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Superfund

Practitioner Insights: Impact of Settlements on CERCLA Actions

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) is a constantly evolving area of law and courts' interpretations of certain provisions can vary dramatically depending on the jurisdiction. Thus, it is imperative that practitioners are aware of how certain areas of CERCLA are interpreted across the country. One important example of such a variance is whether judicially approved settlements of environmental liabilities trigger the statute of limitations under CERCLA.

The Second and Third Circuits of the U.S. Court of Appeals have reached starkly different conclusions on this issue. In the Third Circuit, the statute of limitations is triggered when a party settles its environmental cleanup liability, even if such a settlement does not expressly resolve CERCLA liability. Conversely, the Second Circuit has ruled that the statute of limitations does not begin to run until CERCLA liability is settled. Now, the Ninth Circuit has weighed in, agreeing with the Third Circuit in holding that a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA cause of action and thereby trigger the applicable statute of limitations. Plainly, practitioners must be cognizant of which way each Circuit views the issue or face statute of limitations challenges.

Background When CERCLA originally was passed in 1980, it contained no provision allowing a party who has cleaned up a site to bring an action to recover its costs from another responsible party (i.e., a "contribution action"). In 1986, Congress sought to address that issue with the passage of the Superfund Amendments and Reauthorization Act ("SARA"). SARA provides that a person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in a judicially approved settlement may bring a contribution action. SARA further set forth a statute of limitations for those

actions. Under SARA, a contribution action must be filed no more than three years after a judicially approved settlement. However, SARA does not address whether the settlement must resolve CERCLA liability in order to trigger the running of the statute of limitations. As a result, a clear circuit split has arisen between the Second Circuit and Third Circuit as to whether a judicially approved settlement requires resolution of CERCLA liability.

The Split The Second Circuit has taken a restrictive view, finding that, absent a reference to CERCLA, a judicially approved settlement does not trigger the statute of limitations on a CERCLA contribution action. In *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, the Second Circuit interpreted CERCLA to create a right to bring a contribution action only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved. In *Consolidated Edison*, ConEd sued UGI Utilities to recover cleanup costs at several sites. ConEd alleged that UGI Utilities was liable under CERCLA, as well as New York State law. However, the judicially approved settlement agreement at issue was a voluntary cleanup agreement between ConEd and the New York Department of Environmental Conservation resolving only ConEd's state law liability. The Department agreed that if ConEd cleaned up the sites, the Department would release ConEd from all state law claims.

The Second Circuit found that the agreement made clear that the only liability resolved was liability for state law—not CERCLA claims. The Second Circuit held that there was no running of the statute of limitations because the settling party did not resolve its CERCLA liability. Several years later, in *W.R. Grace & Co.-Conn. V. Zotos International, Inc.*, the Second Circuit confirmed this ruling. The Second Circuit found that a settlement agreement, which made no reference to CERCLA, established that the State settled only its state law claims against Grace, leaving open the possibility that the State or the EPA could, at some future point, assert CERCLA or other claims. Thus, in the Second Circuit, a party cannot bring a contribution action and the corresponding statute of limitations does not begin

to run unless the judicially approved settlement expressly resolves CERCLA liability.

In *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, the Third Circuit rejected the Second Circuit's interpretation. On December 21, 2006, Trinity and the Pennsylvania Department of Environmental Protection entered into a consent order whereby Trinity agreed to fund and conduct response actions according to a schedule approved by the Department. The consent order was entered into pursuant to Pennsylvania law. Trinity tried to bring a CERCLA contribution action based on the consent order resolving its liability under the two Pennsylvania statutes. The court held that a right to bring a contribution action is not dependent on the resolution of CERCLA liability in particular. The court pointed to the plain language of CERCLA, finding that it "requires only the existence of a settlement resolving liability to the United States or a State 'for some or all of a response action.'"

The Ninth Circuit is the newest United States Court of Appeals to weigh in on this issue. In *Asarco LLC v. Atlantic Richfield Co.*, Asarco appealed a decision by the United States District Court of Montana that Asarco waited too long to bring its CERCLA contribution action against Atlantic Richfield. The East Helena Site was added to National Priorities List in 1984. In 1998, a consent decree was entered with the EPA under the Resources Conservation and Recovery Act (RCRA) and the Clean Water Act that made no express reference to CERCLA. In the District Court, Asarco argued that its consent decree with EPA that made no reference to CERCLA could not trigger the statute of limitations for Asarco's contribution action.

