

## THE NEW JERSEY SUPREME COURT'S DECISION IN DIMANT RAISES MORE INTERESTING ISSUES THAN IT RESOLVES

Many of you, as our clients, consultants and others with whom we work, are routinely involved in site contamination, remediation, and cost recovery issues. Others may be touched by these issues in the future, but have been fortunate to date not to have been so involved. We bring to everyone's attention the most recent decision by the New Jersey Supreme Court concerning New Jersey's unique environmental statute, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. ("Spill Act").

New Jersey Department of Environmental Protection v. Ofra Dimant, (A-2-11)(067993) ("Dimant") is being hailed by many as a victory for those being pursued on Spill Act claims. The cause for celebration is that the New Jersey Supreme Court opined on the standard of proof required (at least for the New Jersey Department of Environmental Protection ("NJDEP")) to pursue a discharger or someone in any way responsible for a discharge. So-called "proximate cause" between a discharge and the relief being sought by the government is not required. However, in order for the government to obtain "damages" there must be "a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site."

Frankly, there is nothing astounding about this holding, since it is entirely consistent with prior Spill Act precedent (albeit not from the New Jersey Supreme Court) regarding this particular "nexus" issue. It is, however, a little surprising that the NJDEP tried the case against this last remaining defendant, since the facts were not strong against this remaining defendant (NJDEP settled with the others against which it had a stronger fact pattern). Groundwater contamination was found before the remaining defendant even began operating a dry cleaner at the site in question, and the NJDEP could only assert that it found high levels of Perchloroethylene ("PCE") dripping from a pipe coming from the dry cleaning operation onto asphalt. NJDEP only investigated and tested that pipe once. Moreover, there was no evidence that the asphalt beneath the pipe was eroded – even though scientists generally opine that dripping PCE erodes asphalt.

Rather than further examine that holding, which we would argue was inevitable, we note other issues implied, insinuated, or otherwise thought provoking that stem from the 42-page Dimant decision:

1. This was an action brought by the NJDEP (a governmental entity) against various potentially responsible parties for the contamination. The New Jersey Supreme Court alluded to "joint and several liability" (each discharger has 100% responsibility for all damages) but never drew or attempted to draw any distinction between governmental actions (typically seen as so-called "cost recovery/joint and several liability" actions) versus private party contribution (i.e. each party pays its fair share only) actions. No so-called private party contribution actions were permitted by the Spill Act until the amendment to the Spill Act in 1992. N.J.S.A. 58:10-23.11f (a)(2)(a). If the Dimant decision is utilized by counsel for private party plaintiffs to argue that private party "contribution" actions, as opposed to governmental actions, also impose joint and several liability, this will turn existing federal and state precedent on its head.



2. The New Jersey Supreme Court goes to great lengths to make it clear that the Spill Act is to be broadly interpreted to impose liability on those “in any way responsible for a discharge” but fails to mention to the unwary (presumably since it was irrelevant in the context of this case, which involved only a lessee of property) that the Spill Act imposes ownership status liability on anyone who purchases real property on or after September 13, 1993 – whether or not the discharge continued on site after that date.
3. The New Jersey Supreme Court chastises NJDEP for waiting ten years to take any action to seek investigatory costs relating to the PCE dripping from the pipe and finds it “fundamentally unfair” to force the dry cleaner to undertake an investigation of contamination at such a late date. Does this mean that parties can raise equitable defenses to Spill Act claims by the government? If so, it overrules a significant amount of case law, albeit not from the New Jersey Supreme Court, which holds directly to the contrary.
4. By extrapolation from 3, can parties now argue that if “laches” constitutes a defense to governmental Spill Act actions, other defenses, including a statute of limitations defense, can also be read into the statute? If so, what is that statute of limitations? Case law in New Jersey and in federal district courts is confusing and conflicting on this point.
5. What types of experts are necessary in a Spill Act case? Based on this Court’s analysis, one should very carefully consider whether to ever use a hydrogeologist to prove the source of contamination based solely upon the location of the most highly-concentrated areas of contamination and the direction of groundwater flow. This approach did not work for the NJDEP in Dimant, so don’t assume it will work in private party actions either.
6. While the New Jersey Supreme Court states that there is no de minimis exception to Spill Act liability, this statement could be misconstrued. There are carve outs under the Spill Act for such items as, for example, municipal solid waste. Municipal waste does, of course, contain “hazardous waste.” Therefore, before assuming that since the government or a private party has shown the nexus required under Dimant, you have liability, you must ask the threshold question as to whether the Spill Act provides an exemption you can nevertheless utilize.
7. The Dimant Court characterizes the dripping of material from a pipe onto the asphalt beneath it as a “discharge” under the Spill Act. By so doing, it brings into question NJDEP regulations specifically excluding “leaks” onto surfaces as being Spill Act discharges if they are cleaned up immediately.
8. The Spill Act is not identical to the federal Comprehensive, Environmental Response, Compensation and Liability Act (“CERCLA”), and you cannot simply superimpose CERCLA precedent on Spill Act matters.

Dimant serves, at its core, to emphasize that the Spill Act is a complicated, enigmatic statute that has yet to be fully interpreted or applied. Clients and counsel must be creative in prosecuting and defending Spill Act cases while bearing in mind its core purpose of having those people responsible for contamination pay for its cleanup.

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