# Being Proactive About Passive Migration

## Property owners can be held liable even if they neither caused nor contributed to contamination

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Recent environmental rulings by the New Jersey appellate courts have made clear that owners of contaminated property can be held liable under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq. (the "Spill Act"), even if they neither caused nor contributed to the contamination during their period of ownership. Previously, these individuals had a defense to an action under the Spill Act, known as the "passive migration doctrine." However, more recent New Jersey appellate decisions in *State Farm Fire & Cas. Co. v. Shea* and *New Jersey Schs. Dev. Auth. v. Marcantuone* have muddied the waters for defendants hoping to rely on the passive migration doctrine to avoid liability under the Spill Act.

The passive migration doctrine was originally adopted by the New Jersey Appellate Division in *White Oak Funding v. Winning*, 341 N.J. Super. 294, 298 (App. Div. 2001). In *White Oak Funding*, the issue was whether prior owners of a commercial property could be liable under the Spill Act for contamination that pre-existed their period of ownership. The defendants were two consecutive owners of the property at issue, which had been contaminated prior to their respective periods of ownership. Importantly, the defendants in *White Oak Funding* neither caused, nor contributed to, the contamination at issue. All contamination pre-existed their respective periods of ownership.

Notwithstanding this, the plaintiff argued that the defendants could be liable on two theories, both of which were premised only upon the defendants' failure to conduct any environmental due diligence prior to purchasing the property. The Appellate Division disagreed, however, and held that "[i]mposition of Spill Act liability as a discharger requires some act or omission of human conduct which causes a hazardous material not previously present to enter the waters or land. Liability does not result from passive migration of a hazardous material that previously entered the site." Thus, the "passive migration doctrine" was created, which absolved property owners of liability for contamination that pre-existed their period of ownership.

Following the Appellate Division's pronouncement in *White Oak Funding*, two more recent Appellate Division decisions have essentially nullified the passive migration doctrine in favor of what has become known as the "purchaser defense." The most recent decision dealing with the innocent purchaser defense is *State Farm Fire & Cas. Co. v. Shea*, 2012 N.J. Super. Unpub. LEXIS 2208 (App. Div. Sept. 28, 2012), cert. denied, 213 N.J. 386 (2013).

In *Shea*, the defendant owned a piece of real property where an abandoned underground storage tank (UST) existed from a prior owner, unbeknownst to the defendant. The fact that the defendant, Shea, had neither used, nor had knowledge of, the UST was undisputed. Thus, Shea attempted to argue that he was not liable for the passive migration of the existing contamination that predated his ownership of

the property under the passive migration doctrine from the *White Oak Funding* case.

The Appellate Division disagreed and held that Shea was strictly liable under the Spill Act. This outcome was predicated on a specific section of the Spill Act, which applied to owners of real property that acquired their interest *on or after* Sept. 14, 1993. The provision at issue, N.J.S.A. 58:10-23.11g(d)(2), establishes a defense for good-faith purchasers of contaminated property, who neither cause nor contribute to the contamination at issue.

In creating a defense to Spill Act liability, N.J.S.A. 58:10-23.11g(d)(2) requires a showing that the defendant neither knew about the contamination at issue, nor had reason to know of the contamination, when they purchased the property. In order to establish this, the act specifically requires a showing that the defendant must have undertaken "all appropriate inquiry into the previous ownership and uses of the property," prior to acquisition. The term "all appropriate inquiry" is defined as "the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary."

In *Shea*, the record indicated that Shea, who purchased the property in 1999, did not perform any environmental due diligence and, therefore, could not be afforded the benefit of the innocent purchaser defense. The court in *Shea* distinguished *White Oak Funding*, on the basis that the two prior owners in *White Oak Funding* acquired their interests in 1983 and 1986, respectively. Thus, the innocent purchaser defense embodied in N.J.S.A. 58:10-23.11g(d)(2), which applies only to purchases *on or after* Sept. 14, 1993, would not apply.

Of course, this left open the issue of whether *White Oak Funding* was still good law for property owners who acquired their ownership prior to Sept. 14, 1993. That issue was resolved in the negative, however, by a 2001 amendment to the Spill Act, which became effective exactly seven days after the *White Oak Funding* decision. This amendment, which created a similar, although less-stringent, innocent purchaser defense for purchasers who acquired property prior to Sept. 14, 1993, was the subject of the second recent case from the Appellate Division, *New Jersey Schs. Dev. Auth. v. Marcantuone*, 428 N.J. Super. 546, 560 (App. Div. 2012).

In *Marcantuone*, the defendant's date of acquisition was June of 1985. Prior to the defendant's purchase, the property at issue was historically used as a dry-cleaning facility, although the record indicated that the defendant never owned or operated a dry-cleaning facility on site. In November of 2005, the city of East Orange filed a condemnation action against the defendant, seeking to acquire the subject-property for purposes of building a school. During the pendency of the condemnation proceeding, environmental sampling was conducted, which showed elevated levels of PCE, a contaminant associated with the drycleaning industry.

The condemnation proceedings ended in November of 2007. The court entered an order, requiring the plaintiff to essentially escrow money for the anticipated cost of the environmental remediation. The plaintiff then filed suit under the Spill Act, against the defendant, to recover the cost of the remediation.

The defendant, relying on *White Oak Funding*, argued that it could not be liable under the Spill Act, since it neither caused, nor contributed to, the contamination. The trial court agreed and granted the defendant's motion for summary judgment. The plaintiff appealed, and argued that the 2001 amendment, which became effective just one week after the *White Oak Funding* decision, superseded the Appellate Division's decision in that case. The Appellate Division agreed and reversed.

In reversing, the Appellate Division noted that the 2001 amendment created an innocent purchaser defense for purchasers of real property that acquired their interest *prior to* Sept. 14, 1993. This innocent purchaser defense, codified at N.J.S.A. 58:10-23.11g(d)(5), is substantially similar to N.J.S.A. 58:10-23.11g(d)(2), and requires a showing that the defendant neither knew, nor had reason to know, about the contamination at the time of purchase. Unlike subsection (d)(2) however, (d)(5) does not, necessarily, require a preliminary assessment and/or site investigation. Rather, (d)(5) requires that the person "must have undertaken, at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property *based upon generally accepted good and customary standards*."

Because the trial court granted the defendant's motion based upon the passive migration doctrine from *White Oak Funding*, the Appellate Division reversed and remanded the case for a determination of: (1) what the generally accepted good and customary standards were when the defendant acquired the property in 1985; and (2) whether the defendant's prepurchase investigation, if any, satisfied those standards.

These cases demonstrate that current and prior owners of real property in New Jersey can be liable under the Spill Act for pre-existing contamination, even if they neither cause, nor contribute to, the contamination during their ownership. Practitioners need to know and understand the different standards that will be applied based upon the date of acquisition. Good-faith purchasers of real property, acquiring their interest prior to Sept. 14, 1993, must comply with N.J.S.A. 58:10-23.11g(d)(5), which requires conformance with "generally accepted good and customary standards." Good-faith purchasers, acquiring their interest on or after Sept. 14, 1993, must comply with the more stringent requirements of N.J.S.A. 58:10- 23.11g(d)(2), which requires "the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary." Liability under the Spill Act can hinge on which standard is applied and thus, may come down to when the defendant acquired its interest in the property.

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