

The Impact of 'Accutane' on Environmental Cost Recovery and NRD Litigation

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Two seemingly unrelated recent events are likely to have a significant impact on environmental litigation in New Jersey.

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On Aug. 1, two seemingly unrelated events occurred that, upon deeper analysis, are likely to have significant relationships to each other: The New Jersey Supreme Court issued its opinion regarding the standards for exclusion of expert testimony in civil litigation in *In re: Accutane Litigation*, __ N.J. __, 2018 WL 3636867 (2018), and the New Jersey Department of Environmental Protection (NJDEP) and the Attorney General's Office jointly announced the filing of six new cost recovery lawsuits under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. This article will explore the interplay between these two announcements from the perspective of environmental litigation in New Jersey.

The 'Accutane' Decision

In *Accutane*, in a 6-0 decision, the Supreme Court reversed the Appellate Division and restored the trial court's initial order barring expert testimony of the plaintiffs' two causation experts in over 2,000 consolidated drug liability suits. The ruling effectively put an end to all such suits by rendering it impossible for any of the plaintiffs to prove that the prescription medicine, Accutane, caused their Crohn's disease, as each had alleged. In so holding, the Supreme Court disagreed with the Appellate Division's determination that the trial court had acted outside its discretion in barring the plaintiffs' experts, and it found that the trial judge had properly filled the role as "gatekeeper" to keep out unreliable expert testimony. The Supreme Court largely relied upon its 1991 decision in *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421 (1991), and later cases like *Landrigan v. Celotex Corp.*, 127 N.J. 404 (1992), and *Kemp ex rel. Wright v. State*, 174 N.J. 412 (2002). 2018 WL 3636867 at *31.

Rubanick and its progeny had previously signaled New Jersey's relaxation of the more stringent "general acceptance" test for the admissibility of expert testimony first established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), by setting a different standard that looked to the soundness of the expert's reasoning and methodology as the primary determinants of admissibility of expert testimony in civil cases. However, *Accutane* has made it clear that any such analysis must be piercing and exacting: "Methodology, in all its parts, is the focus of the reliability assessment, not outcome." 2018 WL 3636867 at *31. As a result, New Jersey only retains the *Frye* standard in criminal cases. See, e.g., *State v. Deloatch*, 354 N.J. Super. 76, 78-79 (Law Div. 2002).

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The Supreme Court in *Accutane* found that the plaintiffs' experts had ignored multiple epidemiological studies establishing no causal connection between the Accutane drug and the plaintiffs' disease, and those experts had also employed methodologies that the trial court found would not be accepted as consistent with scientific norms by other experts in the scientific community. As a result, the Supreme Court thought it "unsurprising" that the trial judge deemed the plaintiffs' experts unreliable and had excluded their testimony. Applying an abuse-of-discretion standard to its review of the trial judge's order, the court in *Accutane* rejected the Appellate Division's view that the plaintiffs' experts had employed proper methodology and had simply interpreted the data differently than the defense experts.

The court also held, for the first time in New Jersey, that the factors employed by courts in fulfilling the gatekeeper role in federal cases—known as the *Daubert* factors—should be incorporated for use by New Jersey courts, as well. The court pointed out that the *Rubanick* factors are already quite similar to *Daubert*, but it had not formally adopted *Daubert* as a standard or endorsed its factors in instructing trial courts in their gatekeeper role until now.

As distilled by the court in *Accutane*, four *Daubert* factors were specifically "identified as perhaps pertinent for consideration, but not dispositive or exhaustive," and they are as follows:

1. Whether the scientific theory can be, or at any time has been, tested;
2. Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a 'sine qua non';
3. Whether there is any known or potential rate of error, and whether there exist any standards for maintaining or controlling the technique's operation; and
4. Whether there does exist a general acceptance in the scientific community about the scientific theory.

Of these, the fourth factor seems likely to have the most impact in future "gatekeeping" analysis by trial courts.

However, in adopting these *Daubert* factors, the court in *Accutane* "stop[ped] short of declaring [New Jersey] a '*Daubert* jurisdiction'." Two reasons were given for this:

First, we have already broadened our approach to testing for the reliability of expert testimony for certain areas in civil law, but, to date, we retain the general acceptance test for reliability in criminal matters. Second, there is no monolithic body of case law uniformly or even consistently applying *Daubert*, as others have noted. We hesitate to sweep in adherence to the various approaches taken among the circuits and state jurisdictions when applying the *Daubert* factors. Thus, we do not adopt a "standard" that we cannot fully discern in its application at this time. While the factors are helpful, and while individual cases may be persuasive in appropriate settings, we cannot ignore that there are discordant views about the gatekeeping role in *Daubert* jurisdictions. (Citations omitted.)

2018 WL 3636867 at *32.

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Subject to these constraints, it seems clear that courts in New Jersey are now free to look to the *Daubert* factors to assist in carrying out their gatekeeper role for expert testimony. However, the methodology-based approach that was first announced by *Rubanick* remains the main standard for admitting expert testimony in this state. The facts in *Accutane* further indicate that, under *Rubanick* and *Daubert*, the trial judge as the “gatekeeper” must in all events assure that proposed expert testimony is based on sound reasoning and an acceptable methodology, or it should be barred.

