UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3672

REYNOLDS METALS COMPANY,
Plaintiff-Appellee,

versus

CONSOLIDATED ALUMINUM CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-85-485-A)

(April 21, 1995)

Before REYNALDO G. GARZA, DeMOSS, and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:[*]

Consolidated Aluminum Corporation (Consolidated) appeals from a judgment for damages awarded in an action for breach of contract brought by Reynolds Metals Company (Reynolds). We affirm the district court's holding that Consolidated breached the contract. We vacate and remand, however, to allow the district court to offset the damages.

I. FACTS AND PROCEDURAL HISTORY

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Consolidated owned an aluminum reduction plant in Lake Charles, Louisiana. In the Fall of 1982, Reynolds and Consolidated began discussions regarding the sale of the plant to Reynolds. A pond located on the site of the plant was used to treat waste water. Both parties knew that the pond was contaminated with sediment containing PCB[2] and that the sediment would have to be removed. Neither party, however, knew the extent to which the pond was contaminated. If the PCB concentration exceeded 50 parts per million (ppm), then the EPA required special, costly disposal methods. Reynolds and Consolidated entered into a purchase agreement, and section 7.2 of the purchase agreement provided in pertinent part:

> Consolidated hereby covenants and agrees as follows:
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> (a) PCB's and PCB-Contaminated Items. On or before the Closing date Consolidated will:
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> * * *
>
> (v) cause any PCB's or PCB-contaminated materials in excess of 50 parts per million . . . as determined by the test referred to in clause (ii) of Section 7.2(b), below, to be disposed of in accordance with then applicable environmental laws, rules and regulations.
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> (b) Paste Plant Treatment Pond. As soon as practicable, Consolidated will . . . (ii) test the influent into, and the sediment within, the Paste Plant Treatment Pond for PCB's.

The purchase agreement was executed on May 23, 1983, and the closing date was set for November 30, 1983. Per the terms of the above-quoted agreement, Consolidated had the treatment pond tested by scientific consultants. NUS Corporation conducted the first tests and they indicated that the pond contained PCBs over 50 ppm.

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[2] Polychlorinated biphenyls (PCB).

Consolidated then had Toxicon Laboratories conduct further sampling and analysis and that testing indicated PCB levels in the pond of over 50 ppm. The above tests were conducted using the GC/ECD[3] method of testing, which the district court found was a generally accepted method of PCB detection and qualification. Consolidated then had Toxicon use a method called GC/MS[4] analysis which indicated that the PCB content of the pond was below 50 ppm.

By letter dated October 10, 1993, Consolidated informed Reynolds of the results of all three testing procedures, two of which indicated PCB levels in excess of 50 ppm and a third which indicated less than 50 ppm. Consolidated stated in that letter that the tests indicating an excess of 50 ppm were severely distorted by "interference." It further stated that, based on the test results, the purchase agreement was completely satisfied and no further action was required of Consolidated.

Reynolds responded that it was concerned regarding the disparity of the tests results and did not agree that the requirements of the purchase agreement were completely satisfied. Reynolds stated that it planned to conduct tests for PCBs "immediately after the closing . . . [but did] not believe [its] concerns in this matter should be cause for a delay of the closing." Further, Reynolds stated that "[i]f PCBs, or other pollution, resulting from Consolidated's operation of the facilities is discovered or detected after the closing, such

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[3] Gas chromatography/electron capture detector (GC/ECD).

[4] Gas chromatography/mass spectrometry (GC/MS).

matters become Retained Liabilities for Consolidated under the Purchase Agreement." Consolidated replied that the disparity was explained by the methodologies employed and denied any additional responsibility, stating the agreement "speaks for itself."

On November 30, 1983, as planned, Reynolds and Consolidated closed on the sale of the plant. Immediately after closing, Reynolds hired Environmental Science and Engineering (ESE) to analyze samples from the pond. ESE, using the GC/ECD method, determined that the PCB levels in the pond exceeded 50 ppm. In 1985, based on that report, Reynolds filed the instant lawsuit in district court. In 1986, Reynolds found it necessary to remove the accumulated sludge from the pond to continue to comply with the terms of its waste water treatment permit.

