

## **Jaeckle Prevails in Federal Appeal of Superfund Case to Recover Future Cleanup Costs and Obtain New Allocation**

Jaeckle Fleischmann's environmental practice group recently won a significant victory on behalf of its client, Solvent Chemical Company, Inc. ("Solvent") when it obtained a Decision and a separate Summary Order from the United States Court of Appeals for the Second Circuit in *New York v. Solvent Chemical Company, Inc., et al.* (Docket No. 10-2026-cv (L)) (December 19, 2011) in which Solvent prevailed on both issues it raised on appeal from a Judgment from the Western District of New York issued in 2010. In the Decision, the Circuit Court panel reversed the Trial Court's ruling that Solvent was not entitled to a declaratory judgment enabling it to recover a portion of its future costs related to its ongoing remediation of the Solvent Chemical site in Niagara Falls, New York. In the Summary Order, the Circuit Court panel also adopted Solvent's position and reversed the Trial Court's allocation of approximately one-half of Solvent's remedial costs (*i.e.* the so-called "Hot Spot" costs), remanding the case back to the Western District for a reallocation. In the Summary Order, the Circuit Court also rejected all of the arguments raised by the Appellants, DuPont de Nemours & Company ("DuPont") and Olin Corporation ("Olin"). In combination, the award of future costs related to Solvent's ongoing remedial operations (which are expected to continue indefinitely) and the reallocation of almost 50% of its remediation costs are likely worth millions of additional dollars to Solvent.

### **Case Summary**

Jaeckle Fleischmann & Mugel, LLP has represented Solvent during the course of the litigation since 1996, when it negotiated 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"). Entry of the consent decree with DEC had the effect of settling litigation commenced against Solvent and its parent by the State of New York pursuant to the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), while ensuring that Solvent could pursue other responsible parties for a portion of its cost incurred in implementing the long-term multi-million dollar clean up of the Site.

Before and during the pendency of the cleanup, Solvent commenced third-party litigation against over sixty parties who had contributed to Site contamination. The third-party defendants were former owners, operators, waste generators and arrangers who sent hazardous substances to the Site. In addition, Solvent pursued DuPont and Olin in the litigation for contamination migrating from their adjacent facilities which Solvent found itself unavoidably collecting and treating in connection with implementing the remedy for the Site. Solvent eventually negotiated settlements with all parties except DuPont and Olin, recovering over \$2.6 million in the process. Solvent 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 2007.

In its January 2010 Decision, the Trial Court found DuPont and Olin to be liable parties under CERCLA and allocated to DuPont and Olin approximately 28% of Solvent's past costs (which at trial were defined as remediation costs incurred prior to June 30, 2007), plus prejudgment interest, for a total judgment of \$3.2 million. While undeniably significant, the Trial Court also dismissed Solvent's claim for a declaratory judgment for future costs, concluding that such judgment would be "premature". Because Solvent will continue to pump and treat groundwater indefinitely, its future costs will run into millions of additional dollars. Also, despite expressly adopting Solvent's proposed allocation methodology, the Trial Court allocated the portion of Solvent's cleanup costs related to a so-called "Hot Spot" located on Olin's property in a manner that Solvent argued was inconsistent with that methodology as well as the Court's own findings of fact, leaving Solvent responsible for a majority of the Hot Spot costs.

Consequently, Solvent appealed (1) the Trial Court's refusal to grant Solvent any recovery of future costs, and (2) the Hot Spot allocation. DuPont and Olin also appealed a number of issues including legal, evidentiary and allocation matters. DuPont in particular raised a number of legal issues that it contended prevented Solvent from recovering *any* portion of its costs from DuPont. On December 19, 2011, the Circuit Court issued a Decision and a separate Summary Order covering the various appeal issues.

### **Solvent's Claim for "Future" Costs**

In the Decision, the Circuit Court reversed the Trial Court's refusal to issue a declaratory judgment for future costs. The Circuit Court noted that the Trial Court found that DuPont and Olin were liable for contribution for past remediation costs and that it provided no good reason why those parties should not be liable for ongoing, future costs.

