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Failure of Notice Deadly to Plaintiff's Claim

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The District Court of New Jersey in a case of first impression recently held that a New Jersey resident's lawsuit under the New Jersey Environmental Rights Act ("ERA") must be dismissed due to her failure to give the appropriate parties notice. (Scott v. Dupont, 2009 WL 901135 (D.N.J. April 1, 2009). Although the plaintiff later provided the requisite notice, the court held that the notice provision under the ERA is a mandatory condition precedent and plaintiff's failure to properly file notice is fatal to her claim.

The ERA provides that any person can commence an action in court against any other person alleged to be in violation of any "statute, regulation or ordinance which is designed to minimize pollution, impairment or destruction of the environment." N.J.S.A. § 2A:35A-4(b). The ERA effectively allows a citizen to step into the shoes of the Department of Environmental Protection ("DEP") and enforce environmental laws against an alleged violator. However, the ERA requires that prior to commencing such an action the plaintiff must first provide the DEP, other public officials, and the defendant at least 30 days advance written notice of their intention to file the suit. N.J.S.A. § 2A:35-A-11.

In Scott v. Dupont, the plaintiff was one of several in a class action filed against Dupont alleging that the company allowed significant amounts of a Teflon-related material to contaminate the public water supply. Prior to filing her ERA claim, the plaintiff failed to comply with the act's advance

notice provision. The court dismissed her claim despite the plaintiff's argument that her ERA lawsuit should continue because she notified the DEP and requisite others before Dupont moved for dismissal for failure to provide notice. The court held that the "ERA notice is a mandatory condition precedent to bringing a private cause of action under the ERA," and therefore, is a defect that cannot later be cured.

This decision may possibly be used by New Jersey courts to dismiss claims under other statutory notice provisions. Therefore, plaintiffs should be aware at the commencement of their lawsuit that if statutory notice is required they risk dismissal of their claim prior to the merits ever being heard if notice is not correctly filed. Although a harsh result, if there is a defect in following an environmental statute's notice provision, that defect cannot be cured.

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