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CERCLA vs. New Jersey's Spill Act

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Both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., and New Jersey's Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., provide a statutory basis for the government and responsible parties to compel responsible parties to remediate contaminated sites or to pay for their equitable share of response costs. Although the statutes contain different language, they have generally been viewed by litigants as alternative means to achieve the same result. However, the New Jersey Supreme Court recently held in *NJDEP v. Dimant et al.*, 212 N.J. 153 (2012) that there was a clear difference between the two statutes regarding the issue of causation, and in so doing, it highlighted other significant differences between the two statutory schemes.

A review of environmental case law reveals that there are several important areas in which these statutes reach different, and sometimes conflicting, results.

Causation

The *Dimant* Court held that the New Jersey Department of Environmental Protection (NJDEP) (or others suing under the Spill Act) must connect a discharge to the damages being sought, i.e. the plaintiff must demonstrate that the discharge specifically caused injury to the natural resources or the incurrence of cleanup and related response costs. The Supreme Court rejected the NJDEP's arguments for adoption of the more lenient CERCLA standard for nexus, which requires only "some connection" between a release of a hazardous substance and the costs incurred. In doing so, the Court explicitly distinguished the Spill Act from CERCLA, and determined that the New Jersey statute requires more than CERCLA, namely, a "reasonable nexus or connection must be demonstrated by a preponderance of the evidence." *Id*. at 182. Under the Spill Act, the discharge must be connected to the specific environmental damage "in some real, not hypothetical, way . . . it is not enough . . . to 'ask the trier of fact to supply the link.'" *Id*., quoting *N.J. Tpke. Auth. v. PPG Indus.*, 197 F.3d 96, 105 n.9 (3d Cir. 1999).

In reaching its conclusion, the Court in *Dimant* examined the legislative history of both CERCLA and the Spill Act and noted that there are important distinctions between the two statutes. The first distinction concerns the statutes' respective liability provisions, which is discussed in further detail below. Second, and more germane to the Court's analysis, a review of the legislative history of CERCLA (which was enacted subsequent to the Spill Act) provided a justification for CERCLA's more lenient causation standard—a justification not found in the legislative history of the Spill Act. When the bills that ultimately became CERCLA were first introduced, they contained language that required a showing of proximate causation to attach liability to a given defendant. In the final compromise bill, however, all references to proximate

cause were eliminated. Because of this legislative history, courts have concluded that a plaintiff under CERCLA need only show "some connection" between a defendant's conduct and the incurrence of response costs. *See N.J. Tpke. Auth.*, 197 F.3d at 105.

The *Dimant* Court noted that, in contrast to CERCLA, neither the language of the Spill Act nor its legislative history addresses the standard of causation. The Court reasoned that the appropriate causation standard must "accommodate the Act's multiple forms of relief and must support and justify a range of relief available under the Act, which includes injunctive relief, and/or the recovery of damages and those costs available under the Act." *Dimant*, 212 N.J. at 182. Accordingly, the Court held that upon mere proof of a discharge, one may be able to obtain injunctive relief (e.g., ordering cessation of the discharge, ordering a preliminary assessment and site investigation) under the Spill Act. However, in an action for damages, a reasonable nexus must be shown between the discharge, the alleged discharger, *and* the specific contamination for which damages are sought.

Scope of Liability

Another important distinction between the Spill Act and CERCLA relates to the scope of liability imposed. The Spill Act imposes joint and several liability on any person or entity in any way responsible for the discharge of a hazardous substance. *See* N.J.S.A. 58:10-23.11g(c)(1). On the other hand, CERCLA has been interpreted as permitting apportionment of liability among responsible parties when there exists a reasonable basis to do so. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009). In *Burlington Northern*, the U.S. Supreme Court reviewed the history of apportionment analyses in CERCLA cases, noting that "apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm." *Id.* at 614. Applying factors such as the percentage of land area used, the time of ownership, and the types and volume of hazardous products, the Court held that the facts in that case did reasonably support the apportionment of liability. *Id.* at 617. The *Dimant* Court, however, expressly rejected the applicability of *Burlington Northern* in Spill Act cases. *Dimant*, 212 N.J. at 178–79.

Although the Spill Act provides for divisibility in the form of a subsequent action for contribution (*see* N.J.S.A. 58:10-23.11f(a)(2)(A)), the fact remains that, in the first instance, the Spill Act holds parties liable on a joint and several basis. By contrast, under CERCLA, a defendant has the opportunity to demonstrate that a reasonable basis for apportionment exists, and if a reasonable basis does exist, such a defendant's liability will be limited to the damages attributable to that defendant. Accordingly, liability under the Spill Act has the potential to be greater and more extreme than under CERCLA.

Statute of Limitations

The statute of limitations applicable to environmental actions is a topic deserving of far more space. Briefly, however, it is worth noting that while CERCLA can be seen as convoluted for having a complex and often debated array of applicable statutes of limitations, the Spill Act could be cast in a similar light for having none at all. Under CERCLA, there are several statutes of limitations, each of which applies to a particular situation. Cost recovery claims under section

107 have either a three-year or a six-year limitations period, depending on whether the costs being sought were incurred for a removal action or a remedial action. Contribution actions under section 113 are subject to a three-year statute of limitations. However, the event that triggers this period depends on the particular subsection of section 113 under which contribution is sought. To muddy the waters even further, recent case law indicates that there is disagreement among federal courts as to what events actually trigger the statute of limitations. *Compare Hobart Corp. et al., v. Waste Management of Ohio, Inc., et al.*, 840 F. Supp. 2d 1013 (S.D. Ohio 2011), (holding that the statute of limitations for actions under section 113(f)(3)(B) begins to run on the effective date of the settlement agreement), *with Bernstein, et al. v. Bankert, et al.*, 2012 U.S.App. LEXIS 25867 (7th Cir. 2012) (holding that the statute of limitations for actions under section 113(f)(3)(B) does not begin to run until the potentially responsible party (PRP) has satisfactorily discharged its obligations under the Settlement Agreement and received a certification of completion).