The Circuit Court then examined the five factors raised by a request for a declaratory judgment pursuant to the Declaratory Judgment Act, focusing principally on the first factor: "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved." The Circuit Court held that there would be several "useful purposes" for issuing the declaratory judgment in this case. First, the Circuit Court noted that because the statute of limitations to bring CERCLA contribution claims is short (3 years from entry of administrative order or judicial settlement), if the remediation takes many years (as it did here) the statute will run before much or most of the costs are incurred, thus precluding recovery of such costs in the absence of entry of a declaratory judgment. Second, the Circuit Court found that cost and time involved in relitigating the complex CERCLA issues would be massive and wasteful. Of note, the Circuit Court declined to rule on whether declaratory judgment was always mandatory in the context of a CERCLA contribution claim pursuant to CERCLA's declaratory judgment provision, since it found that the facts of this case required the issuance of a declaratory judgment under the Declaratory Judgment Act.

### **The "Hot Spot" Allocation**

In the Summary Order, the Circuit Court resolved other issues raised in the appeal by Solvent, DuPont and Olin.<sup>1</sup> First, the Circuit Court vacated the Trial Court's allocation of costs at the "Hot Spot." Despite the extremely broad discretion District Judges enjoy in allocating response costs under CERCLA, the Circuit Court agreed with Solvent that the Trial Court had abused that discretion with respect to the "Hot Spot" portion of the remedy. In adopting Solvent's proposed allocation methodology, the Trial Court was to perform separate allocations at the Solvent property, the adjacent "Hot Spot" and in a nearby creek, using data unique to each area. Solvent challenged the Trial Court's Hot Spot allocation of responsibility to DuPont because it essentially ignored that methodology by using DuPont's allocated share calculated at the Solvent property, even though data at the Hot Spot was demonstrably different than at the Solvent property and would have resulted in a higher allocation to DuPont under the adopted methodology.

The Circuit Court also agreed with Solvent that the Trial Court's allocation of responsibility to Olin at the "Hot Spot" lacked a rational basis. Although the Trial Court used the allocation share proposed at trial by Solvent, that number (6.35%) was calculated based on a 93.5% allocation of costs to DuPont at the Hot Spot. Once the Trial Court adopted a much lower allocation number for DuPont at the Hot Spot (33.39%), the 6.35% allocated share left most of the Hot Spot liability to Solvent, a result which was inconsistent with the Trial Court's own findings of fact demonstrating that Olin's contamination was migrating to the Hot Spot (while Solvent's contamination was migrating away from the Hot Spot). Based on both of these inconsistencies, the Circuit Court concluded that the Hot Spot allocation constituted an abuse of discretion and remanded that issue for reconsideration by the Trial Court. Such reversals of equitable allocations under CERCLA are extremely rare, with only one other reported instance of a federal Court of Appeals vacating an allocation as an abuse of discretion.

### **Dismissal of the Cross-Appeals**

The Circuit Court also dismissed, in rather cursory fashion, all of the issues that were appealed by DuPont and Olin. DuPont contended that Solvent could not maintain a contribution action against DuPont, arguing that it lacked "common liability" with Solvent because DuPont had released the chemicals at a separate "facility", and also argued that Solvent had allegedly cited the wrong sub-section of CERCLA in its complaint in support of its contribution claim. The Circuit Court rejected both contentions, finding that DuPont's "common liability" argument was plainly inconsistent with existing Second Circuit precedent and concluding that Solvent's complaint put DuPont on notice as to what Solvent was seeking regardless of the specific statutory provision cited in the Complaint. The Circuit Court also found that DuPont's statute of limitations defense, raised for the first time years into the litigation, had been waived. The Circuit Court also rejected DuPont's divisibility defense – that the harm caused by its contamination was divisible from harm caused by other contamination – as inapplicable to Solvent's contribution claim. Because the Circuit Court upheld Solvent's right to recover under CERCLA's contribution provision (Section 113), the Court did not have to decide the equally

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<sup>1</sup> The Second Circuit's decision was issued in two parts presumably because the Circuit Court panel wanted the Declaratory Judgment portion of its holding to be precedent-setting. Issues addressed in the Summary Order are deemed non-precedential.

thorny question of whether the Trial Court correctly concluded that Solvent could also recover under CERCLA's direct cost recovery provision (Section 107).

Finally, the Circuit Court rejected Olin's evidentiary appeal and its attempt to hold Solvent's parent liable for Solvent's very small share of liability at Gill Creek.

The Circuit Court thus remanded the case back to the district court to reallocate liability at the Hot Spot and to enter a declaratory judgment in favor of Solvent. By making it clear that Solvent is entitled to recover a portion of its ongoing remediation costs, and remanding the case for reallocation of the Hot Spot costs, this successful appeal will likely yield a significantly greater recovery for Solvent, in addition to the \$5.8 million already recovered in the litigation.

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

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