IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & CO., Plaintiff	:	CIVIL ACTION
v.	:	
FIFTH AND MITCHELL STREET, CORP., et al., Defendants	:	NO. 96-5973

MEMORANDUM AND ORDER

McLaughlin, J. August 16, 2006

On June 28, 2006, following a bench trial, the Court issued a Memorandum and Order which made findings of fact and concluded that the plaintiff had proven that defendant Eaton Laboratories, Inc. ("Eaton") and defendant Fifth and Mitchell Street Corp. ("Fifth and Mitchell")[1] were liable under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Pennsylvania Hazardous Sites Clean-Up Act (the "HSCA"). The Court also concluded that the plaintiff had proven that Eaton was liable under the Pennsylvania Storage Tank and Spill Prevention Act (the "Storage Tank Act").

In the June 28, 2006 Memorandum and Order, the Court did not reach any conclusions with respect to the amount of damages the plaintiff is entitled to, but instead asked the

[1] The plaintiff sued both Fifth and Mitchell Street Co. and Fifth and Mitchell Street Corp. The Court will refer to both of these entities collectively as Fifth and Mitchell.

parties for some additional briefing.

The Court will not repeat all of its previous findings, but in summary, the Court found that Eaton used and disposed of perchloroethylene ("PCE") and 1,1,1, trichloroethane ("TCA") at a facility located at the intersection of 5th Street and Mitchell Street in Lansdale, Pennsylvania (the "Site") and that PCE and TCA were released from the Site. Additionally, the Court found that Eaton disposed of PCE and TCA both when Fifth and Mitchell owned the Site and when the plaintiff owned the Site.

Now that liability has been established, the Court must determine the amount of damages that the plaintiff may recover.[2] The plaintiff claims that it has incurred approximately $65,000 in response costs and that it will incur several hundred thousand dollars more in future costs. Turning first to CERCLA, with respect to the costs that have actually been incurred by the plaintiff, the Court will discuss whether those costs are recoverable before turning to the issue of how to treat past settlements the plaintiff has entered into with other parites. The Court will then discuss the issue of costs that the plaintiff claims it will incur. Finally, the Court will briefly discuss

[2] The Court previously found that the plaintiff is entitled to a jury trial under the Storage Tank Act with respect to its claims of property diminution, and thus that issue is not currently before the Court. See F.P. Woll & Co. v. Fifth & Mitchell St. Corp., No. 96-5973, 2005 U.S. Dist. LEXIS 13194 at *19 (E.D. Pa. July 1, 2005).

the HSCA and the Storage Tank Act.

I. CERCLA

A. Costs That Have Been Incurred

1. Recoverable Expenses

The plaintiff argues that it has incurred $64,665.75 in response costs to date. This figure includes the $40,708 that the plaintiff spent to secure a release from the United States Environmental Protection Agency (the "EPA") for past response costs for soil contamination as well as $23,957.75 that the plaintiff has spent with respect to the discovery of contamination at the Site.

Section 107(a)(4)(B) of CERCLA allows the recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The United States Court of Appeals for the Third Circuit has held that to be "necessary," a response cost must be "monies ... expended to clean up sites or to prevent further releases of hazardous chemicals." Redland Soccer Club, Inc. v. Dep't of the Army, 55 F.3d 827, 850 (3d Cir. 1995) (internal quotations omitted).

The EPA has issued regulations explaining when response costs are consistent with the National Contingency Plan ("NCP").

The regulations provide:[3]

> For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:
>
> (i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup; and
>
> (ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

40 C.F.R. § 300.700(3).

The "applicable requirements in paragraphs (5) and (6) of this section" cross-reference other EPA regulations discussing, among other topics, worker health and safety, documentation, reporting requirements, site evaluation, selection of a remedy and notice provisions. 40 C.F.R. § 300.700(5-6).

