

## Discharger of Petroleum Not Able to Maintain Suit Against Another Discharger

Under Navigation Law § 181, a party injured by the intentional or inadvertent discharge of petroleum products may bring a claim for damages against the party responsible for the discharge. But what if the injured party also caused a discharge of petroleum on the property? The Appellate Division, Second Department recently considered the issue in *Kolbert v. Morania Oil of Long Island* [2014-05592, 2016 N.Y. App. Div. LEXIS 3019 (2d Dep't Apr. 27, 2016)].

In *Kolbert*, the defendant provided oil for the Plaintiff's home. Plaintiff sued defendant under the New York State Oil Spill Law, seeking damages resulting from the discharge of petroleum. Defendant moved for summary judgment, supporting its motion with evidence that it did not cause or contribute to the contamination on plaintiff's property, and that plaintiff *himself* caused or contributed to the contamination at the property.

The Second Department noted that under the Oil Spill Law (Navigation Law § 181), even faultless owners of contaminated lands are classified as "dischargers" for purposes of liability. Where the property owner has not caused or contributed to the discharge, the owner may bring a claim against the individuals or entities that "actually caused or contributed" to the discharge (pursuant to Navigation Law § 181(5)). However, where the property owner himself caused or contributed to the spill, he will be precluded from seeking indemnification or contribution from another discharger.

The *Kolbert* court concluded that Defendant met its prima facie burden on the motion, establishing that it was faultless and that Plaintiff caused or contributed to the discharge on his property. The court noted that Plaintiff failed to raise a triable issue of fact in opposition to defendant's summary judgment motion, and on that basis, affirmed the lower court decision dismissing the action against Defendant.

The Supreme Court precluded the plaintiffs' expert's affidavit because the plaintiffs failed to disclose the expert's identity on a timely basis. The Second Department found that preclusion on this basis was unwarranted, but nevertheless found the affidavit to be irrelevant because the expert's conclusions "were speculative and not based upon personal knowledge or evidence in the record." Therefore, the Second Department affirmed the lower court's decision.

Note that the decision does not address the availability of contribution under Navigation Law §176(8), which allows a party who has directly incurred cleanup costs to seek contribution "from any other responsible party." The damages recoverable under this section are more limited than those recoverable under Navigation Law § 181(5) where it is available, as that section includes "all direct and indirect damages" in addition to cleanup and removal costs. For parties barred from recovery under § 181(5) because they are themselves dischargers, however, §176(8) may afford a basis for a partial reimbursement of response costs they incur.

If you have any questions about this *Information Memo*, please contact [Richard L. Weber](#), any of the [attorneys](#) in our [Toxic Tort and Environmental Litigation Practice](#), or the attorney in the firm with whom you are regularly in contact.



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