Prior to cleanup, Reynolds had ESE test the pond using both GC/ECD and GC/MS methods, and the tests showed comparable results (in excess of 50 ppm) under both methods. As part of the cleanup, sludge was tested as it was removed from the pond and segregated according to PCB content. This was so that each load could be disposed of at an appropriate land fill. Sludge containing PCBs under 50 ppm was disposed of in Louisiana. Sludge containing PCBs in excess of 50 ppm was disposed of in Alabama at a much greater cost.

In the court below, Reynolds sought to recover the entire costs of cleanup, attorneys' fees, and costs. Prior to trial, the parties stipulated to two exhibits that were defense exhibits at a deposition. Exhibit 138 was the report of a firm hired by Reynolds

that concluded in the "Results" section that the GC/MS test conducted by Toxicon for Consolidated was biased low because the "high level of coextractants in the sediment extracts caused loss of PCBs to the silica gel cleanup column." The "Results" section of that report was revised on Reynolds' request and submitted as Exhibit 139. Exhibit 139 did not attribute the under 50 ppm finding to the silica gel cleanup. Instead, the "revised" conclusion was simply that the GC/MS analysis used by Toxicon was biased low.

At trial, Reynolds introduced Exhibit 10, which was a combination of Exhibit 138 (minus the "Results" section) and Exhibit 139 (which was the revised results per Reynolds' request). The first page of Exhibit 10 bears a handwritten notation "138." The parties had not stipulated to this integrated document as an exhibit. Consolidated was unaware of this integration and made no objection. Consolidated believed that Exhibit 10 at trial was deposition exhibit 138 (original version of the report with the original "Results" section), which Consolidated believed to be favorable to it.

After the bench trial, the court, because of completely contradictory testimony by expert witnesses, appointed an expert under Rule 706 of the Federal Rules of Evidence to review the testimony of all technical experts and all exhibits relevant to the technical issue, and then render an "opinion to the court as to whether the testing procedures employed by the parties produced technically reliable results on the issue of the PCB level of the

Pond." After the court's decision to appoint, the parties chose David L. Stalling, Ph.D. as the expert. Dr. Stalling reviewed the evidence and submitted a report to the court dated December 3, 1990. Subsequently, the parties deposed Dr. Stalling and during the deposition, Consolidated learned about the revision of Exhibit 138. On October 2, 1991, the court held an evidentiary hearing at which Dr. Stalling testified at length and was examined by both sides. Consolidated then moved to strike the exhibit and the expert's testimony. The district court denied both motions. The court did grant Consolidated's alternative request to introduce "into evidence the original conclusion pages from the earlier draft report."

The court below found that the pond contained PCB levels in excess of 50 ppm. The court concluded that, under the section 7.2 of the purchase agreement, "Consolidated clearly had the obligation to clean up the Pond if it contained contamination in excess of 50 parts per million and it clearly breached its agreement when it failed to do so." The court further found that "[i]t was not physically possible to remove only the sediment in the Pond which exceeded 50 parts per million. All or none had to be removed by Consolidated." The court then entered judgment in favor of Reynolds against Consolidated in the sum of $1,468,038.49 with interest.

II. EVIDENTIARY RULINGS

Consolidated argues that the district court abused its discretion in denying his motion to strike both Exhibit 10 and the

testimony of Dr. Stalling, the court-appointed expert. Evidentiary rulings are reviewed for an abuse of discretion and may be reversed only if the ruling affects a substantial right of a party. Marcel v. Placid Oil Co., 11 F.3d 563, 566 (5th Cir. 1994).

Reynolds does not dispute that exhibit 10 at trial consisted of two separate documents to which the parties previously had stipulated. Reynolds contends, however, that Consolidated did not object in a timely manner. Although Consolidated did not object when Exhibit 10 was introduced, Consolidated did object prior to the court rendering judgment. In any event, the court below addressed the merits of the motion and did not treat it as untimely. We therefore address the merits of this claim.

