

court must make factual findings to resolve the government's 12(b)(1) factual challenge to the court's subject matter jurisdiction."

The U.S. Postal Service on Feb. 25 moved for leave to file an *amicus* brief on the remand by the Ninth Circuit. "As the author and authority on the Certified Mail regulations, the Postal Service manifestly has unique insight on the question before the Court," according to the Postal Service. "Further, the Postal Service has a critical interest in the manner in which courts define the services the Postal Service provides. It is essential to efficient postal operations that those services — including Certified Mail — are interpreted in a uniform manner nationwide. Differing definitions would create uncertainty for the Postal Service and its customers and could force the Postal Service to tailor its processing standards regionally."

#### 'Friend Of A Party'

The growers oppose allowing the Postal Service to file the brief. "An *amicus* brief is intended to offer 'timely, useful' information from an 'impartial individual' whose role is to 'advise[] the Court' rather than 'advocate' on behalf of a litigant. *Greater Yellowstone Coal v. Timchak* [2008 U.S. Dist. LEXIS 92394]," according to the growers. "A proper *amicus* is the 'friend of the court, not friend of a party.' *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (chambers opinion of Posner, J.)."

"Here, the United States Postal Service ('USPS') disqualified itself from being a neutral 'friend of the Court' in 2003, when it submitted two declarations offering a Government-friendly interpretation of the postal regulations governing certified mail," according to the growers. "These declarations contradict the declarations of postal experts — including a former Boise postmaster — that explain why the Government's denial notice was *not* sent by certified mail. At best, the USPS's proposed *amicus* brief simply 'cover[s] the same ground' that both the Government and the USPS itself covered in 2003. *Voices for Choices*, 339 F.3d at 545 [*Voices for Choices v. Illinois Bell Telephone Co.* (339 F.3d 542)]. The Court should not allow a party's witness to bolster its own credibility through the *amicus* process."

Even if the Postal Service had not appeared as a witness for the United States in this action, it is still not an

impartial friend of court as contemplated in *Great Yellowstone Coal*, according to the growers. "Rather, it is a federal entity that is itself subject to suit under the FTCA [Federal Tort Claims Act]. See 39 U.S.C. § 409(c) (extending FTCA to tort claims against the USPS)," according to the growers. "The USPS has vigorously contested jurisdiction in FTCA-related suits brought against it. See, e.g., *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006) rejecting USPS's subject-matter jurisdiction challenge); *MB Fin. Group Inc. v. U.S. Postal Serv.*, 545 F.3d 814 (9th Cir. 2008) (same). The USPS therefore has a bias in favor of the Government, and limiting FTCA jurisdiction.

"Finally, the USPS's proposed *amicus* brief thwarts the Court from making its findings on the existing record (which the Ninth Circuit contemplated in its 'limited remand') and is in violation of the Court's order limiting the motion to 3 pages and 10 pages of supporting brief," according to the growers.

#### Counsel

Steven B. Andersen, Walter H. Bithell and Amanda K. Braisford of Holland & Hart in Boise and Douglas L. Abbott and Peter C. Houtsma of Holland & Hart in Denver represent the growers.

Thomas E. Moss and Robert C. Grisham of the U.S. Attorney's Office for the District of Idaho in Boise and Christina Falk, Brian E. Bowcut, Geoffrey Cook, Dawn De Keyser Dollar, Margaret J. Mahoney and Ina Strichartz of the U.S. Department of Justice in Washington, D.C., represent the United States.

J. Walter Sinclair and W. Christopher Pooser of Stael Rives in Boise, Leonard J. Feldman and Maren R. Norton of Stael Rives in Seattle and John Mandler of Faegre & Benson in Minneapolis represent DuPont.

Mary Anne Gibbons and David C. Belt of the USPS in Washington represent the USPS. ■

## New Jersey Class Describes Plan To Dispense \$8.3 Million Filter Settlement Fund

CAMDEN, N.J. — The plaintiffs in two certified class actions filed a supplemental brief March 8 in the U.S.

