

Be Wary Of Inadvertent Waivers In Contamination Claims

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On Aug. 27, 2014, the Superior Court of New Jersey Appellate Division issued an opinion in *Favorito v. Puritan Oil Company Inc.*[1] reaffirming a nearly 30-year-old New Jersey precedent requiring owners of contaminated property to choose whether to be compensated for the diminution in property value or the remediation of the property. They cannot have their cake and eat it too. The opinion also serves as a warning to litigants to carefully consider decisions made before litigation begins to avoid inadvertently waiving potential claims.

In 1988, Puritan determined that underground gasoline storage tanks on its property had leaked and that the contamination had migrated to a neighboring property. In 2001, Puritan established a groundwater Classification Exception Area for the contaminated ground water; the footprint of this CEA encompassed a portion of the neighboring property. A CEA is an institutional control that restricts the use of the groundwater while the contamination is being remediated. An additional purpose of a CEA is to serve as public notice of the contamination. Unlike a deed notice or deed restriction, however, notice of the intent to establish a groundwater CEA is only mailed to affected property owners at the time it is established and is not recorded in any property's chain of title.

The plaintiff purchased that neighboring property in 2005 as an income property, but was not notified that the property was contaminated until 2009, when Puritan asked for permission to install, operate and maintain groundwater wells on his property. Sampling in 2011 indicated that the groundwater remained contaminated; there was no evidence of soil contamination at the plaintiff's property.

The plaintiff sued the seller of the property, the real estate agent and agency involved in the sale, and Puritan. All of the defendants except Puritan settled. At the conclusion of discovery, the trial court granted Puritan's motion for summary judgment. The Appellate Division affirmed.

On appeal, the plaintiff challenged the trial court's dismissal of his nuisance and trespass claims against Puritan. Because it was undisputed that contamination from Puritan's property had reached the plaintiff's property and that Puritan had agreed to remediate the plaintiff's property at its own expense, in its opinion, the court focused on damages without considering liability. The court relied on the



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Supreme Court of New Jersey's 1987 holding in *Ayers v. Jackson Township* that the damages a party can recover for trespass or nuisance are:

- (a) the difference between the value of the land before the harm and the value after the harm, or at [plaintiff's] *election* in an appropriate case, the cost of restoration that has been or may be reasonably incurred;
- (b) the loss of use of the land; and
- (c) discomfort and annoyance to him as occupant.[2]

Without any significant discussion, the court determined that the plaintiff had chosen remediation funded by Puritan over damages for diminution in property value. Moreover, because the plaintiff did not claim any loss of use of his property and no occupant of the property claimed any discomfort or annoyance, the plaintiff was also not entitled to any other damages. Indeed, the court noted twice that the plaintiff was able to consistently rent the premises at fair market value the entire time he owned the property. Given these findings, the court held that the trial court properly dismissed the plaintiff's trespass and nuisance claims against Puritan.

The court also noted that the plaintiff was not seeking damages for the "stigma" that may be associated with the property after it is remediated. Although only implicit in this opinion, New Jersey courts have previously recognized stigma damages. To be successful, plaintiffs claiming stigma damages must prove a quantifiable loss of property value due to the contamination through facts or expert testimony.[3] Here, though, there is no indication that the plaintiff offered evidence of the current value of his property or the degree to which that value was reduced from the market value of comparable, noncontaminated properties in the local real estate market.

This opinion contains at least three notable lessons for potential litigants. First, the "election" of remediation over reimbursement for the diminution in property value was imputed to the plaintiff. But it is unclear whether the plaintiff realized he had any choice when he first permitted Puritan to install groundwater wells on his property. In accepting Puritan's offer to remediate the groundwater, the plaintiff effectively waived his claims for damages based on diminution of property value. Here, given that the plaintiff bought the property after the CEA was established, it is unlikely that he suffered any loss of property value. He may, however, have paid more than he should have for what he later discovered was contaminated property.

This leads to the second lesson: This opinion highlights the need for thorough due diligence before any property transaction. Although the court does not recount all of the facts available to the trial court, we can deduce that the CEA and groundwater contamination were not expressly disclosed by the seller to the plaintiff. And as explained above, the plaintiff likely did not receive any notice of the CEA from Puritan because he purchased the property after the CEA was established. Nonetheless, the records regarding the CEA were likely available for review at the New Jersey Department of Environmental Protection at the time the plaintiff purchased the property. Here, the plaintiff was not penalized directly for failing to identify the CEA before he purchased the property. The plaintiff was, however, disadvantaged both at the time of purchase and at the time Puritan requested access for new groundwater wells. Either of these transactions might have had a different outcome had the plaintiff been aware of the groundwater contamination at or before the time of those transactions.

Finally, this opinion serves as a reminder of the importance of expansive pleading at the trial court level in order to preserve issues for appeal. The plaintiff attempted to claim for the first time on appeal that, in addition to damages for the diminution in property value, he was also entitled to damages for: (1) the

presence of monitoring wells on his property, (2) having to grant Puritan and its consultants access to his property twice per year to conduct groundwater sampling and (3) having a portion of his property encumbered by the CEA, which limited his use of groundwater and would have to be disclosed to any prospective buyer. Because plaintiff did not raise these issues at trial, the Appellate Division declined to consider them. Had these claims been timely pleaded, they may have afforded the plaintiff a right to additional damages.

For example, the plaintiff may have been entitled to “discomfort and annoyance” damages if he was an occupant of the premises. Although the court did not elaborate on the evidence required for this claim, the plaintiff’s complaints about the presence of monitoring wells on his property and/or being required to allow strangers onto the property to conduct biannual ground water sampling may have been sufficient. To the extent the plaintiff was not an occupant, his tenants may have had a claim for discomfort and annoyance damages.

In contrast, the plaintiff was unlikely to be able to prove any loss of use. In New Jersey, private citizen property owners do not own a possessory interest in the groundwater underneath their properties.[4] Additionally, the plaintiff’s property was served by the municipal water supply. Accordingly, the CEA’s restriction on the use of the groundwater was unlikely to have impacted the outcome of the litigation. The court also suggested that the plaintiff failed to prove any of loss of use of the land. Not only was the soil free of contamination, but the evidence of the plaintiff’s ability to consistently collect market rents during his entire tenure as owner also indicated that he had not suffered any loss of use of his property.

In sum, this case provides valuable lessons in how to — and how not to — prosecute claims for damages based on contamination migrating from one property to another.

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[1] No. A-3426-12T1 (N.J. Super. Ct. App. Div. Aug. 27, 2014).

[2] *Ayers v. Jackson Twp.*, 525 A.2d 287, 294, 106 N.J. 557, 571 (N.J. 1987) (emphasis added).

[3] *Leese v. Lockheed Martin Corp.*, No. 1-11-CV-05091-JBS-AMD, slip op. at 29 (D.N.J. Sept. 30, 2013).

[4] See, e.g., *Reliance Ins. Co. v. Armstrong World Indus. Inc.*, 678 A.2d 1152, 1159, 292 N.J. Super. 365, 380 (N.J. Super. Ct. App. Div. 1996). Although not considered by the court, this is, arguably, another basis for rejecting a trespass claim for groundwater contamination in New Jersey.