

Jaeckle Secures \$5 Million for ICC in Settlements & Judgment of Superfund Case

Jaeckle Fleischmann's environmental practice group recently secured a court order for payments totaling over \$2.5 million in the successful representation of Solvent Chemical Company and its parent company ICC Industries, Inc.

In one of the most complex Superfund matters to be tried in New York State, Jaeckle first assisted Solvent and its parent company ICC in negotiating 1997 consent decrees to settle litigation commenced by the State under the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"). Jaeckle attorneys pursued third-party complaints against over sixty parties. In implementing the site cleanup, Solvent found itself addressing contamination migrating to the site from adjoining facilities operated by DuPont and Olin, who were added to the litigation. After entering into settlements totaling over \$2.6 million with all parties, except DuPont and Olin, Jaeckle attorneys tried the case before United States District Court Judge John T. Curtin in a six-week trial in the Fall of 2007.

Case Summary

Jaeckle Fleischmann & Mugel, LLP ("Jaeckle Fleischmann") represented Solvent Chemical Company ("Solvent") in negotiating a consent decree with the New York State Department of Environmental Conservation ("DEC") requiring implementation of an environmental cleanup at Solvent's former chemical facility in Niagara Falls, New York ("Site"). Solvent's parent, ICC Industries, Inc. ("ICC"), entered into a separate decree with DEC guaranteeing its subsidiary's performance. Entry of the consent decrees with DEC had the effect of settling litigation commenced against Solvent and ICC by the State of New York pursuant to the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") in 1983, years before DEC had even selected the remedy for cleaning up the Site.

During the pendency of the cleanup, Jaeckle Fleischmann commenced third-party litigation against over sixty parties who had contributed to the contamination being cleaned up. The third-party defendants were former owners, operators, and waste generators who sent hazardous substances to the Site. In addition, Jaeckle Fleischmann pursued DuPont and Olin in the litigation for contamination migrating from their adjoining facilities which Solvent found itself unavoidably having to address in connection with implementing the remedy for the Site. Jaeckle Fleischmann negotiated settlements with all parties except DuPont and Olin, recovering over 2.6 million dollars for its client. Jaeckle Fleischmann then tried the case against DuPont and Olin before United States District Court Judge John T. Curtin in a six-week trial which took place in Fall 2007.

At issue in the trial was a question left open by the United States Supreme Court in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), where the Court expressly recognized an overlap between CERCLA § 113(f) contribution claims and § 107(a) cost

recovery claims. The Court noted that a so-called potentially responsible party ("PRP") may sustain expenses pursuant to a consent decree following suit under CERCLA §§ 106 or 107(a) such that the party does not incur costs voluntarily but also does not reimburse the costs of another party. *Id.* at 2338, n.6. The Court stated "[w]e do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a) or both." *Id.* The *Solvent* case involved this exact scenario, and Judge Curtin held that under such circumstances costs were recoverable under both provisions.

Despite having held that Solvent had both a § 113(f) contribution claim and § 107(a) cost recovery claim, Judge Curtin allocated costs exclusively on an equitable basis as allowed only under § 113(f). He allocated nearly \$2.5 million of Solvent's \$9 million in past costs, incurred through approximately June, 2007, plus prejudgment interest, to DuPont and Olin, but dismissed as premature Solvent's claim for declaratory judgment for future costs to be incurred over the next several decades as Solvent continues to pump and treat groundwater impacted by contamination resulting from the decades-long polluting activities of neighbors DuPont and Olin. This is inconsistent with the statutory mandate of § 113(g), which provides that in any § 107(a) cost recovery action "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." (Emphasis supplied.) Therefore, appeal of the decision will be necessary.

Jaeckle Fleischmann mounted a successful defense to a counter claim asserted by Olin seeking to recover a portion of costs Olin incurred cleaning up Gill Creek, which runs through the area of the Olin, DuPont and Solvent facilities. Olin sought to recover over 2.2 million dollars from Solvent and ICC, but the Court, accepting the allocation proposed by Jaeckle Fleischmann, allocated just \$8,041 to Solvent on Olin's Gill Creek claim and dismissed that claim against ICC.

If you have any questions regarding the case or would like more information regarding our Environmental practice group, please contact:

Brenda J. Joyce	716.843.3855	bjoyce@jaeckle.com
Charles D. Grieco	716.843.3844	cgrieco@jaeckle.com
Dennis P. Harkawik	716.843.3848	dharkawik@jaeckle.com

This Jaeckle Alert, prepared by the attorneys at Jaeckle Fleischmann & Mugel, LLP, is intended for general information purposes only and should not be considered legal advice or an opinion on specific facts. For more information on these issues, contact one of the attorneys listed above or your existing Firm contact. Prior results do not guarantee a similar outcome. The invitation to contact is not a solicitation for legal work in any jurisdiction in which the contacted attorney is not admitted to practice. Any attorney/client relationship must be confirmed in writing.

© 2010. All Rights Reserved.