply acknowledged the pre-existing liability for owners of contaminated property and sought to provide a safe harbor for those property owners who conducted the appropriate due diligence. Indeed, it can be argued that if purchasers of contaminated property were not liable under the Spill Act, then the innocent purchaser defense was meaningless when enacted — a result contrary to accepted notions of statutory interpretation.

The Legislature attempted to end the discussion in 1997 when it again amend-

*Conley is an associate in the litigation department of Archer & Greiner in Haddonfield and a member of the firm's environmental law practice group. He worked as an NJDEP case manager prior to attending law school.*

ed the Spill Act to expressly provide that a person who acquires contaminated property on or after September 14, 1993, and who knew or should have known of the discharge, is strictly liable under the Spill Act for cleanup and removal costs. N.J.S.A. 58:10-23.11g(c)(3). However, questions remained for former owners of contaminated property as well as pre-1993 purchasers of contaminated property. In 2001, the legislature amended the Spill Act to create a retroactive innocent purchaser defense to those persons who purchased contaminated property prior to Sept. 14, 1993. The question again arose whether this innocent purchaser defense created Spill Act liability for pre-1993 purchasers of contaminated property. As with the prospective innocent purchaser defense, a statutory interpretation argument can be made that if pre-1993 purchasers of contaminated property are not liable under the Spill Act, then the 2001 amendment was meaningless when enacted.

However, to date, the legislature has not enacted a provision expressly providing that a person who acquires contaminated property prior to Sept. 14, 1993, and who knew or should have known of the discharge, is strictly liable under the Spill Act for cleanup and removal costs.

Accordingly, a similar but contrary statutory interpretation argument could be made: If the 2001 amendment is sufficient to establish Spill Act liability, then the legislature's 1997 amendment to the Spill Act, which expressly established liability, is duplicative and unnecessary. Said differently, the 1997 amendment indicates that the legislature did not consider the 1993 amendment to the Spill Act, which established the post-1993 innocent purchaser defense, to be sufficient statutory authority to establish liability for post-1993 landowners. Thus, the argument would continue, the 2001 amendment, which established the pre-1993 innocent purchaser defense, is not sufficient authority to establish liability for pre-1993 landowners. Without express statutory authority, ambiguities remain for pre-1993 purchasers of contaminated property; particularly for those owners who have since sold the property.

Unfortunately, the relevant case law is often misleading and conflicting. In *White Oak Funding, Inc. v. Winning*, 341 N.J. Super. 294 (App. Div. 2001), the court addressed a suit by the current property owner alleging that the persons who owned the property from 1983-1986 were liable for cleanup and removal costs because, inter alia, they were aware of the prior use of the property as a fuel oil distribution business and, despite this knowledge, conducted no environmental due diligence. The Court held, however, that these facts "are devoid of the critical fact which triggers liability . . .: the person must be in any way responsible for the discharge that caused the contamination."

The court cited *Ventron* in holding that the prior owners were not liable because they "had neither ownership nor control over the property when the discharge" occurred. *White Oak*, therefore, holds that a party who owned contaminated property prior to 1993 is not liable under the Spill Act, despite a lack of due diligence, because no discharges occurred during their ownership. *White Oak,* however, may be inapposite. The date of the *White Oak* decision was July 6, 2001. The 2001 amendment to the Spill Act establishing the pre-1993 innocent purchaser defense went into effect one week later, on July 13, 2001. The court did not appear to consider whether the pending innocent purchaser defense created Spill Act liability for pre-1993 owners of contaminated property.

More recently, the U.S. District Court of New Jersey issued an unpublished opinion that may be the first to address this issue since the pre-1993 innocent purchaser defense was enacted. In *Litgo New Jersey, Inc. v. Martin,* 2010 WL 2400388 (D.N.J. June 10, 2010), the plaintiff brought suit seeking contribution for cleanup costs arising from PCE and TCE contamination. The court addressed the Spill Act liability of the current owner of the property, Litgo, as well as an intermediate owner, Goldstein. The court held that the Spill Act "is structured so that the current owners of a property purchased before September 14, 1993 are liable for removal and cleanup costs unless they can prove that they" satisfy the elements of the innocent purchaser defense. The court held that Litgo, which acquired title to the property in 1990, is liable under the Spill Act because it is the current owner and does not satisfy the elements of the innocent purchaser defense. The court further held that Goldstein, who briefly acquired title prior to Litgo, is not liable under the Spill Act because, even though he did not satisfy the elements of the innocent purchaser defense, he is not the current owner of the property. The court further noted that "there has been no allegations that a discharge of hazardous substances occurred during that brief period" in which Goldstein owned the property.

In summary, the court held that a person who acquires contaminated property prior to September 1993 and remains the owner of the property is strictly liable under the Spill Act absent compliance with the innocent purchaser defense. However, a former owner that acquired the same property prior to September 1993 and also did not conduct due diligence is not subject to Spill Act liability unless there was a discharge during that party's ownership period. Ultimately, while the ruling in *Litgo* is persuasive only and ambiguities persist regarding liability for pre-1993 purchasers of contaminated property, current law dictates that both pre- and post-1993 purchasers of contaminated property should take stock of potential liabilities and evaluate whether they satisfy the elements of the innocent purchaser defense. If those elements are not met, current and former owners should consider what other options are available to limit potential liabilities. ■