Consolidated argues that it suffered great prejudice by the introduction of the altered exhibit 10 at trial in that it would have made a difference in its trial strategy. The difference between altered Exhibit 10 and deposition exhibit 138 is that the deposition exhibit 138 expressly attributed the low bias of the GC/MS method to the silica gel cleanup technique, and the revised version (Exhibit 10) did not. Consolidated asserts that this difference is critical because its chemical analysts did not use a silica gel cleanup.

Although Consolidated, at the time of trial, did not realize the document had been altered, the court below conducted an evidentiary hearing prior to rendering judgment. During that hearing, Dr. Stalling, in response to a hypothetical question by Consolidated, testified that he thought that the issue regarding

the silica gel cleanup was "irrelevant." Also, during the deposition, Consolidated's counsel asked Dr. Stalling whether it was possible that a loss of PCBs occurred from the silica gel because of the high level of coextractants, to which Stalling replied that it was "most improbable." Further, the court, as the fact-finder, expressly considered the corrected exhibit before rendering judgment.

To summarize, eight separate tests were conducted by the parties, 3 by Consolidated and 5 by Reynolds. Out of 8 tests, only 1 indicated that the PCB level was below 50 ppm. Additionally, it was stipulated by the parties (without admission as to the relevance to the case) that Reynolds expended certain funds to transport and dispose of sludge in Alabama. Sludge with PCB levels in excess of 50 ppm had to be disposed in Alabama at a much greater cost. Because the evidence overwhelmingly indicates that the pond contained sediment with PCBs in excess of 50 ppm, and an evidentiary hearing was held after Consolidated discovered the altered exhibit, Consolidated cannot show that the district court's refusal to strike the exhibit and testimony affected the substantial rights of Consolidated. Marcel v. Placid Oil Co., 11 F.3d at 566. Accordingly, the court's rulings were not an abuse of discretion.

III. ALLOCATION OF DAMAGES

Consolidated next argues that the district court erred in its award of damages to Reynolds for breach of the contract. Findings of fact, including damage awards, are reviewed for clear error.

Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119, 121 (5th Cir. 1994). Mere disagreement with the district court's evaluation of the record is insufficient, we must be left with the definite and firm conviction that a mistake has been committed. Our standard of review for the district court's contract interpretation is de novo. Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203, 1206 (5th Cir. 1993).

The parties have agreed that New York substantive law applies. "Under New York law, we first look to the written agreement to discern the parties' intent and limit our inquiry to the words of the agreement itself so long as the agreement sets forth the parties' intent clearly and unambiguously." Nicholas Laboratories Ltd. v. Almay, Inc., 900 F.2d 19, 20-21 (2nd Cir. 1990) (citations omitted). If language in a contract is deemed ambiguous, the intent of the parties is a question of fact. Koch v. Specto Optical, Inc., 585 N.Y.S.2d 448, 449 (App. Div. 1992).

As previously set forth, section 7.2 of the purchase agreement provided that:

> Consolidated hereby covenants and agrees as follows:
>
> (a) PCB's and PCB-Contaminated Items. On or before the Closing Date Consolidated will:
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> * * *
>
> (v) cause any PCB's or PCB-contaminated materials in excess of 50 parts per million . . . as determined by the test referred to in clause (ii) of Section 7.2(b), below, to be disposed of in accordance with then applicable environmental laws, rules and regulations.

Relying on this language, Consolidated argues that the cleanup expenses should have been allocated between the parties.

Specifically, Consolidated argues that the contract made it responsible only for disposing of sediment that had PCBs in excess of 50 ppm and made Reynolds liable for the costs involved in disposing of the PCBs contaminated with less than 50 ppm.[5] The district court rejected Consolidated's interpretation, stating that "[i]t was not physically possible to remove only the sediment in the Pond which exceeded 50 parts per million. All or none had to be removed by Consolidated."

Consolidated now argues that although the district judge's "all or none" reasoning "may apply to the physical excavation of the pond, it does not apply to paying for the clean-up and disposal of the sediment." Consolidated further asserts that:

> [t]he simple fact that Consolidated might not have been able to remove the over-50-ppm sediment from the pond without also removing the under-50-ppm sediment does not mean that Reynolds could not share the expenses of the clean-up. Under the Purchase Agreement, Consolidated had no obligation to do anything with material containing PCBs under 50 ppm. It could have removed it from the pond bottom and then left it on the site for Reynolds to haul away and dispose of.