Here, the defendants concede that if liability is otherwise established under CERCLA, the $40,708 that the plaintiff paid to the EPA to settle past liability for soil contamination is properly considered a response cost under CERCLA. (Eaton's Damages Br. 5, July 14, 2006; 5th & Mitchell's Proposed Conclusions of Law ¶ 20, Aug. 22, 2005; Telephone Conference Tr. 42:7-14, July 21, 2006).

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[3] These regulations deal specifically with a cost recovery action, but the definition of a response cost applies equally in a contribution action.

There is a dispute over whether the other $23,957.75 is recoverable. Based on the current record, the Court cannot conclude that the additional $23,957.75 that the plaintiff spent in connection with the discovery of contamination at the Site constitutes recoverable response costs.

Following the trial, the plaintiff submitted an exhibit (P50) that purported to show $37,426.57 in past response costs. P50 was a collection of invoices from a law firm that represented the plaintiff and it was unclear what all the invoices were for. The defendants objected to this figure and argued that P50 in its present form was insufficient to determine whether the costs were properly considered response costs.

Well after the conclusion of the trial, on December 7, 2005, the plaintiff submitted an affidavit from an attorney at Lavin, O'Neil, Ricci, Cedrone and DiSipio (the "Lavin Law Firm") which stated that the plaintiff had been billed for $23,957.75 in response costs. The affidavit said that this figure excluded litigation costs and reflected:

> [O]versight of actions taken to ensure that the [the Site] was free from identifiable health hazards, to understand the scope of the contamination problem, to place all carriers on notice of the contamination, to cooperate with efforts of carrier's adjusters to understand the scope of the problem, to participate in EPA and [Pennsylvania Department of Environmental Resources'] efforts to investigate the property and ultimately to negotiate a buy/sell agreement and companion consent decree that resolved [the plaintiff's] liability for past investigative costs related to the soil investigation of [the Site].

(Aff. of James Weiner, Esq., Dec. 7, 2005).[4]

At a minimum, monies that the plaintiff paid to negotiate a consent decree with the EPA are not recoverable response costs under CERCLA. In Key Tronic Corp. v. United States, 511 U.S. 809, 820-21 (1994), the Supreme Court concluded that such costs were not recoverable because although such work may have aided the EPA and affected the scope of cleanup, "[w]e nevertheless view such work as primarily protecting [the petitioner's] interests as a defendant in the proceedings that established the extent of its liability." Key Tronic Corp., 511 U.S. at 820-21. Additionally, based on the Supreme Court's reasoning, the Court has serious reservations as to whether expenses incurred by the plaintiff for tasks such as placing insurance carriers on notice and negotiating a buy/sell agreement are recoverable.

That said, just because litigation expenses are not recoverable does not mean that any payments to attorneys are not recoverable under CERCLA. Id. at 819-820. For example, in Key Tronic Corp., the Supreme Court held that payments made to lawyers in connection with identifying other potentially responsible parties may be recoverable. Id. at 820. However, at

[4] The Court cited this affidavit in its June 28, 2006 Findings of Fact and noted that the plaintiff had incurred $23,957.75 in costs related to the discovery of contamination at the Site. The Court reached no conclusions on whether these expenses constituted response costs under CERCLA.

most, the plaintiff's figure of $23,957.75 that was paid to the Lavin Law Firm constitutes a mix of recoverable and unrecoverable expenses. Because the Court is unable to determine which entries correspond to unrecoverable expenses and potentially recoverable expenses, the plaintiff has not met its burden of proof in demonstrating that the $23,957.75 or any portion thereof constitutes response costs.

Thus, the plaintiff has actually incurred $40,708 in response costs. Next, it is necessary to address the issue of past settlements the plaintiff has entered into with other defendants.