NJDEP and Attorney General’s Joint Announcement

Also, on Aug. 1, the Murphy administration announced the filing of six new environmental lawsuits in what the Attorney General claims to be “the largest single-day environmental enforcement action in at least a decade.” Three of these new cases seek recovery for costs incurred by the State in conducting environmental cleanups, and three others seek recovery of natural resource damages (NRD). However, it is reasonable to predict that more such cases may be coming as the Attorney General also stated that this “is just the beginning” in announcing these filings.

Effect of ‘Accutane’ on NJDEP Cost Recovery and NRD Litigation

Understanding how *Accutane* will likely affect cost recovery and NRD claims in New Jersey requires an initial appreciation of the context in which expert testimony is most frequently used to establish liability in such cases. At the risk of oversimplification, the basic test for liability for all “cleanup and removal costs” under the Spill Act requires a showing that a “person” has either “discharged a hazardous substance, or is in any way responsible for any hazardous substance” that has been discharged. N.J.S.A. 58:10-23.11g.c.(1).

Within these parameters, liability under the Spill Act can take many forms, such as: (1) actually having discharged or being directly responsible for having caused a discharge to the property; (2) having owned the property at the time of the discharge, even if the owner did not actually cause the discharge to the property; and (3) having acquired property on which a pre-existing discharge already occurred. However, given the innate imprecision and breadth to the “in any way responsible” test, there are a number of other situations in which potential liability may arise.

Against this backdrop, what is most relevant to the present discussion is the Supreme Court’s decision in *New Jersey Department of Environmental Protection v. Dimant*, 212 N.J. 153 (2012), holding that the party seeking recovery in every Spill Act case must be in a position to establish a reasonable “nexus” between the claimed offending discharge(s) and the environmental damage(s) to the property for which cleanup and related costs have been incurred. *Id.*, at 176-78. Specifically, *Dimant* held:

In implementing the [Spill] Act in accordance with the spirit animating its adoption and refinement over the years, the causation standard to be applied to Spill Act claims must accommodate the Act’s multiple forms of relief and must support and justify a range of relief available under the Act, which includes injunctive relief, and/or the recovery of damages and those costs available under the Act, *as the request for relief is framed. In this matter, a party in Sue’s circumstances must be shown to have committed a discharge that was connected to the specifically charged environmental damage of natural resources—the groundwater damage—in some real, not hypothetical, way. A reasonable nexus or connection must be demonstrated by a preponderance of the evidence....* [W]hile a plaintiff need

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not “trace the cause of the response costs” to each defendant in a multi-defendant case involving a contaminated site, *it is not enough for a plaintiff to simply prove that a defendant produced a hazardous substance and that the substance was found at the contaminated site and “ask the trier of fact to supply the link.”* ... In sum, we hold that on proof of the existence of a discharge, one can obtain prompt injunctive relief under the Spill Act. *However, in an action to obtain damages, authorized costs and other similar relief under the Act there must be shown a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site.*

Id., at 182 (citations omitted; emphasis in original). Although *Dimant* did not explicitly identify how this nexus requirement is to be met, it did “clarify that the Spill Act does not require proof of the common law standard of proximate-cause causation of specific environmental damage as a precondition to relief under the Act.” *Id.*, at 160.

Based on the above, expert testimony is often the primary technique for establishing the nexus requirement discussed in *Dimant*. This is bolstered by the fact that contamination is not commonly visible from the surface of a property. Instead, what is typically required to prove liability is a combination of environmental testing and expert testimony to establish for the trier of fact the “what, when, where, how much, and who” is responsible aspects in an environmental damages case. The case of *6400 Corporation v. Chevron U.S.A.*, 2007 WL 209932 (App. Div. 2007), stands as an example in which forensic techniques like “age dating” and “contaminant fingerprinting” were allowed by the trial court to be used by the plaintiff’s experts, over the defendants’ objections, to establish the defendants’ liability at a former gas station, and that determination was affirmed on appeal.

Still, there remains the concern, now underscored by *Accutane*, that a court must guard against too freely permitting “experts” to give testimony in environmental cases, previously often allowed because the contamination is invisible to the eye and its origin and scope are difficult to discern. Simply put, this is an area of expert testimony where the differing methodologies used to forensically describe contamination (obviously necessary to the *Dimant* reasonable “nexus” requirement) tend to vary wildly in terms of acceptance and overall reliability in the expert and broader scientific communities.

Based on anecdotal and personal observations by the authors of this article, trial courts have sometimes seemed a bit too willing in the past to let in otherwise dubious expert testimony or “junk science” on the apparent rationale that even an imperfect analysis is better than having less information placed into the record to draw from in determining Spill Act liability. Hopefully, and it is more than likely, the *Accutane* outcome will herald a new era in which the “gatekeeping” role in environmental litigation will be exercised more rigorously than in the past, and will bring a clearer focus upon general acceptance in the scientific community of the methodologies relied on by proposed experts.

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