District Court for the District of New Jersey to answer questions about the distribution of a proposed \$8.3 million settlement of nuisance claims against DuPont for alleged contamination of private well water and a public utility water supply with perfluorooctanoic acid; the preliminary approval hearing is set for March 21 (Richard A. Rowe, et al. v. E.I. DuPont de Nemours & Co., No. 06-1810, D. N.J.; Misty Scott, et al. v. E.I. DuPont de Nemours & Co., No. 06-3080, D. N.J.; See 3/1/11, Page 10).

**(Supplemental memo in support of joint motion available. Document #15-110315-055B.)**

Richard A. Rowe and Misty Scott allege that perfluorooctanoic acid (PFOA) from the Salem County, N.J., DuPont Chambers Works refinery contaminates the aquifer from which private water well owners and the Penns Grove Water Supply Co. (PGWS) draw water. Rowe represents class members who have a private water well. Scott represents plaintiffs who use PGWS water.

The plaintiffs and DuPont filed a joint motion on Feb. 22 for preliminary approval of the settlement.

In exchange for a release from the nuisance injunctive relief claim, DuPont agrees to pay \$8.3 million into a class benefits program that will provide class members an in-home water filtration system or a cash payment.

#### **Incidental Payment Option**

Class counsel said in the supplemental brief they intend for the cash payment to equal the value of the filter option. "That Filter Option package value (and corresponding Incidental Payment Option) is currently estimated to be at least approximately \$800, assuming approximately 4800 participating Class Households, one Culligan RC-EZ-4 water filter system per package at approximately \$100, at least 10 replacement cartridges at approximately \$50 each, a \$200 installation check, and free delivery of the water filter package to the Class Household," according to the plaintiffs.

The plaintiffs anticipate that a class administrator will be appointed if the settlement is approved. The class administrator will distribute claim forms to the households in the classes and determine the number of households that will choose the filter package or the incidental payment, according to the plaintiff. The

class administrator will be responsible for negotiating the price for the filter and replacement cartridges based on the selection of the class members, according to the plaintiffs. Based on the negotiated costs, the class administrator will set the cash value of the incidental class payment, according to the plaintiffs.

The second issue addressed by the plaintiffs in the supplemental brief is if all of the settlement fund, less attorney fees and class administrator expenses, will be distributed to the class. The plaintiffs said they anticipate the class administrator will adjust the installation check and the incidental cash payment to distribute all of the settlement fund to class households.

#### **Class Administrator**

Finally, the plaintiffs said the task of selecting a class administrator has not been completed.

Rhon A. Jones and David B. Byrne III of Beasley, Allen, Crow, Methvin, Portis & Miles in Montgomery, Ala.; John B. Nalbandian and Robert A. Bilott of Taft, Stettinius & Hollister in Cincinnati; J. Steven Justice of Taft, Stettinius & Hollister in Dayton; Shari M. Blecher, Michael George Sinkevich Jr. and Stuart J. Lieberman of Lieberman & Blecher in Princeton, N.J.; R. Edison Hill of Hill, Peterson, Carper, Bee & Deitzler in Charleston, W.Va.; and Larry Winter of Winter, Johnson & Hill in Charleston represent the plaintiffs.

Roy Alan Cohen and Jeffrey M. Pypcznski of Porzio, Bromberg & Newman in Morristown, N.J.; Jennifer Quinn-Barabanov, Libretta P. Stennes, Charles G. Cole and Anthony F. Cavanaugh of Steptoe & Johnson in Washington, D.C.; John M. Johnson and Kevin E. Clark of Lightfoot Franklin White in Birmingham, Ala.; and Raymond Michael Ripple and Donna L. Goodman of DuPont Legal in Wilmington, Del., represent DuPont. ■

### **Fracking Attorneys Dispute Venue To Seek Resolution Of \$760,000 Fee Disagreement**

SCRANTON, Pa. — The attorneys of record in a Susquehanna County, Pa., hydraulic fracturing personal injury and property damage lawsuit pending in the