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Appellate Division Rejects Judicial Review Upon Assertion of Good-Cause Defenses to an NJDEP Spill Act Directive Prior to Imposition of Direct Oversight

On January 9, 2023, the New Jersey Appellate Division issued its decision in [*In re N.J. Dep't of Env'tl. Prot. Direct Oversight Determination*](#), in which the court addressed whether good-cause defenses asserted by Solvay Specialty Polymers USA, LLC ("Solvay") to a statewide directive had to be decided by a court before the New Jersey Department of Environmental Protection (NJDEP) could place it under direct supervision. Solvay has owned and operated a manufacturing plant along the Delaware River since 1990 (the "Site"). When Solvay was informed of sampling data establishing the presence of perfluorononanoic acid (PFNA) and perfluorooctanoic acid (PFOA), two specific per- and polyfluoroalkyl substances (PFAS), so-called "forever chemicals," in the area near the Site, Solvay began investigating and remediating PFNA and PFOA that might be attributable to the Site.

In September 2013, at the NJDEP's request, Solvay entered into the NJDEP's site remediation program and hired a licensed site remediation professional (LSRP) to oversee its remediation efforts. In March 2019, the NJDEP issued a [Statewide PFAS Directive](#) to Solvay and other entities, in which the NJDEP determined that Solvay is responsible for PFNA and PFOA contamination arising from the Site, which has contaminated the Site and surrounding areas, including the state's natural resources. The Statewide PFAS Directive provided detailed steps to be taken by Solvay within site-specific time frames. If Solvay failed to comply with the directive, it would be subject to penalties in the form of treble damages under the Spill Compensation and Control Act ("Spill Act").

In April 2019, Solvay asserted good-cause defenses to the Statewide PFAS Directive, arguing, among other things, it is not liable

under the Spill Act for PFAS impacts not caused by the Site. In September 2020, the NJDEP issued a determination that Solvay's remediation efforts are subject to compulsory and discretionary direct oversight by the agency ("Direct Oversight Determination"). The requirements under direct oversight are more onerous than for sites that are being remediated with LSRP oversight, as direct oversight involves a higher level of agency control over a remediation project. On November 4, 2020, Solvay filed an appeal from the Direct Oversight Determination, and six days later, the NJDEP filed a complaint in the Law Division against Solvay seeking enforcement of the Statewide PFAS Directive.

On appeal, Solvay argued that it was denied due process rights as established in *In re Kimber Petroleum Corp.*, 110 N.J. 69 (1988), because it was required to comply with the Direct Oversight Determination before it has an opportunity to have its good-cause defenses to the Statewide PFAS Directive adjudicated in the Law Division. In other words, Solvay argued that, pursuant to *Kimber*, if a directive recipient asserted good-cause defenses, all obligations under a Spill Act Directive were subject to judicial review before a need to comply with the directive, and therefore it did not comply with the timetables for actions under the Statewide PFAS Directive. In *Kimber*, the New Jersey Supreme Court interpreted the Spill Act to permit judicial review of the assessment of treble damages if the subject of an NJDEP directive asserted good-cause exceptions to its provisions. The court said that judicial review provides the necessary due process protections because a recipient of an NJDEP directive could assert good-cause defenses that were subject to judicial review during a cost recovery action filed by the NJDEP for treble damages.

The Appellate Division disagreed with Solvay. The three-judge panel held that the mere issuance of the Direct Oversight Determination does not trigger the due process protections that were established in *Kimber*. Importantly, the panel drew a bright-line distinction between a treble damage monetary penalty and the Direct Oversight Determination. The latter, the Appellate Division held, is not a penalty like the assessment of treble damages, but a tool through which the NJDEP seeks compliance with the Statewide Directive while its enforcement action, along with Solvay's good-

cause defenses, are being adjudicated in the Law Division.

The three-judge panel noted that Solvay was not denied due process. Solvay effectuated its rights under *Kimber* by asserting good-cause defenses to provisions of the Statewide PFAS Directive and refusing to comply with those provisions. Solvay will have the opportunity in the Law Division to adjudicate its defenses to those provisions with which it has refused to comply. If it establishes those defenses are valid, penalties will not be assessed. If Solvay does not prevail on its defenses, but establishes they were objectively reasonable, it may argue that the imposition of treble damages as a penalty for its partial non-compliance is not reasonable considering all of the circumstances.

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