FREEZE FRAME

Alzheimer's Association Long Island honored members of its Legal Advisory Committee that include SCBA members, at a gala on Oct. 27. Honored SCBA members included, Frank Buquicchio, Nancy Burner, Lawrence Eric Davidow, and Vincent J. Russo.

Photo by Arthur Shulman

Several SCBA Solo & Small Firm Committee members attended the Nov. 29 meeting.

ENVIRONMENTAL LAW

Navigation Law Update

By Robert R. Dooley

Two recent decisions address some interesting issues that arise in cases involving oil spills.

Huntington and Kildare, Inc. v. Grannis, 2011 NY Slip Op 7774 (3rd Dept., Nov. 3, 2011), was an Article 78 proceeding stemming from an enforcement action commenced by the Department of Environmental Conservation (DEC) under the Navigation Law. Huntington, the owner of the land, answered and sought to file a third-party complaint for indemnification and contribution against Stewart's Ice Cream Company, Inc., a former tenant. The ALJ determined that Huntington was guilty of the violations, imposed a $15,000 civil penalty and required the submission of a work plan to remediate the contamination. Huntington argued that they did not own the source of the contamination, the underground storage tanks. The Appellate Division Court affirmed the dismissal of the petition holding that strict liability under the Navigation Law is found by a potentially responsible party's capacity to prevent spills before they occur or the ability to clean up contamination after a release *not* ownership of the system. The record before the Appellate Division reflected that Huntington and its predecessor controlled the activities conducted on the property when each owned it and that the entities knew or should have known that petroleum was being used on the property.

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Control or the opportunity to control liberalizes the burden permitting the DEC to quickly perform a cleanup. The legislature's intent is being carried out in holding Huntington primarily responsible to the state for ensuring that the cleanup is taken care of. As far as the legislature is concerned, how Huntington manages its costs regarding the cleanup of the petroleum discharge is Huntington's concern.

The second decision is *State of New York v. Getty Petroleum Corp.*, 2011 NY Slip Op. 7781 (3rd Dept. Nov. 3, 2011), an appeal from a motion for summary judgment where the Supreme Court denied the application to declare the lien provisions of the Navigation Law unconstitutional. M&A Realty, Inc. ("M&A"), a defendant, contended that the procedures used to file an environmental lien on its property were not authorized by the underlying statute and that its due process rights were violated. The lawsuit arose out of a long history on the property. Wells were monitoring groundwater on the property due to prior discharges prior to M&A's ownership. In 2003, M&A owned the property and DEC observed a spike in the wells' readings. As a result, the DEC assigned a new spill number. M&A refused to perform the remediation contending that the spike was related to the prior spills. DEC started performing the remediation itself rather than fight with M&A. As a result, DEC performed the remediation between 2003 and 2009 and incurred $208,000 in remediation costs.

The Attorney General demanded reimbursement from M&A warning that failure to do so would result in a civil lawsuit and the filing of an environmental lien. M&A's argument was that a judicial determination was required prior to the filing of a lien. M&A's position was founded on the language of Navigation Law § 181-a which states that the fund has a lien for costs incurred in a cleanup on the property "(a) owned by a parson liable to the fund..." noting that elsewhere in the Navigation Law the phrase "potentially liable" is used. The theory was that the absence of the word "potentially" means that there is a legislative intent to require a judicial determination of liability prior to filing a lien.

The court held"[i]f the Legislature had intended a pre-filing judicial determination of liability, it undoubtedly would have not only affirmatively so stated, but also would have provided at least cursory guidance to pertinent procedural issues." In a footnote, the logic continued that M&A's logic would essentially impose an obligation to complete a full trial on the merits in order to file the environmental lien, which would be in conflict with the urgency in the Oil Spill Act.

M&A also argued that its due process rights were violated as a result of the lien. The court outlined the factors weighed in assessing due process owed to M&A: "(1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the probable value of other procedural safeguards; and (3) the government interest." Walking through these factors, the court observed that the lien did not deprive M&A of the possession of the property but "it does cloud title..." The court determined that the risk of an erroneous deprivation was small as a result of the structure of the Oil Spill Act legislation imposing strict, joint and several liability that is liberally applied to owners of property where petroleum discharge is discovered. The court observed that M&A was given prior notice that the lien would be filed and that the lien wasn't filed until after the lawsuit was commenced. M&A could challenge the lien either within the pending action or by using Lien Law § 59. For the governmental interest, the court stated that the state has "a strong interest in protecting and preserving its lands and waters" as well as "in ensuring reimbursement of taxpayer moneys expended in cleaning up polluted sites when the discharger is unwilling to do so on his or her own accord," citing *State of New York v. Dennin*, 17 A.D.3d 744, 746 (3d Dept. 2005). When performing an analysis under due process in the context of an agency determination, the court noted that an opportunity to be heard in a meaningful manner is to be provided and that the agency is to provide "substantial evidence supporting each element necessary for the lien." The court chose to accept the state's alternative that an order to show cause provides a speedy resolution to the challenge for a landowner.

Under the Navigation Law, the Legislature intended to have the remediation performed promptly. Where a party fails to take control of the remediation both a lien on the property and subsequent litigation to recover the costs are viable options to assist the state recover tax payer dollars. In performing the remediation themselves, clients are also able to avoid regulatory penalties that may be as high as $25,000 per day for failing to clean up the oil spill promptly. Where a client is not willing to undertake the cleanup or not able to do so, it is imperative that the statutory structure and mechanisms in place be discussed with your clients to ensure they understand the implications of not performing the remediation.

Note: Robert R. Dooley is the Co-Chair of the Environmental Law Committee and is an associate with the Law Office of Frederick Eisenbud where his practice is concentrated in environmental, municipal and commercial litigation.

Thank You For Helping Make the Holidays Brighter

One of the true joys of the Holiday Season is to say thank you to the following people for their generous contributions which made our holiday gala at the Bar Center a memorable occasion:

To Ron Hoffman for the beautiful wreath that adorns the Bar Center. For eighteen years, since we've moved into the Bar Center, Ron and his brother Glenn dropped off a magnificent Holiday wreath for the front of our Bar Center. Glenn is no longer with us, but the character of his life might be summed up in a few words: he was sincere, he was earnest, he was loyal, he was a splendid man and we pause to pay our tribute of affection and respect to his memory.

Also much thanks to the SCBA staff, Hugo and Joe LaCova who decorated the building so beautifully and to Fireside Caterers for their continued support and gourmet fare.