

## **The Extent of Recoverable Damages for Migrating Contamination Remains Uncertain**

January 6, 2015

Property owners suffering from migrating contamination from an adjacent property are often faced with a variety of damages in addition to cleanup costs.

The Appellate Division's recent holding in *Favorito v. Puritan Oil Co.*, Docket No. A-3426-12T1 (App. Div. August 27, 2014) has reaffirmed New Jersey's bar against "double-dipping" for damages in environmental contamination cases. Yet, while the Court appears to offer plaintiffs a choice between diminution in property value and remediation, in actuality there may be no choice at all. Moreover, the Court's decision highlights numerous other issues relating to damages that have yet to be resolved by the New Jersey courts.

In *Favorito*, four years after acquiring a residential property, plaintiff discovered the groundwater under his property was contaminated with hazardous substances migrating from a neighboring property. Prior to the plaintiff's purchase of the property, a nearby gas station, Puritan, found gasoline had leaked from underground storage tanks at the gas station to plaintiff's property. Thereafter, Puritan began remediating the contamination, even installing groundwater monitoring wells on plaintiff's property. Additionally, the New Jersey Department of Environmental Protection ("NJDEP") placed a portion of the property within a Classification Exception Area ("CEA"), to suspend the use of groundwater during the cleanup.

While unaware of Puritan's remedial efforts at the time of purchase, plaintiff later consented to the installation of groundwater monitoring wells and groundwater and soil testing on his property after he was alerted to the contamination by Puritan's agents. Plaintiff then sued Puritan alleging violations of the New Jersey Spill Compensation Control Act, N.J.S.A. 58:10-23.11 et seq. ("Spill Act"), as well as nuisance and trespass claims. Plaintiff sought the difference between the price he had paid for the property at the time of purchase and what the property was valued at given its contaminated condition. "[T]he trial court found that plaintiff's damages [for trespass and nuisance] were limited to either the cost of cleaning the property or the difference between the market value of the property in a contaminated state and in an uncontaminated one." *Favorito*, at 7 (emphasis in original). Accordingly, the trial court granted Puritan's motion for summary judgment in light of the fact Puritan was remediating the property.

The Appellate Division affirmed the trial court's decision holding that "a party may receive the difference between the value of the land before and after the harm or, at the party's election, the cost of restoration." *Id.* at 8. In this case, plaintiff was deemed to have elected remediation over damages for diminution in value by permitting Puritan's agents access to the property for remediation. Interestingly, the "choice" proffered by the Court does not exist. Arguably, where a responsible party is willing and able to remediate contamination on the property of another, the property owner does not have a choice between diminution in value or remediation in light of the Site Remediation Reform Act's ("SRRRA") affirmative obligation on responsible parties to remediate. See N.J.S.A. 58:10C-1 et seq. Moreover, under the Spill Act, responsible parties are directed to obtain a court order to enter upon a third party property for the purposes of site inspection and remediation where site access is denied by the property owner

and remediation is required. See N.J.S.A. 58:10B-16(b); N.J.A.C. 7:26C-8.

What is significant about this decision is not the discussion of choice, but the Court's discussion of the range of other potential damages available to property owners with migrating contamination. Along with diminution of property value or remediation, under a nuisance or trespass claim property owners can recover damages for (1) the loss of use of the land, and (2) discomfort and annoyance to the occupant. *Ayers v. Jackson Twp.*, 106 N.J. 557, 571 (1987). In *Favorito*, however, the plaintiff failed to claim these additional damages or allege facts sufficient to support them.

In some jurisdictions an additional avenue of relief through stigma damages may exist. Stigma damages have been awarded where there is a continuing or permanent loss of property value, such as contamination left onsite following remediation or loss of property value through public perception of contamination. See, e.g., *Allen v. Uni-First Corp.*, 558 A.2d 961, 962 (Vt. 1988) (finding evidence relating to real estate values prior to and following media reports could support the existence of a permanent nuisance).

While stigma damages were not an issue in *Favorito*, it is unclear whether a New Jersey court would allow for stigma damages where a property's value has not been restored to full value despite remediation. See *T&E Indus. v. Safety Light Corp.*, 123 N.J. 371, 398 (1991) (" . . . our award of declaratory relief for future cleanup costs does not allow for a double recovery. . . . When the property has been decontaminated, it will be restored to full value. Plaintiff will then be able to sell the property at market value."); see also *Leese v. Lockheed Martin Corp.*, No. 1-11-CV-05091-JBS-AMD, slip op. at 34-37 (D.N.J. Sept. 30, 2013) ("Common sense likewise instructs that residential properties that contain potentially harmful chemicals would be less desirable, and thus, less valuable, than non-contaminated properties in the eyes of a prospective buyer or tenant - although the burden remains on the Plaintiffs to prove that intuition with admissible evidence.").

If you are addressing environmental contamination on your property and have questions regarding potential liability or damages, please contact Heidi Minuskin, Deborah Kelly or Michelle Murphy.