2. Settlements

In its brief, the plaintiff represented that it had entered into four settlements. The plaintiff has settled with the PNB Commercial Finance Corporation ("PNB Finance"), Hajoca Corporporation ("Hajoca") and D.C. Filter and Chemical, Incorporated ("D.C. Filter") for $10,000 each and the plaintiff settled with Jetronics Industries, Incorporated ("Jetronics") for $350,000. However, the plaintiff has only received $20,000 which represents the settlements with PNB Finance and Hajoca.

There are two basic options for dealing with settling parties in a multi-defendant case such as this one. One method, the pro rata approach, would reduce the combined liability of the

non-settling parties by the percentage of total fault of the settling parties. The other option, the pro tanto approach, would reduce the combined liability of the non-settling parties by the amount of any settlement regardless of the actual percentage of the total fault of the settling parties.

By way of example, consider a case where there is $10 in total damages and five defendants are equally at fault. Under a pro rata regime, if three of the defendants settled for a total of $5, the $10 in total damages would be reduced by the percentage share of the settling defendants' liability, in this example 60% or $6, and then the two non-settling defendants would be responsible for the remaining 40%, or $2 each. The $1 shortfall due to the fact that the three settling defendants settled for less than their combined percentage of the liability would fall on the plaintiff.

The same facts under a pro tanto regime would yield a different result. Under the pro tanto approach, the amount of total damages, $10, would be reduced by the $5 received from the three settling defendants. The remaining $5 would be allocated among the remaining defendants and because, in this example, each defendant was equally at fault, they would each be liable for $2.50. Under a pro tanto regime the $1 shortfall would be allocated among the non-settling defendants and would not fall on the plaintiff.

In this case, the plaintiff argues that the Court should apply the pro tanto approach. On the July 21, 2006 telephone conference, both Eaton and Fifth and Mitchell argued that the Court should apply the pro rata approach. (Telephone Conference Tr. 19:3-12, 22:21-23:7, July 21, 2006).[5] For a number of reasons, the Court believes that the pro tanto approach is best in this case.

In the case of a suit brought by the government, CERCLA explicitly endorses the pro tanto approach. Under CERCLA section 113(f)(2), a settlement by one potentially responsible party with the government will reduce the liability of other potentially responsible parties by the amount of the settlement. 42 U.S.C. § 9613(f)(2). However, CERCLA is silent as to what should be done in a case such as this that is brought by a private party. Furthermore, the parties have not cited and the Court has not found any case from either the Supreme Court or the United States Court of Appeals for the Third Circuit that has met this issue in a CERCLA action. Courts in both this district and other federal appellate courts, however, have endorsed the pro tanto approach.

A recent case, Action Manufacturing Co., Inc. v. Simon

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[5] In its inital brief on damages, Fifth and Mitchell appeared to imply that the pro tanto approach was appropriate by stating that the plaintiff's response costs should be reduced by payments received from other defendants. (Fifth & Mitchell Damages Br. 1, July 14, 2006). However, on the July 21, 2006 telephone conference, Fifth and Mitchell clarified their position and stated that the pro rata approach should apply.

Wrecking Co., No. 02-8964, 2006 U.S. Dist. LEXIS 22392 (E.D. Pa. Apr. 24, 2006) dealt with this issue in a CERCLA contribution action. There, the District Court concluded that the pro tanto approach was best based on CERCLA's policy of encouraging settlements and because it would be impractical to calculate the percentage fault of all the settling defendants. Action Mfg. Co., 2006 U.S. Dist. LEXIS 22392 at *84-85. Additionally, the United States Court of Appeals for the Seventh Circuit has also concluded that the pro tanto approach should apply in CERCLA contribution actions and the Court of Appeals for the First Circuit held that it was within a district court's discretion to apply the pro tanto approach. Am. Cyanamid Co. v. Capuano, 381 F.3d 6, 20 (1st Cir. 2004); Akzo Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 308 (7th Cir. 1999).

