The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017
PHILADELPHIA, MONDAY, NOVEMBER 13, 2017 VOL 256 • NO. 94 An ALM Publication

ENVIRONMENTAL LAW

Settlements and CERCLA Contribution Claims–A Lesson in Careful Drafting

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Special to the Legal

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The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), better known as Superfund, provides private parties with two types of claims to recover costs associated with investigating and remediating contaminated sites—a cost recovery claim under CERCLA Section 107(a), 42 U.S.C. Section 9607(a), and a contribution claim under Section 113(f), 42 U.S.C. Section 9613(f). A party can have either a CERCLA Section 107 cost recovery claim, or a Section 113 contribution claim, but not both, as each section of CERCLA provides mutually exclusive remedies.

A party has a claim for contribution under CERCLA Section 113(f)(3)(B) if that party 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 an administrative or judicially approved settlement." A party can therefore settle its liability for a contaminated site with the EPA or a state government, and then recover a portion of the costs of that settlement from other potentially responsible parties (PRPs) who caused or contributed to the contamination at the site. CERCLA imposes a three-year statute of limitations on Section 113 contribution actions, which begins to run on the effective date of the administrative or judicially approved settlement. While at first, these may appear to be cut-and-dry statutory provisions, there is ample case law exploring the nuances of what it means for a party to have "resolved" its liability such that a party's contribution claim is ripe, and exactly when the corresponding three-year statute of limitations begins to run.

Courts are often called upon to interpret the precise language of the consent decree or settlement agreement in question to determine whether it satisfies CERCLA's requirement of having "resolved" liability such that a party can bring a CERCLA 113 contribution action against other PRPs, and likewise, whether such a claim is time-barred. Because the language of a consent decree or settlement agreement can be determinative of when a CERCLA contribution claim arises, there is a growing split among the United States Circuit Courts of Appeals regarding what language is sufficient to meet the defining feature of CERCLA Section 113(f)(3)(B)—that the agreement "resolves" some or all of the party's liability to the United States or a state at a contaminated site.

The U.S. Court of Appeals for the Ninth Circuit recently added to that growing body of case law in *Asarco v. Atlantic Richfield*, 866 F.3d 1108 (9th Cir. 2017). In *Asarco*, the Ninth Circuit held

that a 1998 consent decree issued under the Resource Conservation and Recovery Act (RCRA) and the federal Clean Water Act did not "resolve" Asarco's liability at the East Helena Superfund Site in Montana. As a result, Asarco's June 2012 CERCLA Section 113 contribution action against other PRPs at that site was not time-barred. While the court held that a non-CERCLA settlement agreement could satisfy the requirement of "resolving liability" for a CERCLA Section 113 contribution claim, and the 1998 RCRA consent decree required Asarco to undertake "response actions" within the meaning of CERCLA—the language of the consent decree was insufficient to "resolve" Asarco's liability.

First, the release of liability in the 1998 RCRA consent decree was limited to resolving claims for civil penalties, even though the original complaint sought both civil penalties and injunctive relief by requiring future remediation to be completed. Second, the 1998 RCRA consent decree had numerous references to Asarco's continued legal exposure, through multiple reservations of rights provisions that allowed EPA to bring future RCRA, CERCLA, or other statutory claims against Asarco. Finally, and perhaps most importantly, the 1998 RCRA consent decree expressly stated that even if Asarco fully complied with the terms of the agreement "Asarco is not released from liability, if any for the costs of any response actions taken or authorized by EPA under any applicable statute, including CERCLA."

In contrast, the Ninth Circuit held that a subsequent 2009 CERCLA consent decree entered as part of Asarco's Chapter 11 bankruptcy proceedings did "resolve" Asarco's liability for all of its response costs at the East Helena Superfund Site. The 2009 CERCLA consent decree included a covenant not to sue that was immediately effective. The agreement also capped Asarco's total liability for the contamination at the $99.294 million that Asarco had paid into its bankruptcy trust accounts, and expressly provided Asarco with protection against third-party CERCLA contribution claims.

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The *Asarco* case provides a useful reminder that the language of a consent decree or settlement agreement matters, and may have varying consequences depending on the language used and the particular jurisdiction where the site is located. Careful drafting is therefore, crucial, and can be case dispositive. A review of case law reveals several common themes that can serve as a guideline for drafting consent decrees and settlement agreements that satisfy CERCLA's requirement that the document "resolves" a party's liability.