The district court apparently found the language unambiguous.[6]

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[5] As indicated previously, the district court's finding that the pond contained PCB contamination in excess of 50 ppm is not clearly erroneous.

[6] The court below, in the context of the estoppel claim (which is not raised on appeal), opined that "[u]nder the provisions of Section 7.2 of the contract, Consolidated clearly had the obligation to clean up the Pond if it contained contamination in excess of 50 parts per million and it clearly breached its agreement when it failed to do so." However, when the district court expressly found that Section 7.2 required Consolidated to clean the entire pond if the PCB levels exceeded 50 ppm, the court referred to evidence extrinsic to the contract (the court found that it was not possible to remove only the sediment in the pond which exceeded 50 ppm).

The agreement specifically provided that Consolidated was responsible for removing the sludge (which contained levels of PCB in excess of 50 ppm) prior to the closing date. Of course, at that point in time Reynolds would not have been an owner. Further, Consolidated has pointed to no provision in the contract explicitly setting forth the allocation of the clean up costs. We agree with the district's interpretation of the contract.

Assuming arguendo that the language is ambiguous, we nonetheless come to the same conclusion. The court below found that Reynolds (through Mr. Amos) "was determined that if PCB levels exceeded 50 parts per million, Consolidated would bear the costs of removing the sludge from the Pond." As previously stated, the court also found that it was physically impossible to remove only the sediment which contained levels of PCB in excess of 50 ppm. Consolidated has not shown that these factual findings are clearly erroneous. Accordingly, we affirm the court's holding that Consolidated was required to clean up all the contaminated sludge because the levels of PCBs exceeded 50 ppm.

Finally, Consolidated asserts that "the parties had stipulated that [Reynolds] was responsible for introducing 23% of the pond material, and the evidence clearly permitted costs for different clean-up activities to be distinguished and allocated according to the contamination level of the material involved." The district court, interpreting New York law in this diversity case, stated that "damages for breach of contract consist of the `amount necessary to put the plaintiff in the same economic position he

would have been in had the defendant fulfilled his contract.'" See Conclusions of Law at 17 (quoting Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92 (2nd Cir. 1984)). The court below further found that "had Consolidated fulfilled its obligations under Section 7.2, all of the sludge containing PCBs in excess of 50 parts per million (along with all other PCB contaminated sludge) would have been disposed of at the time of the sale."

The parties have stipulated that twenty-three percent of the total quantity of sludge in the pond was put there by Reynolds subsequent to the closing date and prior to the cleanup of the pond. Consolidated contends that the district court erred by failing to subtract twenty-three percent of the total clean up expenses because that placed Reynolds in a better economic position than it would have been in had Consolidated performed the cleanup of the pond prior to closing. In response, Reynolds asserts that when the additional sediment was added to the pond, it became inextricably mixed with the contaminated sludge.

We find that Consolidated is entitled to an offset for some of the damages. If Consolidated had performed the cleanup of the pond prior to the closing date, then Reynolds would have been responsible for removing the sediment it placed in the pond subsequent to the closing. Consolidated requests that the total damages be reduced by twenty-three percent. We decline to do so because there is no evidence indicating the extent to which the sediment for which Reynolds was responsible was contaminated with PCB. Likewise, we are unable to determine the cost of removing the

sediment which Reynolds placed in the pond had such sediment not been mixed with the sediment placed in the pond by Consolidated. The cost of removing such twenty-three percent of the total sediment should be determined and that amount offset against the damages awarded by the district court. This should place Reynolds in the same economic position it would have been in had Consolidated not breached the contract and also prevent Reynolds from receiving a windfall or unfair benefit from Consolidated's breach. We therefore vacate and remand the case for the limited purpose of allowing the district court to make such a determination in the first instance.

CONCLUSION

For the above stated reasons, we **AFFIRM** the judgment of the district court except insofar as it holds that Consolidated is responsible for the entire cleanup costs of the sediment placed in the pond by Reynolds; that part of the judgment is **VACATED** and **REMANDED** for further proceedings consistent with this opinion.