

# “What keeps you up at night?”

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## State of New Jersey Tries to Expand Environmental Liability

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### SUMMARY

**The New Jersey Supreme Court will review the New Jersey Department of Environmental Protection's position that a party is liable under the Spill Compensation and Control Act for contamination even when there is no evidence associating the party's alleged discharge with environmental contamination in *New Jersey Department of Environmental Protection v. Dimant*, 418 N.J. Super. 530 (App. Div. 2011), certif. granted.**

The Department of Environmental Protection ("DEP") and the New Jersey Spill Compensation Fund Administrator (collectively the "State") brought a Spill Compensation and Control Act ("Spill Act") contribution suit against owners and operators of dry cleaner/laundromat businesses and other parties, for costs associated with remediating soil and groundwater contamination in Bound Brook, New Jersey, an area plagued by regional contamination. In the late 1980s, the DEP and local public authorities conducted an investigation, focusing, in part, on one of the defendant dry cleaner/laundromat sites that used PCE in its dry cleaning process (the "Sue's Clothes Hanger"). The investigators detected PCE in an indoor grated pit that discharged into the sanitary sewer system, not to soil or groundwater. The investigators also observed a slow leak of PCE from a pipe that dripped PCE onto asphalt outside the building.

In 2000, the State's expert investigated to locate the source of the contamination identified in the 1980s. The State's expert plotted the potable wells containing the highest levels of PCE in the late 1980s, which were directly behind the Sue's Clothes Hanger site. The State's expert also conducted soil and groundwater sampling at the Sue's Clothes Hanger site, which revealed PCE and its breakdown products at very low levels in the soil and PCE and MTBE (a constituent not normally associated with dry cleaners) in groundwater. Based on the location of the potable wells containing the highest levels of PCE in the late 1980s and the slight detections of PCE in the soil and groundwater in 2000, the State's expert opined that Sue's Clothes Hanger was primarily responsible for the area groundwater contamination.

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Noting the failure to establish any nexus between the contamination and the alleged discharge, the trial court concluded that the State did not prove Sue's Clothes Hanger caused the contamination because: (1) detection of PCE's breakdown products predated the contamination to Sue's Clothes Hanger's operations; (2) the soil contamination existed prior to Sue's Clothes Hanger's operations; (3) PCE detected in the grated pit did not discharge to soil or groundwater; (4) the PCE that dripped from the pipe onto the asphalt was not noted as being continuous and was also not noted as dripping into cracks in the asphalt that could have permitted the PCE to reach soil or groundwater; and (5) there are alternative sources of the contamination. On appeal, the court explained that although case law does not expressly require the State to prove causation, it is implicit in decisions and in the statutory definition of "discharge," which refers to "resultant damage."

The State appealed to the Supreme Court and relied, in part, on CERCLA cases, stating that CERCLA was promulgated in the Spill Act's image and the only causation required to be proven is that

"there is some 'nexus' between the substance used and its appearance in the environment."

The State's position on appeal is that the only nexus needed to prove Sue's Clothes Hanger's Spill Act liability is Sue's Clothes Hanger's use of PCE and the location of potable wells containing the highest levels of PCE in the late 1980s near Sue's Clothes Hanger's site. In furtherance of its position, the State postured that the Spill Act's definition of "discharge" does not require any damage when the spill or release occurs inside the State.

*If the State had its way, any and every spill or release in New Jersey would automatically create Spill Act liability even if the State could not establish that the release caused any contamination.*

If you are interested in receiving additional updates on this case, please contact Andrea Lipuma at [alipuma@saul.com](mailto:alipuma@saul.com) or Deb Shuff at [dshuff@saul.com](mailto:dshuff@saul.com).

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