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STATE V. SPEONK FUEL CREATES CONFUSION ON LIABILITY FOR OIL SPILLS

The recent New York State Court of Appeals decision in *State of New York v. Speonk Fuel, Inc.* sets forth a potentially dramatic expansion of the liability of dischargers of petroleum under Navigation Law § 181(1). The opinion proclaims that discharger liability may lie against an entity that purchases a petroleum storage system *after* the discharge ends and the leaking system component is removed. However, the breadth of this holding is called into question by a close reading of the case background, and the decision is likely to create more confusion than it resolves.

Defendant Local Wrench Service Station, Inc. immediately preceded Speonk Fuel (“Speonk”) as the owner and operator of a gasoline service station and its associated underground petroleum storage system. In October 1985, the storage system was tested for tightness – one of the five underground tanks in the system failed the tightness test. As it happens, Speonk’s president, Thomas Mendenhall, was present at the property during the tank tightness test.

Three months later, on January 8, 1986, Speonk contracted to purchase the service station and the storage system, and Mendenhall contracted to purchase the underlying real property. Two weeks later, the defective tank was removed from the ground and discovered to have a one-eighth inch hole. Local Wrench, Speonk and Mendenhall did not complete the sale of the service station, storage system and real property until March 12, 1986 – roughly seven weeks *after* the defective tank was removed.

Eventually, DEC hired contractors to remediate contamination at the site. The State then sued Local Wrench (which went out of business), Speonk and Mendenhall, seeking to recover cleanup and removal costs.

Presented with these facts, the Court of Appeals held Speonk liable as a discharger: “We consider it sufficient for purposes of liability here that, with knowledge of its vendor’s discharge of oil and the need for clean up, Speonk did nothing.” The Court cited its 2002 decision in *State v. Green* for the principle that discharger liability is predicated “on a potentially responsible party’s *capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill.*” The implication is clear: a purchaser of contaminated property will be considered a “discharger” where the contamination was known at the time of purchase and the purchaser had the capacity to remediate the spill. As noted by the sole dissenting judge, the result of *Speonk Fuel* is that an entity which had no interest in or control over either the real property or the petroleum storage system at the time the discharge occurred is now viewed as a “person who has discharged petroleum” under the Navigation Law.

A careful review of the case history of *Speonk Fuel* creates more confusion than clarity. In June 2000, the Appellate Division, Third Department suggested that Mr. Mendenhall should be added to the case as a defendant because (a) he owned the real property that included the system from which the discharge occurred, and (b) the contamination from that discharge remained when he purchased the system. In the same opinion, the Third Department granted Speonk’s motion for summary judgment, holding that Speonk’s mere operation of the service station business after the system was repaired was insufficient to impose liability. In other words, in June 2000, Speonk was out of the case, and it appeared likely that Mendenhall would be responsible for cleanup costs.

Then the parties changed the facts: In August 2000, the parties stipulated that Mendenhall owned the real property and that Speonk owned the underground petroleum storage system. In June 2001, the parties – and the Court – entered into a second stipulation that dismissed the Complaint against Mendenhall, reinstated Speonk as a defendant, and consented to entry of judgment against Speonk on the issue of liability under the Navigation Law. Speonk reserved the right to appeal, and the right to contest the



reasonableness of damages. Nevertheless, when the case returned to the Third Department in July 2003, Speonk's stipulation of liability made all the difference: "As a discharger, Speonk is strictly liable to plaintiff for 'all clean up and removal costs and all direct and indirect damages' ". The Court of Appeals decision followed suit, without mention of the stipulations.

The dissenting judge took issue with the majority's application of *State v. Green* to the facts at hand. *Green* involved liability placed on a trailer park owner for the contamination caused by his tenants. The majority cites *Green* for the proposition that liability is predicated on the potentially responsible party's "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill". However, the *Green* court took care to condition liability on the ability of the trailer park owner to control potential sources of contamination on its property, and held that the term "discharger" would include landowners who have both control over activities occurring on their property and reason to believe that petroleum products will be used by tenants. In contrast, Speonk did not possess the system at the time of discharge, and did not have control of the premises until nearly two months *after* the defective tank was removed. In essence, the Court disregarded *Green*'s control test in favor of a new standard: mere ownership of the offending "system", even though the defective portion of the system was removed prior to the date of acquisition and nothing was leaking when the system was acquired.

In the end, *Speonk Fuel* creates confusion for those attempting to forecast discharger liability. The court held that discharger liability may now apply to an entity which acquires possession of a system (a) *after* a discharge has occurred, and (b) *after* removal of the discharging component. Yet the opinion leaves several questions unanswered: Is the mere failure to clean up existing contamination now tantamount to discharging itself? Is a mere contract to purchase contaminated property enough to impose liability upon the purchaser for a discharging system? Would a purchaser escape liability if it did not have actual knowledge of potential environmental contamination prior to purchase? What if, acting with due diligence, it would have had knowledge? And, perhaps most important, is the control requirement of *Green* now a thing of the past?

Unfortunately, answers to the questions raised in the wake of *Speonk Fuel* must await future court opinions. For now, a prospective purchaser must exercise great care when purchasing real property that once hosted a system from which a leak occurred.

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SOIL VAPOR INTRUSION AN EMERGING ENVIRONMENTAL CONCERN

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Many business owners and operators have become so familiar with the requirements relating to environmental contamination that they routinely begin investigation and remediation without fully considering potential legal liabilities. However, the standard approach of “investigate, remediate and get on with business” is no longer sufficient where the contamination includes volatile compounds (i.e., petroleum or chlorinated solvents). This is due to increased focus by regulatory agencies and others on the potential intrusion of volatile contaminants from groundwater or soil into overlying buildings. This phenomenon – known as Soil Vapor Intrusion or SVI – is an emerging environmental legal concern for businesses, and the potential liabilities associated with SVI are expected to be significant.