The District Court followed the Third Circuit's approach to the triggering of the statute of limitations. The court noted that the plain language of CERCLA provides a contribution cause of action to parties who have resolved their liability for "some or all of a response action or some or all of the costs of such action in . . . [a] judicially approved settlement." According to the District Court, if Congress intended to narrow the scope to cover only settlements that expressly resolve CERCLA liability, it could have done so, as it did in other sections of CERCLA.

On appeal, the Ninth Circuit found that a settlement agreement entered into under authority other than CERCLA could give rise to a CERCLA contribution action. The Court started by looking to the language of CERCLA that requires a responsible party to enter into a settlement agreement that is administratively or judicially approved, but the provision is silent on whether the agreement must settle CERCLA liability in particular. Finding the plain text of the provision unilluminating, the Court examined a related section of CERCLA. The Court found that the requirement of a CERCLA action in the related section and its absence in the section at issue in the case is "strong evidence" that Congress did not intend to require that the settlement of CERCLA claims in order to have the right to bring a contribution action.

The Ninth Circuit also examined the meaning of the phrase "resolve its liability" in CERCLA. Again, the Court's analysis started with the language of CERCLA. The Ninth Circuit found that "resolved its liability" means the settlement agreement must determine a party's legal obligations with certainty and finality. The Ninth Circuit further determined that a settlement is

reached even though the government may have the ability to enforce an agreement's terms. And, there is no need for the party to concede liability under the agreement in order to resolve liability.

The Ninth Circuit found that Asarco did not "resolve its liability". The agreement preserved all of the United States' enforcement options against Asarco. In short, because the agreement did not resolve any of Asarco's obligations, it did not resolve Asarco's liability. Therefore, Asarco could not have brought its contribution action, and the statute of limitations did not begin to run in 1998. A later 2009 agreement, on which Asarco bases its present contribution action, did resolve Asarco's liability. Because Asarco filed that action within the three-year limitations period, it was timely. Thus, the district court's decision was vacated and the matter was remanded for further proceedings.

Implications In the Second Circuit, a CERCLA contribution action arises only when the settlement expressly resolves CERCLA liability. Conversely, in the Third Circuit and Ninth Circuit, a non-CERCLA settlement can give rise to a CERCLA contribution action and thereby trigger the three-year statute of limitations. With the Ninth Circuit joining the Third Circuit, perhaps the trend will continue in the direction of allowing non-CERCLA settlement agreements to form the basis for a CERCLA contribution action. From a practical standpoint, courts will likely follow the Third and Ninth Circuits because that approach seems to be most consistent with the expansive remedial purpose of CERCLA.

CERCLA is designed to encourage private parties to assume the financial responsibility of cleanups by allowing them to seek their costs from other responsible parties. An interpretation that limits the right to bring a contribution action to only CERCLA settlements would deter private parties from settling and delay the cleanup of contaminated properties. To the extent this becomes the dominant approach, practitioners need to pay close attention to the non-CERCLA settlements their clients enter in order to evaluate whether a right to bring a contribution action is created and the corresponding three-year statute of limitations is triggered. Focusing on the obligations under the agreement and the protections afforded to the settling party will be key.

Regardless of how the trend plays out, it is imperative that practitioners are aware of the distinction among the Circuit Courts in order to avoid having a contribution claim found to be time-barred. Many federal circuit courts have yet to address the issue of when settlements trigger the statute of limitations under CERCLA. Until this issue reaches the Supreme Court, lawyers practicing in federal court need to pay careful attention to the liabilities being resolved under an agreement and the express language used in the agreement. Based on the divergence at the Circuit Court level, there can be very different timing on the triggering of the statute of limitations.

Counsel should bear in mind that a wide range of cleanup activities taken pursuant to state or federal laws may trigger a right to bring a contribution action. For example, the removal of certain types of fill from a wetland in connection with restoration activities could be subject to CERCLA's three-year statute of limitations if the activities were agreed to as part of a judicially approved settlement. Ultimately, to eliminate any doubt, a prudent practitioner could file their contribution action

and let the court rule on whether the claim is ripe. The expense incurred in bringing a premature claim is far outweighed by what could be lost if the opportunity to file a contribution action is missed.

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