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New Jersey's Appellate Division Rules that Mere Generation of Hazardous Substances Without Evidence of Spill is Insufficient for Spill Act Liability

Posted at 11:16 AM on October 27, 2010 by Gerard M. Giordano

In the recent case of Northern International Remail and Express Co. v. Lester Robbins, et al., the Appellate Division held that a plaintiff's claim against a former owner of property cannot survive without evidence that the former owner's tenants did more than just generate hazardous waste. In Northern International, Northern International Remail and Express Co. ("Northern") purchased a site in Union, New Jersey from defendant, Lester Robbins ("Robbins") in 1991. The site was purchased by Robbins in 1976, and at the time was being leased by Baron Blakeslee, Inc. ("Baron"). Baron was engaged in the storage and distribution of chlorinated solvents, and used "a minimum of two 1,000 gallon outdoor tanks" for storage of such solvents. Although Baron continued to be a tenant at the Union site after it was purchased by Robbins, Baron, however, moved the work it performed at the Union site to another location in 1970.

After moving its operations in 1970, Baron subleased the Union property to J&J Construction Co. ("J&J"), a corporation engaged in the installation of car radios. Another entity known as T&T Corporation ("T&T") may also have operated at the property. The evidence indicates that both J&J and T&T generated hazardous waste. However, there was no evidence of the type of hazardous waste generated or if any governmental actions were taken against any of these entities for the storage of hazardous waste at the Union site.

In 1998, Northern sought to refinance the Union property. In connection with the refinancing, contamination was uncovered at the Union property, which was attributed to past operations by Baron. Northern's counsel in 1998 asked Robbins to contribute to the cost of the clean up at the Union property.

Northern eventually sued Robbins in 2008 based on New Jersey's Spill Compensation and Control Act (the "Spill Act") and common law claims of strict liability, nuisance, negligence, indemnification and restitution. On motion for summary judgment, the lower court dismissed Northern's common law claims on the basis that the six year statute of limitations expired. The lower court also entered a judgment in favor of Robbins under the Spill Act on the basis that the evidence produced did not show that there had been a discharge of hazardous substances during the period of Robbins' ownership of the Union property. Northern appealed the lower court's ruling.

In order for Robbins to be held liable under Spill Act, Northern had to prove that hazardous substances were discharged at the Union site while Robbins was the owner of the property. Because Baron transferred its operations from the Union site prior to Robbins taking title to the Union property, Northern did not allege that Baron discharged any contamination at the Union property after Robbins took title to the property. Rather, Northern argued on appeal that Robbins was not entitled to summary judgment under the Spill Act because J&J and T&T were "registered generators of hazardous waste at the Union property during the period that Robbins was owner" asserting that this fact was sufficient to establish that there was a discharge at the Union property during Robbins' ownership.

The Appellate Division rejected Northern's contention noting that there was no evidence that the hazardous waste generated by J&J and T&T included the contaminants that were being detected at the Union property. The Court reasoned that given the absence of such evidence, it could not find that J&J or T&T discharged hazardous substances at the property. Therefore, the Court concluded that the "generation of hazardous waste, without more, does not give rise to [Spill Act] liability."

The Court also dismissed Northern's argument that Robbins was responsible for the continuing discharge of hazardous waste from Baron's

operation even though Baron's activity at the property ended prior to Robbins' ownership of the property. The Court held that liability under the Spill Act cannot be imposed "if a party's only link to the discharge is through the passive migration of pre-existing contamination." Thus, continuing contamination from a pre-existing contamination is insufficient to impose liability under the Spill Act.

The Appellate Division also upheld the lower court's determination that Northern's common law claims should be dismissed on the basis of the statute of limitations. The Court noted that the information obtained by Northern in 1998 at the time it was refinancing its property "was more than sufficient" for Northern to realize that it should have pursued its claim against Robbins. Thus, Northern's cause of action accrued in 1998 and clearly by statute would have had to bring suit within six years of 1998.

This case is instructive for several reasons. In order to establish liability of a prior owner or operator for contamination at a site, there must be evidence connecting the prior owner's or operator's operations at the site to the contamination being detected at the property. The mere fact that a former owner or operator handled hazardous substances is insufficient. Typically, such a connection is established through direct evidence such as former employee testimony or expert testimony based on the expert's review of records linking the former owner's or operator's operations to the contamination at the site. Thus, it is essential when contemplating an environmental cost recovery action to put in place a team of experts and attorneys that will be able to gather the necessary evidence to maintain a case against former owners or operators that were responsible for the contamination.

One of the most common mistakes by a property owner is delaying to act upon information suggesting that a prior owner or tenant may have contaminated the property. Therefore, it is imperative to bring a cost recovery action immediately when you know or suspect your property was contaminated by a prior owner or current or former tenant at the property. This information can be based on, as in Northern International, recent soil or groundwater sample results indicating that the property is contaminated. Generally, once such information is available, the "clock" starts running for filing a cost recovery action. For common law claims such as strict liability, nuisance, and negligence the statute of limitations

is six years. Thus, to avoid running afoul of the statute of limitations for these types of claims, an action must be brought within six years of when you knew or should have known that the that the property was contaminated.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

Court Plaza North
25 Main Street
Hackensack, NJ 07601
Phone: (201) 489-3000

900 Third Avenue
16th Floor
New York, NY 10022
Phone: (212) 752-8000

500 Delaware Avenue
Suite 1410
Wilmington, DE 19801
Phone: (302) 652-3131

300 East Lombard Street Suite 2000
Baltimore, MD 21202
Phone: (410) 230-0660

301 Commerce Street
Suite 1700
Fort Worth, TX 76102
Phone: (817) 810-5250