

MASSACHUSETTS LAWYERS WEEKLY

APRIL 29, 2002

Does 'Taygeta' Protect 'Innocent' Property Owners?

BY JEFFREY R. PORTER



Last month, in *Taygeta v. Varian*, the Supreme Judicial Court decided that the time within which a property owner must file a lawsuit to recover damages resulting from the contamination of ground-

water under her property does not even begin to run until the property owner knows for sure that her groundwater has been contaminated.¹

While the *Taygeta* decision might seem helpful to "innocent" owners of potentially contaminated properties,

it is based on an interpretation of Chapter 21E, the Massa-

chusetts law governing the clean up of contaminated properties, that overlooks a property owner's statutory and regulatory obligations to investigate and respond to contamination on her property.

Lawyers representing purchasers and owners of potentially contaminated properties should keep these statu-

tory and regulatory responsibilities in mind or their clients may inadvertently increase their liability under Chapter 21E and CERCLA, Chapter 21E's federal analog.

Until last month, most environmental law practitioners assumed that the discovery rule applicable to tort actions applied to Chapter 21E property damage claims as well.² As the SJC recognized in *Taygeta*, the "discovery rule" "tolls the statute of limitations [from the time the plaintiff is injured] until the plaintiff knows, or reasonably should have known, that it has been harmed or may have been harmed by the defendant's conduct."

While the SJC confirmed the applicability of the discovery rule to tort claims for contamination, it refused to apply that same rule to a Chapter 21E claim arising from the same contamination.

The SJC's decision was surprising since in 1992, only a few years after the SJC announced the applicability of the "discovery rule" to tort claims, the Legislature amended Chapter 21E to specify that claims for property damage pursuant to the statute "shall be commenced within three years after the date that the person seeking recovery first suffers the damage or within three years after the date the person seeking recovery of such damage discovers or reasonably should have discovered that the person against whom the action is being brought is a person liable pursuant to this chapter for the release or threat of release that caused the damage, whichever is later." See G.L.c. 21E, §11A(4) (emphasis added).³

The SJC based its refusal to apply

the "discovery rule" to the plaintiff's claim in *Taygeta* on its determination that "[a] plaintiff who brings a cause of action for property damage under G.L.c. 21E has no duty to investigate whether its property may have been contaminated by another."

'Innocent' Property Owners

Before 1998 an owner of property "contaminated by another" had the same statutory and regulatory obligations to investigate and remediate contamination on his property as the person who caused the contamination. See generally, G.L.c. 21E, §5.

In 1998 (after *Taygeta* filed its complaint against *Varian*), the Legislature amended Chapter 21E to, among other things, exempt an "innocent" owner of a property contaminated by an "unknown" "upgradient or upstream source or sources" from statutory liability to the commonwealth and others if the owner could demonstrate its "innocence" "by a preponderance of the evidence." See G.L.c. 21E, §5D(b).

The 1998 legislation also limited such an owner's remedial obligations so that, after 1998, it was true that he did not have to investigate the "source" of contamination on his property so long as he could document his "innocence" in the absence of such an investigation.

However, to this day, such "innocent" owners still have clear, albeit limited, statutory and regulatory obligations to respond to the presence of contamination on and under their property whether or not they caused or contributed to the contamination. See generally G.L.c. 21E, §5D(a)(3) and (4).

Environmental

Jeffrey R. Porter is the manager of the environmental law section of Mintz, Levin, Cohn, Ferris, Glowsky and Popeo in Boston. Mintz, Levin submitted an amicus brief in the Taygeta case on behalf of Associated Industries of Massachusetts. However, this commentary is the author's and does not necessarily represent the views of Associated Industries of Massachusetts, or any one of its members.

For example, any property owner must notify the Department of Environmental Protection of specified levels of contamination on their property whether or not they had anything to do with that contamination. See G.L.c. 21E, §5D(a)(3), and 310 CMR 40.0331, et seq.

State regulators have taken the position that the requirement to notify DEP of such contamination is triggered not only when a property owner actually knows of specific levels of such contamination but also when a property owner *should have known* of such contamination.

In fact, in his *Taygeta* brief, the attorney general argued that "... the MCP [the DEP regulations implementing Chapter 21E found at 310 CMR 40.0000, et seq.] requires owners to test their properties under some circumstances even if they currently lack actual knowledge that a 'reportable release' has occurred."

