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New York Court Of Appeals Rules That Purchasers Of Petroleum-Contaminated Properties May Be Held Strictly Liable Under The New York Oil Spill Act For Pre-Existing Discharges

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In a landmark case expanding the reach of New York's Oil Spill Act, New York's highest court has ruled that a purchaser of petroleum contaminated property may be held liable for the cost of remediating contamination released prior to the date of purchase, even though the purchaser did not cause the release and was not in a position of control to prevent it. *See State of New York v. Speonk Fuel Inc.*, Slip Op. No. 117 (October 19, 2004). Effectively reversing previous cases that had limited the reach of Oil Spill Act liability to parties who either actually caused the discharge or who were in a position of control to prevent it, the Court of Appeals concluded that a purchaser of petroleum contaminated property could be held liable for costs incurred by the State in remediating the contamination because the purchaser had knowledge that the property was contaminated prior to the purchase and "did nothing" to remediate it.

The Court arrived at its holding after a terse analysis of the Oil Spill Act's liability provisions and its own prior ruling in a 2001 case on the scope of those provisions. It began its analysis by noting that the Oil Spill Act, known more formally as the Navigation Law, imposes strict liability (*i.e.*, without regard to fault), against any person "who has discharged petroleum." Navigation Law, § 181(1). It also noted that the Navigation Law defines the word "discharge" as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping" of petroleum into the State's waters. *Id.* at § 178(2). Reading these two provisions together, the Court first found that the statute did not sufficiently set forth the "category of persons" who may be deemed strictly liable under the statute.

In order to answer this question in the context of a purchaser of previously contaminated property, the Court examined its prior holding in *State of New York v. Green*, 96 N.Y. 2d 403 (2001), in which it had ruled that a landlord could be held liable under the Oil Spill Act for petroleum contamination associated with its tenant's use of petroleum products. Even though the landlord had not physically caused the discharge himself, the Court concluded in *Green* that because he nonetheless was able to control the tenant's activities and had reason to believe that the tenant would be using petroleum products, he was therefore a party "who has discharged" petroleum within the meaning of the statute. The Court further explained in *Green* that its ability-to-control test for imposing Oil Spill Act liability would preclude the imposition of liability against landowners for discharges by third parties over whom they have no control – such as a "midnight dumper."

In the wake of the Court's ruling in *Green*, it was widely accepted that liability could not be imposed under the Oil Spill Act against a purchaser of petroleum-contaminated property where the contamination wholly predated the purchaser's acquisition. Prior to *Green,* this issue was a subject of uncertainty and controversy, with some earlier lower-court decisions suggesting that a landowner's mere status as an owner could be sufficient by itself to impose liability under the Oil Spill Act. *See, e.g., Art-Tex Petroleum, Inc. v. New York State Dep't of Audit & Control*, 248 A.D.2d 902 (3d Dep't 1998); *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 114 (3d Dep't 1996). *Green*, however, was widely accepted as having settled the issue once and for all by establishing that to be liable, the defendant must have either caused the discharge or otherwise have been in a position of control so that he could have prevented it.

In *Speonk*, however, the Court said that its ruling in *Green* not only recognized that liability could be imposed against a person who had either physically caused a petroleum discharge or failed to prevent a discharge where it was in a position to prevent it, but also that a person could be held liable under the Oil Spill Act for having failed to clean up petroleum contamination on property owned by it. It therefore concluded that where, as in *Speonk*, a purchaser who acquired property after the petroleum discharge occurred (and therefore was not in a position of control to prevent the release) could nonetheless be held liable if it was aware of the contamination prior to its purchase of the property and ultimately failed to remedy the contamination itself.

Curiously, there is no language in *Green* holding that the landlord's liability could be established on the sole ground that it had failed to remediate the contamination. Furthermore, the Court's ruling in *Speonk* that Oil Spill Act liability may be imposed solely on the grounds of a purchaser's knowledge of contamination and failure to remediate it appears to be at odds with the Court's discussion in *Green,* in which it stated that the ability-to-control test precluded the imposition of liability against a landowner whose property was contaminated by a "midnight dumper."

The Court's ruling in *Speonk* creates a number of questions and challenges for purchasers of petroleum-contaminated property or potentially contaminated property in New York. The first of these is that purchasers must now be cognizant when purchasing property known to have been contaminated by a petroleum discharge that unless some mechanism is provided for in their purchase agreement requiring the seller to remedy the contamination, along with a means to secure that obligation such as an escrow, the purchaser could find itself liable to the State for the cost of cleaning up.

Another concern for purchasers, which is presented by but not addressed in *Speonk*, is whether they may be deemed liable on the basis of less-than-conclusive evidence of petroleum contamination or its extent. Unfortunately, the Court's ruling provides no guidance as to the quantum of evidence that will suffice to put the purchaser on notice of the contamination in a sufficient degree to impose liability under the Oil Spill Act. Although the purchaser in *Speonk* apparently had considerable knowledge regarding the extent of petroleum contamination at the property, having specifically discussed it with state regulators, the Court's ruling is silent as to whether less-definitive signs of contamination (*e.g.*, stained concrete or soils, stressed vegetation, historic use of the property involving petroleum, significant reduction in purchase price, etc.) will be sufficient to trigger liability.

Another question left unresolved by the new liability standard espoused in *Speonk* is whether a purchaser who was not actually aware of petroleum contamination on purchased property prior to its acquisition may be nonetheless *imputed* with knowledge if he has failed to perform appropriate due diligence prior to the purchase in order to determine whether contamination exists at the site. The traditional approach under most liability-imposing environmental statutes is to impose liability for unknown contamination against purchasers who fail to undertake minimum efforts aimed at ferreting out the existence of contamination prior their purchase. This in turn has given rise to the widespread practice of purchasers in performing Phase I/ Phase II environmental site assessments of properties prior to purchase. In light of these traditional requirements, it would be anomalous for a court to conclude that a purchaser could escape liability under the Oil Spill Act altogether by adopting a "don't ask don't tell" approach to due diligence.

Finally, a literal reading of *Speonk* could even give rise to an argument that a purchaser of property known to be contaminated by an off-site source, such as a release from an adjacent or nearby residential fuel oil tank or service station gasoline tank, could be deemed liable for the cost of cleaning up contamination on his property. While in most instances it is likely that the New York Department of Environmental Conservation would pursue the party responsible for having directly caused the contamination in the first instance, the question remains whether it would invoke *Speonk* to impose liability against a down-gradient property owner if the party who actually caused the contamination is insolvent or nowhere to be found.

In light of *Speonk*, purchasers of property in New York should carefully ponder these issues when contemplating the purchase of property that is either known to be contaminated with petroleum or which potentially could be contaminated due to its prior uses and/or the uses of neighboring or adjacent properties.

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