Unlike litigants under CERCLA who must determine which statute of limitations apply and when the statute is triggered, Spill Act litigants continue to debate whether any statute of limitations applies at all. The language of the Spill Act does not contain a statute of limitations for private contribution actions. Confronted with this glaring omission, federal courts have chosen to select a limitations period for Spill Act contribution actions from among those periods that are applicable to actions seeking similar relief under New Jersey common law. Courts in this situation have typically elected a six-year period, noting that the New Jersey statute of limitations at common law for trespass and tortious injury to real property is six years. State courts, however, continue to hold that there is no limitations period under the Spill Act, as none is explicitly included within the language of the statute. Despite this discrepancy, the state legislature has not taken any action to clarify the issue or expressly adopt a statute in Spill Act matters, and the state Supreme Court has not had the opportunity to address this issue. For now, the uncertainty continues.

Definition of Liable Parties

The Spill Act provides less certainty than its federal analog in its delineation of liable parties. The Spill Act attaches strict liability for cleanup and removal costs to anyone who is "in any way responsible for any hazardous substance." N.J.S.A. 58:10-23.11g(c)(1). When this language was added in 1979, the sponsor's statement characterized the amendment as imposing joint and several liability for a more extensive class of responsible parties. Assemb. 3542 (Sponsor's Statement), 198th Leg. (N.J. 1979). This vague definition of liable parties, however, has created uncertainty as to the extent of its reach. By contrast, CERCLA takes a much different approach and specifically defines four categories of PRPs. These include: (1) the current owner or operator of a vessel or a facility; (2) the owner or operator of a vessel or a facility at the time of disposal of any hazardous substance; (3) any person who arranged for disposal or treatment of any hazardous substances located on the site; and (4) any transporter of hazardous substances to a site the transporter selected. Although the determination of who is an "arranger" is far from clear, CERCLA provides greater clarity on the identification of liable parties than the Spill Act.

Both statutes have been refined and amended through legislative action and judicial interpretation. CERCLA, for example, has been amended on more than one occasion to include potential limitations to liability. The 1986 Superfund Amendments and Reauthorization Act (SARA) created an "innocent landowner" defense under CERCLA and the subsequent Brownfields Amendments clarified this defense while also adding protections for bona fide purchasers and contiguous-property owners. Similarly, the Spill Act was amended in 1993 to include an innocent-purchaser defense, which has been further defined through case law, including the recent decision in *New Jersey Schools Development Auth. v. Marcantuone*, Docket No. A-1868-10T3 (N.J. Super. Oct. 29, 2012). The *Dimant* decision can also be seen as narrowing the reach of the imprecise "in any way responsible" language by clarifying the causal link that is required to hold a party liable for damages. While both statutes are meant to have a very expansive reach with respect to holding parties liable, cases such as *Dimant* clearly illustrate that this reach is not coextensive.

CERCLA Preemption of State Law

The preceding analysis of some of the significant differences between CERCLA and the Spill Act, when considered in conjunction with a recent decision from the U.S. District Court for the Eastern District of Wisconsin, suggests the following question: Does it matter? Given the recent decision in *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 2012 U.S. Dist. LEXIS 143798 (E.D. Wis. 2012) in which the court determined that CERCLA preempted the defendants' state-law counterclaims, there is a question as to whether the above analysis is relevant to actions in which both CERCLA and state-law claims are asserted.

In *Appleton*, the plaintiffs moved for summary judgment with respect to the defendants' state-law counterclaims, which included claims for contribution, cost recovery, negligence, strict liability, and public nuisance. The plaintiffs argued that such state-law claims were preempted by CERCLA and could not be asserted by the defendants because the CERCLA contribution claims had already been decided (the court had previously allocated the plaintiffs with a zero percent share of the costs at issue). The court agreed with the plaintiffs that the state-law counterclaims were preempted, noting that "what CERCLA takes away, state law claims cannot give back." *Id.* at *10. In reaching this conclusion, the court repeatedly highlighted the fact that the costs for which the defendants sought contribution arose under CERCLA and were expended pursuant to CERCLA. "[I]f CERCLA itself provides a scheme for reapportioning those funds, then allowing a state law claim to essentially reapportion those funds in a way that CERCLA did not intend would pose a conflict." *Id.* at *8.

The language chosen by the court in *Appleton* provides some indication that its holding may not be as unfavorable to state environmental laws as it first appears. Nothing in the court's decision suggests that state-law claims are preempted by CERCLA in every instance. On the contrary, the court specifically notes that "state law claims are not preempted merely because CERCLA might also provide a claim for relief." *Id.* at *14. The court's holding was instead limited to the following assertion: Where costs have been incurred and/or expended pursuant to CERCLA, and where those costs have been apportioned pursuant to the provisions of CERCLA, a PRP cannot use state-law claims in an attempt to have those costs reapportioned in a more favorable manner.

Under the facts of *Dimant*, therefore, where costs were incurred pursuant to state statute, and where damages were sought under state statutory authority from the outset, it appears that *Appleton* would not preclude the application of state law, even if it were found that application of CERCLA would lead to a different result.

The holding of *Appleton* appears to be limited in that sense, and by no means should be viewed as obviating all of the provisions of state environmental claims. The long history of jurisprudence regarding federal preemption in general has traditionally left room for variations between state and federal law. *Appleton* has not changed this, but has simply refined these principles in the environmental context, leaving room, at least in some instances, for the differences outlined in *Dimant*.

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