The Court finds the reasoning of these cases persuasive. First, at least based on the current record, it would not be possible to determine the percentage share of the settling defendants. Although some evidence was introduced at trial regarding Jetronics' contribution to the contamination at the Site because Eaton was spun off from Jetronics and operated in a similar manner, no such evidence was introduced with respect to the other three settling defendants or any other entities that might have contributed to the contamination. To do a fair pro rata allocation, the parties would need to present additional

evidence to the Court regarding the settling defendants' contributions to contamination at the Site which is not practical at this late stage in the litigation.

Additionally, the United States Court of Appeals for the Third Circuit has observed that CERCLA is designed to encourage settlements. United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1184 (3d Cir. 1994). The pro rata approach is inconsistent with this policy. Under a pro rata regime, it is the plaintiff who must cover any shortfall between what is received from settling defendants and what a court later determines their percentage fault to be. Thus, every time a plaintiff settles with a defendant, it runs the risk that the settlement will not reflect that defendant's full share of the total liability and the plaintiff will be responsible for the difference.[6] Under a pro tanto regime, this risk is placed on the defendants, which encourages them to settle or risk being responsible for a larger share of the damages while at the same time removing all the risk that was placed on the plaintiff by reaching early settlements.

This is not to suggest that all courts apply the pro tanto approach. There are several examples of courts applying a pro rata approach in CERCLA actions. See, e.g., Lyncott Corp. v.

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[6] Conversely, if the settlements end up surpassing the total liability of the settling defendants, a plaintiff could receive a windfall under the pro rata regime.

Chem. Waste Mgmt., Inc., 690 F. Supp. 1409, 1418 (E.D. Pa. 1988); Pneumo Abex Corp. v. Bessemmer & Lake Erie R.R. Co., Inc., 936 F. Supp. 1274, 1278-79 (E.D. Va. 1996); see also McDermott Inc. v. AmClyde & River Don Castings, LTD., 511 U.S. 202, 217 (1994) (adopting the pro rata approach over the pro tanto approach in an admiralty case). Additionally, Eaton correctly points out that the pro tanto approach can unfairly lead to a non-settling defendant assuming a greater share of liability than it actually contributed to.[7]

However, under the pro rata regime, this problem does not go away, but it is the plaintiff as opposed to the non-settling defendants who must shoulder any shortfall between the amount received through settlements and the actual liability of the settling defendants. Of course, the plaintiff, unlike the non-settling defendants is a party to the settlements and can ensure that the settling defendants pay their fair share based on what is known at the time of the settlement, but new facts may be discovered after a plaintiff reaches a settlement or circumstances may change that would result in unfairness for the plaintiff under the pro rata regime.

Thus, the Court will apply the pro tanto approach in

[7] The Court notes that neither Eaton nor Fifth and Mitchell has ever argued that the settlements reached by the plaintiff were not made in good faith and Eaton and Fifth and Mitchell did not object when the plaintiff reached its settlement agreements with Jetronics, PNB Finance, Hajoca and D.C. Filter.

this case. Central to this decision is the Court's conclusion that based on the current record, it is the only practical approach in this specific case. Additionally, the pro tanto approach is mandated by CERCLA in claims brought by the government and the Court believes applying that approach here, in a contribution action brought by a private party, is consistent with the underlying policies of CERCLA.

Accordingly, the Court will deduct any settlements that the plaintiff has received from the total response costs that the plaintiff has incurred. Although this would normally be simple arithmetic, here, it is not clear which of the settlements that the plaintiff has entered into are recoverable.

The plaintiff asserts that it has received only $20,000 which represents the settlements that it entered into with PNB Finance and Hajoca. The plaintiff has represented that the $350,000 settlement with Jetronics was, by its terms, only recoverable against the Home Insurance Company, which was Jetronics' insurance carrier. The plaintiff asserts that the Home Insurance Company is in receivership and, although it has submitted a claim, it has not received any money as a result of its settlement with Jetronics.