TIPS FOR DRAFTING SETTLEMENT AGREEMENTS TO SATISFY CERCLA SECTION 113(F)(3)(B)

• **Titles matter—**Courts look at the title of the consent decree or settlement agreement as an indication of whether the document was intended to resolve a party's liability. Many courts have found that documents titled "Administrative Settlement Agreement and Order on Consent" satisfy the requirements of CERCLA Section 113.

• **Be explicit that the consent decree or settlement agreement resolves CERCLA liabilities—**A key split among the Circuits is whether a non-CERCLA settlement agreement can give rise to a CERCLA Section 113 contribution claim. If your settlement covers a contaminated site located in Pennsylvania or New Jersey—the Third Circuit confirmed in *Trinity Industries v. Chicago Bridge & Iron*, 733 F.3d 131 (3rd 2013), that non-CERCLA settlements count, since CERCLA Section 113(f)(3)(B) does not require that the "response action" be initiated under CERCLA—settlements under a state environmental statute or other federal statutes may suffice. In contrast, if your site is located in New York, the Second Circuit in *Consolidated Edison Co.*

of New York v. UGI, 423 F.3d 90 (2d Cir. 2005), held that CERCLA Section 113(f)(3)(B) only provides a right to contribution when the settlement expressly resolves CERCLA claims. The Ninth Circuit in *Asarco* agreed with the Third Circuit—non-CERCLA settlement agreements can form the basis for a CERCLA contribution claim.

• **Include an express recognition of CERCLA's contribution provisions**—An explicit acknowledgement that the settlement resolves a party's CERCLA liability is key. Make sure your consent decree or settlement agreement contains language indicating that the agreement "constitutes an administrative settlement for the purposes of Section 113(f) of CERCLA, 42 U.S.C. Sections 9613(f)(2)." Also include an express recognition that the settling party is entitled to protection from third-party contribution actions or claims under CERCLA Section 113(f)(2), 42 U.S.C. Section 9613(f)(2) and CERCLA Section 122(h)(4), 42 U.S.C. Section 9622(h)(4) for the "matters addressed" in the settlement agreement.

• **Precisely define the "matters addressed" in the settlement—** CERCLA Section 113(f)(2) provides contribution protection to settling parties for the "matters addressed in the settlement." Carefully define the "matters addressed" to be as broad or as narrow as necessary depending on the facts and circumstances, and the scope of a party's potential liability at a site. For example, if a party wants a one-time cash out settlement for a site, the "matters addressed" should be as expansive as possible and track the language in the model CERCLA consent decree of "all response actions taken or to be taken, and all response costs incurred or to be incurred at or in connection with the site." In contrast, if a party wants to settle liability only for a portion of the site, or only for the investigation phase of work to preserve a contribution claim for later, potentially more costly, phases of remediation at a site—the "matters addressed" should be narrowly tailored.

• **Expressly state that the agreement "resolves" liability—**Include an explicit provision that the settling party has "resolved its liability" to the United States or state government for the defined "matters addressed" in the settlement, whether they are past response costs, performing a remedial investigation and feasibility study, a particular area or areas of concern at the site, or for the entire remediation of the site.

• **Limit reservation of rights to the extent possible—**Courts have often found that extensive reservations of rights provisions that allow the EPA or state government agency to reassert claims against the settling party to be fatal to finding that the agreement "resolves" the party's CERCLA liability. Reservation of rights provisions are often conditioned upon the completion of specific tasks. For example, EPA's model consent decree for a CERCLA remedial design/remedial action conditions EPA's covenant not to sue upon "satisfactory performance" of the obligations in the consent decree. The Sixth and Seventh circuits have held that this standard reservation of rights language weighs against finding that the settling party has "resolved" its liability under CERCLA. (See e.g., *Florida Power v. First Energy*, 810 F.3d 996 (6th Cir. 2015); *Berstein v. Bankert*, 733 F.3d 190 (7th Cir. 2012).) In contrast, the Ninth Circuit in *Asarco* adopted a new test, holding that a party has "resolved its liability" if the settlement agreement determines a party's obligations "with certainty and finality," but that this does not mean that the settlement agreement must be devoid of all reservation of rights clause. •

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