This means that, notwithstanding the SJC's seemingly broad pronouncement in *Taygeta* regarding "innocent" property owners, those who do not investigate conditions which regulators believe should have alerted them to the likelihood of a reportable release on their property run the risk of being accused of breaching their statutory and regulatory notification obligations under state law.⁴

Failure to timely (which can mean in as little as two hours) notify DEP of reportable conditions is punishable by stiff civil, or even criminal, penalties. See, e.g., G.L.c. 21E, §11.

A Troubled SJC

In *Taygeta*, the SJC seemed troubled that a potential plaintiff might be prejudiced by deferring her own investigation while awaiting the completion of an ongoing investigation by a potential defendant in satisfaction of his obligations under Chapter 21E and the MCP.

Of course, any such prejudice could be easily avoided by a "tolling agreement" between the parties extending the time for making a claim until the ongoing investigation is completed. In fact just such an agreement was made between *Taygeta* and *Varian* for some time.

If your client fails to investigate the potential for contamination on his property, he could face pitfalls beyond the potential for being a target of enforcement of Chapter 21E and the MCP.

The Federal Small Business Liability Relief and Brownfields Act of 2002, which was held up in Congress for

almost a decade before it was enacted in January, reaffirms a qualifying "innocent" owner's exemption from federal Superfund liability for contamination migrating from another property.

However, to qualify for the exemption, a purchaser must demonstrate that he "conducted all appropriate inquiry" and still did not have reason to know that his property could be contaminated by contamination from another property.

For now, an "appropriate inquiry" is statutorily defined as a Phase I Environmental Site Assessment meeting the standard set by the American Society for Testing and Materials.

In any event, a purchaser of contaminated property who does nothing to investigate the condition of the property may disqualify herself from

Despite the broad language used by the SJC in *Taygeta*, reading that decision as permission for your client to close his eyes to the subsurface condition of his property could dramatically affect his responsibility under federal and state law for later discovered contamination.

claiming the benefit of this federal liability exemption, thereby significantly increasing her potential responsibility for clean-up costs under federal law.

Ironically, at the same time that the SJC was considering *Taygeta*, DEP was considering a revision to the MCP that would require a person conducting a subsurface investigation on property owned by another person to provide the results of that investigation to the property owner.

If this regulation were promulgated, it would take when the clock starts to tick with respect to a property owner's potential property damage claim out of a property owner's hands once he grants access to his property to someone else to conduct a site investigation.

This could result in an increased reluctance by potentially impacted property owners to allow access to their properties to others attempting to determine the extent of migrating

contamination. DEP is reconsidering this potential revision in light of the SJC's *Taygeta* decision.

For all of these reasons, your client would be better advised to conduct appropriate investigations prior to the purchase of real estate or reach appropriate agreements protecting his rights if he plans to await investigations by others. MLW

Endnotes

¹ *Taygeta Corporation v. Varian Associates, Inc.* (SJC-08566), decided March 7, 2002. The SJC also held that the owner of a property that is "an ongoing source of groundwater contamination" is liable for a "continuing nuisance" even if the property owner engaged in no tortious conduct within the applicable statute of limitations period (distinguishing the court's frequently cited 1995 decision in *Carpenter v. Texaco*, 419 Mass. 581 (1995)).

² Pursuant to Chapter 21E, §5, any liable person is responsible for property damage resulting from a release of hazardous materials for which he is liable. Such "property damage" can include "diminution in value." See *Guaranty First Trust Co. v. Textron, Inc.*, 416 Mass. 332 (1993).

³ Also in 1992, the SJC held that, prior to the legislative specification of applicable limitations periods, a claim for reimbursement of response costs under Chapter 21E was subject to the three-year tort statute of limitations. See *Oliveira v. Pereira*, 414 Mass. 66 (1992). Late last year, *Lawyers Weekly* reported that a Superior Court judge relied in part on the SJC's decision in *Oliveira* to hold that because Chapter 21E "addresses liability under commonly understood tort principles," a plaintiff is entitled to a jury trial of a Chapter 21E claim. See *Newlyweds Foods, Inc. v. Westvaco Corporation* (Middlesex Civil Action Number 99-5194)(Lauriat, J.)(Dec. 12, 2001). In light of the SJC's decision in *Taygeta* that not all tort rules apply to Chapter 21E claims, the vitality of this reasoning could be questioned.

⁴ In *Taygeta*, the SJC recognizes "that there will be instances ... when a person seeking recovery for property damage 'reasonably should have discovered' that the person against whom the action is being brought is a person liable under G.L.c. 21E ... Some forms of environmental contamination may be obvious, such as through sight, smell, or taste, and sometimes there is no uncertainty as to its source."