Eaton and Fifth and Mitchell do not dispute these facts, but they have asserted that the plaintiff may still recover the $350,000 settlement or some portion thereof from the

Home Insurance Company. On the July 21, 2006 telephone conference, counsel for the plaintiff stated that he would attempt to provide the Court with the current status of the Jetronics settlement. On an August 14, 2006 telephone conference, counsel for the plaintiff reported that he was unable to find out the status of the settlement other than that a claim had been made to the receiver that had still not been resolved.

Thus, the plaintiff has not demonstrated that the $350,000 settlement it reached with Jetronics or any portion thereof is unrecoverable and under the pro tanto approach the Court will deduct the entire value of that settlement from the total liability of the defendants.[8] Because the settlements the plaintiff reached with PNB Finance, Hajoca and Jetronics far exceed the response costs incurred by the plaintiff to date, the Court will not address how the $10,000 settlement with D.C. Filter which the plaintiff has not received should be treated. Should the plaintiff's response costs ever exceed the value of the settlements reached with PNB Finance, Hajoca and Jetronics, the Court will address this issue.

3. Allocation of Response Costs

Even excluding the D.C. Filter settlement, the

[8] Accordingly, the Court need not reach the issue of how to account for an unrecoverable settlement under the pro tanto approach.

plaintiff has reached settlements totaling $370,000. The plaintiff has only incurred $40,708 in response costs to date and thus the settlements reached by the plaintiff exceed the response costs incurred by $329,292. Thus, the Court need not reach the issue of how to allocate the response costs actually incurred by the plaintiff, because under any allocation, the plaintiff would not receive anything from either Eaton or Fifth and Mitchell under the pro tanto approach at this time due to the set off from the prior settlements.

B. Future Costs

In addition to response costs that have actually been incurred, the plaintiff put on evidence in the form of expert testimony at trial that was designed to show that it will be responsible for approximately $1,000,000 more in future costs. Even though neither the EPA nor any other governmental agency has asked the plaintiff to pay these costs, the plaintiff requests that the Court award it a lump sum payment now.

First, there is the threshold issue of whether the plaintiff's expert, Mr. Leis, is even qualified to opine on what the EPA or the Commonwealth of Pennsylvania might do in the future with respect to the Site. Mr. Leis is a licensed geologist, who was qualified as an expert on groundwater investigation and remediation. Even if Mr. Leis was qualified to

opine on how to best remedy the contamination at the Site, that is not the same as predicting what the EPA will do in the future and precisely how much it will cost.

Mr. Leis reached his conclusions by predicting what the EPA and other governmental entities will charge the plaintiff for the cleanup of Area 6. He based these findings on an assumption that the Site was a de minimis contributor to the contamination and as such would be responsible for between .07% and 10% of the costs. Based on previous work on unrelated superfund sites, Mr. Leis estimated that the EPA would find the contamination at the Site to be responsible for 2.5% of the total liability. These figures were not based on direct statements from the EPA, but rather Mr. Leis's experience at other sites in other states. Based on these assumptions and projecting the total cleanup costs over 30 years to be about $20,000,000, Mr. Leis predicted that the plaintiff would be responsible to the EPA for about $500,000 in groundwater cleanup costs. (Trial Tr. 90:9-91:1, July 12, 2005).

Mr. Leis's estimations of other portions of the plaintiff's future costs are similarly speculative. As stated in the Court's findings of fact, since 2002, the EPA has not made any demand for payment from the plaintiff. Additionally, neither the 1994 or 1999 Remedial Investigation Field Studies mentioned Eaton and the EPA's Record of Decision for Area 6 issued on

August 10, 2000 listed sites that were contamination sources for groundwater, but neither the Site nor Eaton were mentioned. F.P. Woll & Co. v. Fifth & Mitchell St. Corp., No. 96-5973, 2006 U.S. Dist. LEXIS 44011 at *14-16 (E.D. Pa. June 28, 2006).

