New Jersey Appeals Court Breaks Precedent, Holds that Spill Act Contribution Claims Are Subject to Six-Year Statute of Limitations

Client Advisories

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On August 23, 2013, the Appellate Division of the New Jersey Superior Court issued a published decision in the matter *Morristown Associates v. Grant Oil Co.*, Docket No. A-0313-11T3, holding that the general six-year statute of limitations for damage to property, *N.J.S.A.* 2A:14-1, applies to a private claim for contribution brought under the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 et seq. ("Spill Act"). The *Morristown Associates* decision represents a potentially major shift in the way courts in New Jersey view contribution claims and may have significant impacts on the ability of parties undertaking remedial activities at sites in New Jersey to recover their costs from other responsible parties. In the wake of the decision, it is imperative that parties performing cleanups take steps to protect their interests and avoid having their claims time-barred. This advisory analyzes the decision in *Morristown Associates* and provides some examples of steps that potentially affected parties may take to preserve their rights to seek contribution.

Prior Caselaw Regarding the Time Period for Filing a Spill Act Contribution Claim

The Spill Act does not include a provision establishing a time period within which claims for contribution must be filed. Historically, New Jersey courts have held that there is no time limit for filing a Spill Act contribution claim. For example, in *Pitney Bowes, Inc. v. Baker Industries*, 277 N.J. Super. 484, 488 (App. Div. 1994), the Appellate Division considered whether the 10-year statute of repose established in *N.J.S.A.* 2A:14-1.1 barred a claim for contribution against an engineering company that installed underground storage tanks at a property that was subsequently found to be contaminated. The court found that the statute of repose was not applicable to a Spill Act contribution claim, explaining that the Spill Act strictly limits the defenses available to a responsible party to the few defenses specifically enumerated in the statute. *Id.* The court further held that "[t]here is no provision of any defense available either to a direct or a contribution defendant based on the passage of time." *Id.*

Five years later, in *Mason v. Mobil Oil Corp.*, 1991 N.J. Super. Unpub. LEXIS 7 (App. Div. June 8, 1999), the Appellate Division considered whether the general six-year statute of limitations for property damage claims set forth in N.J.S.A. 2A:14-1 applies to contribution claims under the Spill Act. Relying upon the rationale set forth in *Pitney Bowes*, the Appellate Division again concluded that the only defenses available to a contribution defendant were those specifically spelled out in the Spill Act. Because the Spill Act does not include a statute of limitations or provide any defenses based upon the passage of time, the court concluded, in an unpublished decision, that there is no statute of limitations applicable to Spill Act contribution claims. *Id.*

Following the Appellate Division's decision in *Mason*, several federal courts reached a different conclusion and found that the six-year statute of limitations applicable to common law property damage claims, *N.J.S.A.* 2A:14-1, also applies to Spill Act contribution claims. *See, e.g., Reichhold, Inc. v. U.S. Metals Refining Co.*, 655 F. Supp. 2d 400, 446-47 (D.N.J. 2009); *Champion Labs v. Metex Corp.*, 2005 U.S. Dist. LEXIS 37068 at *17 (D.N.J. July 8, 2005). However, prior to the recent decision in *Morristown Associates*, no New Jersey state court opinion had ever endorsed these federal court decisions. Nor had it been reported that any New Jersey state court ever barred a Spill Act contribution claim based upon a statute of limitations.

In fact, in *Pennsauken Solid Waste Management Authority v. Ward Sand & Materials, Inc.*, Docket No. L-13345-91 (Law Div. Nov. 17, 2008), retired federal judge John Lifland, acting as a Special Master, rejected defendants' attempts to rely upon federal caselaw applying a statute of limitations to Spill Act contribution claims. Judge Lifland emphasized that, while not binding because it was an unpublished decision, *Mason* was "well reasoned, persuasive and grounded on *Pitney Bowes* [which was binding]." [See Note 1 below] Accordingly, he concluded that plaintiff's claims were not time barred. Thus, prior to *Morristown Associates*, it was seemingly well-settled in New Jersey state court that there was no statute of limitations applicable to Spill Act contribution claims.

Morristown Associates

The *Morristown Associates* case involved contamination at a shopping center property from a leaking underground storage tank ("UST") system. Plaintiff, the owner of the property, filed suit in 2006 against several heating oil companies, alleging that the oil companies delivered heating oil to the property between 1988 and 2003, and that they knew or should have known that the fill pipes to the UST were leaking when they delivered the oil. Defendants moved for summary judgment on the grounds that Plaintiff should have been aware of the leaking fill pipes by at least 1999, when another UST at the property was found to be leaking, and, therefore, Plaintiffs' claims were barred by the general six-year statute of limitations for property damage claims, *N.J.S.A.* 2A:14-1.

The trial court agreed with defendants, finding that the six-year statute of limitations applied to plaintiff's claims and that plaintiff should have been aware of the contamination by 1999, when it became aware of the other leaking UST at the property. The Appellate Division affirmed.

To justify its departure from its earlier decisions holding that there were no time limitations for filing a Spill Act contribution claim, the Appellate Division explained that: (1) *Mason* was an unpublished opinion and, therefore, was not binding; and (2) *Pitney Bowes* dealt with a statute of repose, rather than a statute of limitations.