Regulatory agencies in many states, including New York State, are increasingly requiring businesses to consider SVI as a potential exposure pathway when investigating and remediating releases of volatile contaminants. Across the country, there have been several high-profile cases in which large numbers of people are believed to have been potentially exposed to volatile contaminants in their homes and businesses due to SVI. This article is not intended to document those cases, or describe the appropriate engineering/technical response to an SVI concern, but to highlight potential legal issues that are related to SVI by reference to a hypothetical case study.

Case study facts

Imagine that a manufacturing facility is located in a combined-use industrial/office-park location. Solvents have historically been used at the facility in parts-washing operations, and in 1994, a prior solvent spill was remediated under an administrative order on consent between the facility and the New York State Department of Environmental Conservation (DEC). Because DEC was satisfied with the prior remediation, the facility has considered the matter to be closed for nearly 10 years. In recent years, single family homes have been built around the industrial/office park, and potential solvent impacts have been identified in the neighborhood. The possibility that solvents have migrated from the facility, throughout the industrial/office park and into nearby residential neighborhoods creates an SVI concern. What legal considerations should the facility evaluate?

Who are potential claimants?

Regulatory agencies, including the DEC and the New York State Department of Health (DOH), can be expected to require further investigation, and possibly remediation, of the newly discovered solvent impacts. Even though the facility considers the prior solvent spill to be closed, the order on consent likely contains a “reopener” under which DEC will seek to require performance of further investigation and/or remediation. Voluntary cleanup agreements and brownfield cleanup agreements can be expected to have similar reopener language. In addition, the DOH may have statutory authority to require the facility to address the contamination.

If soil vapors have migrated from the environment into the facility, the company’s employees may have workers’ compensation claims. Similarly, if soil vapors have migrated into neighboring businesses in the industrial/office park, the employees of those businesses will have workers’ compensation claims against their employers. More significantly, employees of neighboring businesses may also have toxic tort claims against the facility for bodily injury. The neighboring businesses may have claims for any remediation they perform and could also bring claims for property damage or diminution in property value. The residents may have similar claims against the facility and, in addition, might bring toxic tort claims based on alleged bodily injury.

These claims can be based on a variety of legal theories, including negligence or nuisance. The potential claimants will seek injunctive relief under common law and potentially under the Resource Conservation and Recovery Act (which, if successful, will reimburse them for attorneys’ fees). Depending on the nature of the contamination, other New York and federal statutes could be relied upon by the claimants, including the New York State Navigation Law and the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or federal Superfund). Clearly, the existence of an SVI concern means that the facility is subject to a large number of potential claimants and claims.

How should the facility respond to a SVI concern?

As soon as the facility becomes aware of a potential SVI concern, it should make arrangements to conduct an internal investigation to respond appropriately. The investigation team should be comprised of facility personnel, experienced environmental consultants, and environmental legal counsel. A determination must be made regarding who will conduct the investigation – for example, should the investigation be conducted by counsel in order to take advantage of any legal privileges that may be available?

The investigation team will review the 1994 order on consent, and consider whether any legal defenses to a regulatory demand for further action are available. In appropriate circumstances, there may be limitations on DEC's authority to invoke a reopener. Defenses to potential claims that may be brought against the facility should also be identified and evaluated. Defenses may focus on applicable statutes of limitations and causation, that is, whether the alleged injury is caused by the contamination. This is significant, because concentrations of contaminants in indoor air are frequently low, and they can frequently be shown to be caused by a variety of sources.

Insurance concerns

The investigation team must also consider whether insurance coverage may exist for future claims. For example, if coverage for the prior solvent contamination was contested, and insurance was obtained under a settlement with the insurance company, does the site release issued by the insurance company permit an argument that further coverage should be available for the SVI contamination? There may also be an argument available that a pollution exclusion clause in the facility's liability policy does not serve to bar injuries which result from indoor-air contamination.

The investigation team must also evaluate whether the solvent impacts are attributable to the facility, or whether another business may be the source; this action will involve a review of prior remediation reports and data, and may also involve environmental testing to determine potential migration pathways. Freedom of Information Law reviews to learn more about the environmental activities of the neighboring businesses may be helpful. The possibility that indoor-air contamination may be attributable to other sources within the building should also be explored. The team must consider appropriate standards and criteria that can be used to evaluate the SVI impacts. This will be a critical issue in discussions with regulatory agencies. The investigation team should also consider whether, based on the results of the investigation, the facility has any legal reporting obligation or a duty to warn employees or neighboring businesses and residents. Once all available information has been assembled and evaluated, the facility will be in a better position to discuss the SVI concern with potential claimants.

SVI concerns will also affect the manner in which environmental due diligence is conducted in the context of the purchase and sale of real property or a business. To protect their clients, counsel should be mindful of potential future SVI concerns when drafting transactional documents. For example, counsel for a purchaser should focus more attention on past spills of volatile contaminants, even if those spills have been administratively closed for many years. Counsel for a seller may wish to disclose the existence and details of those past spills, so it is clear the purchaser was aware of them. Both parties will seek to incorporate contract language – including representations, warranties and indemnification – that makes it clear who has responsibility for future SVI concerns that arise.

In sum, SVI is an emerging environmental issue, but businesses should also view it as an emerging potential source of significant legal liabilities. Practically, if a facility has experienced past spills of volatile contaminants, SVI is a possible concern, and a proactive approach to managing potential liabilities will benefit the facility in the long run.

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