

## *KD Alert: New Jersey Supreme Court: Close is not enough under the “Spill Act”*

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The New Jersey Supreme Court has ruled that in order to hold a party liable under the Spill Compensation and Control Act (the “Spill Act”), the Department of Environmental Protection (“DEP”) must establish a reasonable link between a contamination source and a contaminated resource under the evidentiary standard known as the “preponderance of the evidence.” This decision is important because previously it was unclear just how stringent the causation standard was under the Spill Act. In a remediation action called *New Jersey Dep’t of Env’tl. Prot. v. Dimant*, 2012 N.J. LEXIS 956 (September 26, 2012), the DEP argued causation was established under the Act where the DEP presented evidence of a discharge of a particular pollutant along with evidence that the same type of pollutant contaminated a nearby resource, without having to trace the contamination precisely to the discharge. In contrast, the alleged polluter, a dry cleaning business named Sue’s Clothes Hanger (“Sue’s”), contended the DEP must at least show a “plausible migration pathway” between the discharge and the contamination. On appeal, the Supreme Court agreed with Sue’s, finding the DEP’s proofs were too attenuated to establish causation under the Act.

In 1988, the DEP found perchloroethylene (“PCE”) contamination in groundwater near Sue’s building. An investigation revealed a pipe extending from the rear of the building leaked liquid containing 3,000 times the permissible level of PCE. It then filed a remediation action seeking to hold Sue’s liable for the contamination of nearby groundwater. Sue’s fought back on the basis there were no plausible proofs to show the leaked liquid had migrated to the groundwater. Sue’s contended the damage was not reasonably traced back to the allegedly leaking pipe because the DEP had only performed one test on the pipe, and there was no evidence as to how long the liquid continued to drip, or where the liquid purportedly migrated. Moreover, the two sides’ experts disagreed as to the direction of groundwater flow under the site. In addition, Sue’s noted the pavement below the pipe was intact, something of particular importance, as PCE tends to degrade asphalt. The Court found that because Sue’s operated its dry cleaning service for a mere fifteen months, coupled with the fact that only a single test occurred in December 1988, the proofs were insufficient to show a plausible link between the source and the polluted resource, particularly when other dry cleaning businesses adjacent to Sue’s clearly contributed to the contamination.

As clarified by *Dimant*, a party is only liable under the Spill Act if a plausible connection can be shown to exist between the discharge source and the contaminated resource. Thus, it is essential to show, at a minimum, a pollutant could have reached a polluted resource from a particular source. While it need not be shown the discharged substance actually migrated to the contaminated resource – i.e., a more rigorous showing of proximate causation – a plausible theory connecting the source and the contamination is necessary. This minimal causation requirement is critical, as the Spill Act is a strict liability statute, meaning a discharger is liable regardless of the level of care exercised. In addition, the *Dimant* decision is important as the Spill Act imposes joint and several liability, meaning one of perhaps many potentially responsible parties can be responsible for the entire cost of a cleanup, and because under the Spill Act, it is not only actual dischargers that may be liable. Owners and operators, such as parent corporations, may also be liable.

The Spill Act is a powerful tool in the hands of the DEP and other claimants to force cleanup costs upon a wide range of potential dischargers. It poses a particular danger in that no matter how careful one is, strict liability is imposed for all cleanup costs, and one of many potentially responsible parties can be liable for all costs of cleanup due to joint and several liability. Even so, *Dimant* shows that an alleged discharger can mount a successful defense by focusing on the adequacy, or lack thereof, of the investigation purporting to link them to environmental damage.

For more information on this matter, please contact Iram P. Valentin or one of the attorneys in KD’s Insurance Coverage & Monitoring practice group.

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