Morristown Associates, A-0313-11T3 at * 11-14. With respect to the latter, the court noted that a statute of repose is different from a statute of limitations because a statute of repose is strictly applied "without any regard to when the claimant discovered or could reasonably have discovered the harm," whereas a statute of limitations may be relaxed based upon application of the discovery rule. *Id.* at 14. Accordingly, the court concluded that, while it may have been unjust to apply the 10-year statute of repose to the plaintiff's Spill Act contribution claim in Pitney Bowes, it is not unjust to apply a statute of limitations to a Spill Act contribution claim. *Id.* Finally, the court deferred to the trial court's findings that plaintiff should have been aware of its contribution claim by 1999, when it discovered the other leaking UST at the property, and, therefore, should have filed suit by 2005. *Id.* at 19-20.

Potential Implications of Morristown Associates

The *Morristown Associates* decision represents a marked departure from prior law in several respects, each of which has potentially significant ramifications for parties performing remediation activities. Most obviously, the court's willingness to retroactively apply a previously unrecognized limitations period means that parties who have been performing remediation activities for years may encounter hurdles in recovering all of their costs. Likewise, parties beginning to perform remediation activities may face time limitations for investigating and filing their claims.

Less obvious, but of equal concern, the decision in *Morristown Associates* may also be interpreted to redefine when a cause of action for contribution accrues. Pursuant to the Spill Act, "whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance." *N.J.S.A.* 58:10-23.11f(a)(2). By the plain terms of the statute, a claim for contribution does not accrue until a party "cleans up and removes a discharge of a hazardous substance." *Id.*

In other words, it is not the mere discovery of contamination that triggers a claim for contribution, but rather the incurrence of costs cleaning up and removing contamination that does so. In fact, in *Magic Petroleum Corp. v. Exxon Mobil Corp.*, 2011 N.J. Super. Unpub. LEXIS 2021 (App.Div. July 26, 2011), the Appellate Division affirmed the dismissal without prejudice 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 scope of 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." *Id.* at *21.[See Note 2 below] Thus, prior to *Morristown Associates*, it was well-recognized that a contribution claim could not accrue based simply upon a plaintiff's knowledge or imputed knowledge of contamination.

Even federal courts willing to apply a statute of limitations to Spill Act contribution claims have recognized that the limitations period does not begin to run until the contribution plaintiff actually cleans up and removes the discharge. *See, e.g., Kemp Indus., Inc. v. Safety Light Corp.*, 1994 U.S. Dist. LEXIS 21466 at *106-108 (D.N.J. Jan. 25, 1994) (denying defendant's motion for summary judgment based upon statute of limitations with respect to

certain 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 and removal of a discharge of a hazardous substance.")

The recognition that a claim for contribution under the Spill Act does not accrue until a party cleans up and removes the discharge is also consistent with CERCLA. Unlike the Spill Act, CERCLA specifically includes time limits for filing contribution and cost recovery claims. For example, a plaintiff seeking to recover its direct costs under CERCLA has six years from the initiation of *physical construction of the remedial action* or three years from *completion* of a removal action to file a claim for cost recovery. 42 U.S.C. § 9613(g)(2) (emphasis added).[See Note 3 below] 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) (emphasis added). In each of these instances, the limitations period established under CERCLA is linked to the incurrence of costs by the plaintiff, not the mere discovery of contamination.

However, by applying the discovery rule to plaintiff's claims, the court in *Morristown Associates* linked the accrual date for plaintiff's contribution claim to the time when plaintiff should have become aware of the contamination at its property, not the time when it cleaned up and removed the discharge. *Morristown Associates*, A-0313-11T3 at *19-21 (holding that plaintiff's claim accrued "when plaintiff should reasonably have discovered the contamination at [the property]"). The court's re-definition of when a contribution claim accrues compounds its decision to read a statute of limitations into the Spill Act. Not only do parties performing remedial activities now potentially face a six-year time limit for filing their contribution claims, but the clock for filing those claims also begins to tick much earlier than ever previously recognized.

While the *Morristown Associates* decision will likely be appealed to the Supreme Court and is probably not the last word from the courts concerning the time limits for filing Spill Act contribution claims, it has potentially significant ramifications. A party that has been performing remedial activities for years under DEP oversight with the understanding that there was no time limit for it to file a contribution action may find its claim time-barred. Likewise, a plaintiff proceeding under the belief that its contribution claim did not accrue until it implemented a DEP approved cleanup plan may find itself unable to recoup some, or all, of the costs it incurred. Given these potential outcomes, it is imperative that parties performing remedial activities take steps to protect themselves until further guidance is issued by the courts. Such steps may include tolling agreements, other forms of claim preservation agreements, alternative dispute resolution agreements, or even the early filing of protective litigation.

[Note 1] The Pennsauken matter subsequently settled before Judge Lifland's decision was submitted to the court for approval.

[Note 2] Magic Petroleum is an unpublished opinion and, therefore, is not binding. It is also currently pending on appeal before the New Jersey Supreme Court.

[Note 3] CERCLA distinguishes between remedial actions, which are generally considered long-term, site-wide cleanups, and removal actions, which are generally considered short-term, focused cleanups.

If you have any questions regarding this ruling or other environmental law matter, please contact a member of Archer's Environmental Law Practice Group in Haddonfield, N.J., at (856) 795-2121, in Flemington, N.J., at (908) 788-9700, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Philadelphia, Pa., at (215) 963-3300.

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