When faced with cost estimates that are best classified as speculative, courts have not allowed plaintiffs to recover lump sum payments of costs that they have not incurred and may never incur and under CERCLA, the plain language of the statute only allows for recovery of costs that have been "incurred." 42 U.S.C. § 9607(a). Instead, at least for cost recovery claims under section 107, a plaintiff will go to court after it incurs any response costs to recover those costs and ask for a declaratory judgement against the defendants requiring them to pay any response costs the plaintiff incurs in the future. See 42 U.S.C. § 9613(g)(2)(B). In fact, for cost recovery actions, at least as written, CERCLA requires a court to issue a declaratory judgment for future costs. Id.

Although the language of CERCLA only appears to apply to cost recovery actions, courts have issued declaratory judgments in contribution actions too. One recent case, Beazer East Inc. v. Mead Corp., 412 F.3d 429 (3d Cir. 2005), reviewed a district court decision that issued a declaratory judgment in a contribution action. Although the Court of Appeals disapproved of the district court's allocation, their decision discussed the

merits of the declaratory judgment, and at least implicitly approved of the use of declaratory judgments in CERCLA contribution actions. See Beazer East, 412 F.3d at 449. The Court finds no reason to distinguish between contribution and cost recovery claims with respect to declaratory judgments and most other courts do not make such a distinction. See, e.g., United States v. Davis, 261 F.3d 1, 46 (1st Cir. 2001); Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1191 (9th Cir. 2000). Additionally, the plaintiff, Eaton and Fifth and Mitchell all concede that the Court has the power to issue a declaratory judgment in this case. (Eaton's Damages Br. 7, July 14, 2006; Fifth & Mitchell's Damages Br. 4, July 14, 2006; Pl.'s Damages Br. 4, July 19, 2006).

Consistent with this approach, it would not be appropriate to award the plaintiff a lump sum payment for costs it has not yet incurred and at least the United States Court of Appeals for the Ninth Circuit has specifically disapproved of awarding a plaintiff speculative future costs. In re Dant & Russell, Inc., 951 F.2d 246, 250 (9th Cir. 1991).[9] If the

[9] The situation in this case and Dant & Russel, where the only evidence of future costs consists of estimations or assertions of what might happen in the future, must be distinguished from a case where a plaintiff is under a binding obligation to pay costs in the future. In such a case, even though a plaintiff has not actually had to pay out any money, the fact that it is under a binding obligation to do so satisfies the requirement that costs must have actually been incurred. See e.g., Action Mfg. Co., Inc. v. Simon Wrecking Co., No. 02-8964,

plaintiff were able to recover its predicted future costs now, there is a risk that Mr. Leis's predictions about what the EPA and other governmental entities will do in the future will not be correct and the plaintiff will receive a windfall from the fact that others polluted on a piece of property it owned.

Accordingly, the Court will issue a declaratory judgment that the Court's determinations regarding liability will apply should the plaintiff be required to incur additional response costs in the future that exceed the value of the PNB Finance, Hajoca and Jetronics settlements.[10] Of course, the plaintiff will still need to show that any expenses incurred in the future are properly considered response costs.

Should the plaintiff be able to show that it has been required to incur response costs in excess of these settlements, the Court will apply its previous determinations as to liability and determine how such response costs should be allocated among

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2006 U.S. Dist. LEXIS 22392 at *57-62 (E.D. Pa. Apr. 24, 2006).

[10] The plaintiff has requested that any such declaratory judgment be tailored so that it can take affirmative steps to resolve any potential future claims against it by federal or state agencies. However, in its Findings of Fact, the Court concluded that neither the EPA nor the Commonwealth of Pennsylvania had demanded the plaintiff investigate or cleanup the Site since 2002. F.P. Woll & Co. v. Fifth & Mitchell St. Corp., No. 96-5973, 2006 U.S. Dist. LEXIS 44011 at *14-16 (E.D. Pa. June 28, 2006). Additionally, Mr. Woll testified at trial that he had no plans to voluntarily pay money to cleanup the Site absent a demand from a governmental agency. (Trial Tr. 102:24-103:4, July 11, 2005). Thus, the Court will not allow the plaintiff to affirmatively seek out additional response costs.

