



Ninth Circuit Clarifies Three Issues of First Impression for Parties in CERCLA Contribution Actions

08.16.2017 | By [Willis Hon](#)

In *Asarco LLC v. Atlantic Richfield Company*, No. 14-35723 (9th Cir. Aug. 10, 2017), the United States Court of Appeals for the Ninth Circuit issued a published opinion interpreting the statute of limitations for contribution actions under Section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). That ruling has implications for those seeking or defending against contribution actions under CERCLA and was the Ninth Circuit's first opportunity to consider several new issues relating to the mechanics of CERCLA contribution actions.

The Court addressed three questions of first impression within the Ninth Circuit: (1) whether a non-CERCLA settlement agreement could form the basis for a CERCLA contribution action, (2) whether a "corrective measure" under the Resource Conservation and Recovery Act ("RCRA") qualifies as a "response" action under CERCLA, and (3) what does it mean for a party to "resolve[] its liability" in a settlement agreement for the purposes of a CERCLA §113(f)(3)(B) contribution action? The Court answered the first two questions in the affirmative and provided some parameters to analyze the third.

Background

This case featured a contribution claim under CERCLA § 113(f) by plaintiff Asarco LLC ("Asarco") for response costs it incurred as a part of its obligations under a 2009 settlement agreement ("2009 CERCLA Decree") for clean up of the East Helena Superfund Site. At issue in this case was whether an earlier 1998 settlement agreement under RCRA between the Asarco and the United States ("1998 RCRA Decree") triggered the running of the statute of limitations for a CERCLA § 113(f) contribution claim and therefore barred Asarco's current claim.

The statute of limitations for such a contribution action for costs or damages under CERCLA § 113(f) requires the action to be commenced no more than 3 years after ... the date of ... entry of a judicially approved settlement with respect to such costs or damages. CERCLA § 113(g)(3)(B). Asarco's contribution claim in this case, filed on June 5, 2012, would be untimely if it could have been brought after judicial approval and entry of the 1998 RCRA Decree. Therefore, the Court needed to determine whether Asarco's contribution claims under CERCLA § 113(f) vested with the 1998 RCRA Decree or only with the 2009 CERCLA Decree.

A RCRA Settlement Agreement May Form the Basis for a CERCLA Contribution Action

First, the Ninth Circuit held that a non-CERCLA settlement agreement may form the basis for a CERCLA contribution action under Section 113(f) if the party seeking contribution performed a response action under the agreement. Asarco had argued that because the 1998 RCRA Decree was based upon the RCRA statute, it could not have triggered the statute of limitations. Examining the structure of CERCLA, the Court found that Congress did not intend to limit CERCLA contribution actions to only settlement agreements under CERCLA and this interpretation was consistent with CERCLA's broad remedial purpose

The Ninth Circuit next held that the corrective measures by Asarco taken pursuant to the 1998 RCRA Decree qualified as "response" actions within the meaning of CERCLA § 113(f). Response is a term of art under CERCLA and means remove, removal, remedy, and remedial action. 42 U.S.C. § 9601(25). The Court found that, put simply, a "response action" covers a broad array of cleanup activities. Reviewing the agreement, the Court found that the 1998 RCRA Decree clearly required Asarco to take response actions to clean up hazardous waste at the Site.

Parameters to Determine Whether a Settlement Agreement Resolves A Party's Liability

Lastly, however, the Ninth Circuit found that Asarco did not resolve its liability under the 1998 RCRA Decree as required by CERCLA § 113(f)(3)(B). Therefore its contribution claims had not accrued and the 1998 RCRA Decree did not trigger the statute of limitations.

The Court focused on the meaning of the portion of CERCLA § 113(f)(3)(B) that requires an agreement allowing a party to resolve its liability to the United States or a State for some or all of its response action or the costs of action based upon that agreement, an issue which has led to conflicting decisions by the Sixth and Seventh Circuits.

Ultimately, the Court concluded that for purposes of CERCLA § 113(f)(3)(B), a settlement agreement must determine a [potentially responsible party's] compliance obligations with certainty and finality. In summarizing its test for whether a settlement agreement allows a party to resolve its liability, the Court stated:

In sum, an examination of § 113(f)(3)(B)'s plain language, with due consideration for CERCLA's structure and purpose, leads us to the conclusion that a PRP resolve[s] its liability to the government where a settlement agreement decides with certainty and finality a PRP's obligations for at least some of its response actions or costs as set forth in the agreement. A covenant not to sue or release from liability conditioned on completed performance does not undermine such a resolution, nor does a settling party's refusal to concede liability. Whether this test is met depends on a case-by-case analysis of a particular agreement's terms.

Applying this test to Asarco's 1998 RCRA Decree, the Court concluded that it failed to resolve Asarco's liability for any of its response actions or costs. Accordingly, the statute of limitation for a CERCLA § 113(f)(3)

(B) contribution action did not run with the entry of the 1998 RCRA Decree.

The Court next analyzed whether the 2009 CERCLA Decree resolved Asarco's liability within the meaning of CERCLA § 113(f)(3)(B) and found that it did. Therefore, the Court concluded that Asarco had brought a timely action for contribution under CERCLA § 113(f)(3)(B). The Court therefore vacated the district court decision and the case has been remanded back to the district court to determine "whether Asarco is entitled to any financial contribution from [Arco] and, if so, how much."

Linda R. Larson of Nossaman represented Asarco as appellate counsel, along with McGuire Woods who serve as trial and appellate counsel.