Landmark Ruling by New Jersey Supreme Court Raises NJDEP’s Burden of Proof in Establishing Spill Act Liability

On September 26, 2012, in perhaps the most significant New Jersey environmental decision in the last thirty years, the New Jersey Supreme Court in New Jersey Department of Environmental Protection v. Dimant (A-2-11) (067933) dealt a major blow to the New Jersey Department of Environmental Protection’s (“NJDEP”) strategy of pursuing business owners for cleanup costs under New Jersey’s Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (“Spill Act”) without sufficient evidence linking those businesses to the contamination and alleged damage at issue. In a case of first impression, the Court has made it clear that in order for the NJDEP to successfully pursue a claim for damages under the Spill Act, including claims for natural resource damages (“NRD”), the NJDEP must demonstrate, by a preponderance of the evidence, a “reasonable nexus or connection” between the alleged discharge by the defendant and the damage forming the basis for the NJDEP’s lawsuit. The unanimous decision will make the NJDEP’s claims for damages under the Spill Act much more difficult to prove, in particular those relating to historical discharges.

Dimant involved a cluster of residential wells in Bound Brook, New Jersey found in 1988 to be contaminated with perchloroethylene (“PCE”), a chemical commonly used as a dry-cleaning agent and a degreaser in auto body shops. A State investigation launched that same year focused on several nearby businesses as potential discharge sources, including four dry-cleaning facilities, a former Mobil service station, and a Chevrolet dealership. As part of its investigation, NJDEP investigators found an exterior pipe leaking liquid containing PCE at one of the dry-cleaning facilities, Sue’s Clothes Hanger (“Sue’s”). Despite this finding, the NJDEP did not investigate the property further; nor did it take any enforcement action at that time.

Nearly sixteen years later, the NJDEP brought a Spill Act claim against Sue’s in 2004, alleging it to be responsible for a discharge under the Spill Act and liable for damages associated with the contamination of the residential wells in Bound Brook. Following a bench trial, the New Jersey State Court found that the NJDEP had failed to prove by a preponderance of the evidence that a discharge by Sue’s caused or contributed to the contamination in...
the Bound Brook wells. In particular, the NJDEP did not establish whether the exterior leak at Sue’s was “continuous or intermittent”; whether the leak entered the soil or evaporated on the pavement below the pipe; or whether the other nearby businesses using PCE in their operations could be ruled out as potential discharge sources. The trial court determined that absent such a “nexus” between a discharge by Sue’s and the contamination, the NJDEP could not compel contribution under the Spill Act for investigation, cleanup, or damages.

After the Appellate Division upheld the trial court’s ruling in an opinion approved for publication (See 418 N.J. Super. 530 (App. Div. 2011)), the NJDEP appealed to the New Jersey Supreme Court, arguing the court below had erred in requiring the State to demonstrate a factual connection between the damages alleged and a discharge by Sue’s. According to the NJDEP, liability for damages under the Spill Act could be demonstrated merely by showing that Sue’s was responsible for a discharge as defined by the Act and that the substance discharged was found at the site. According to the NJDEP, it was not relevant, and not a required part of its case, to demonstrate that a discharge from Sue’s had caused or contributed to the damage at issue.

The New Jersey Supreme Court rejected the NJDEP’s argument and noted that “a party in Sue’s circumstances must be shown to have committed a discharge that was connected to the specifically charged environmental damage of natural resources—groundwater damage—in some real, not hypothetical way.” The Court went to great lengths, through a parsing of the Spill Act’s language and an analysis of the legislative history, to contrast this additional “connection” requirement under the Act and the less onerous standard of liability found under its Federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). The Court further noted that “[a] reasonable nexus or connection must be demonstrated by a preponderance of evidence.” Note that in adopting this “reasonable nexus” standard, the Court declined to adopt the more stringent “proximate causation” standard advocated by Sue’s.

The Dimant decision will have an enormous and immediate impact on the manner in which claims for damages under the Spill Act are litigated, and companies confronted with such claims should be re-evaluating their defense strategies accordingly. If you would like further information about the Dimant decision and how it may affect your company, please contact Kevin J. Bruno, Frank A. Dante, or Louis D. Abrams of Blank Rome LLP’s Environmental Litigation Practice Group.

1. The Court limited the “reasonable nexus or connection” causation requirement to actions for damages while holding that prompt injunctive relief under the Spill Act may be obtained upon mere proof of the existence of a discharge.