Eaton, Fifth and Mitchell and the plaintiff.[11]

II. The HSCA and the Storage Tank Act

Because the HSCA closely resembles CERCLA, none of the parties has argued that the plaintiff's claim under the HSCA should be treated any differently than the CERCLA claim. The Court notes that CERCLA and the HSCA contain generally analogous provisions. See Joshua Hill, Inc. v. Whitemarsh Twp. Auth., 294 F.3d 482, 485-86, 489 (3d Cir. 2002). Accordingly, as under CERCLA, the Court concludes that the plaintiff has not shown that the $23,957.75 in fees are recoverable response costs under the HSCA.

The Court has not found any case law discussing the merits of the pro tanto approach to settlements under the HSCA, but based on the similarities between the HSCA and CERCLA, the Court concludes that the pro tanto approach should apply under the HSCA as well. Because the settlements far exceed any response costs that have actually been incurred, the Court need not consider the issue of how to allocate response costs under the HSCA at this time.

The Court also reaches the same conclusion under the

[11] Should the plaintiff be required to incur response costs in the future that are in excess of the value of the settlements with PNB Finance, Hajoca and Jetronics, the Court will also consider how to treat the settlement with D.C. Filter that the plaintiff has not been able to recover.

HSCA as under CERCLA with respect to the plaintiff's future costs and thus the Court will issue an identical declaratory judgment with respect to the plaintiff's HSCA claims as with its CERCLA claims.

Finally, under the Storage Tank Act, the Court has previously determined that the plaintiff will be entitled to a jury trial on its property diminution claim against Eaton. The plaintiff has also asserted a claim for attorneys' fees under the Storage Tank Act, but has agreed to hold off on this issue until a final determination is made on the property diminution claim. (Telephone Conference Tr. 49:19-50:1, July 21, 2006).

III. Conclusion

Thus, the Court concludes that because the value of the settlements the plaintiff reached with PNB Finance, Hajoca and Jetronics far exceed the amount of response costs that have actually been incurred, the plaintiff is not presently entitled to any damages under CERCLA or the HSCA. The Court will issue a declaratory judgment which reflects the Court's conclusion that Eaton and Fifth and Mitchell are liable under CERCLA and the HSCA. In the event that the plaintiff is required to incur additional expenses that it can prove are response costs and that exceed the value of the settlements the plaintiff reached with PNB Finance, Hajoca and Jetronics, the plaintiff will not have to

demonstrate liability under CERCLA or the HSCA. If this happens, the Court will consider how to allocate the response costs and how to treat the settlement the plaintiff reached with D.C. Filter. The Court will not issue a final judgment at this time, but instead will wait until a final determination is made with respect to the plaintiff's claims under the Storage Tank Act.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & CO.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
FIFTH AND MITCHELL STREET, CORP., et al.,	:	
Defendants	:	NO. 96-5973

ORDER

AND NOW, this 16th day of August, 2006, upon consideration of Eaton's Brief Regarding Damages (Docket No. 316), Fifth and Mitchell's Memorandum of Law in Regard to Damages (Docket No. 315), the plaintiff's Memorandum of Law Addressing Post Trial Issues, Fifth and Mitchell's Reply and Eaton's Reply, as well as arguments presented on telephone conferences held on July 21 and August 14, 2006 between the Court and counsel, IT IS HEREBY ORDERED that for the reasons stated in a Memorandum of this date, the Court will not award the plaintiff any damages at this time, but will issue a declaratory judgment as to Eaton's and Fifth and Mitchell's liability under CERCLA and the HSCA.

The Court will not issue a final order at this time, but instead will wait until a final determination is made on the plaintiff’s remaining claims under the Storage Tank Act.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. MCLAUGHLIN, J.