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CERCLA

SETTLEMENTS

Courts are starting to coalesce around a ''common sense approach'' to allocating settlement proceeds in CERCLA cases, attorneys Doug Arnold, Sarah Babcock and Nicole DeMoss say. Noting the uncertainty that still exists in most jurisdictions surrounding private party settlements in litigation under the Comprehensive Environmental Response, Compensation, and Liability Act, the authors offer advice to defendants in considering potential settlement terms.

Finding Finality in CERCLA Settlements



By Doug Arnold, Sarah Babcock and Nicole DeMoss

Thirty-five years after enactment of the Comprehensive Environmental Response, Compensation, and Liability Act, settling multiparty Superfund litigation still remains a complex and unpredictable endeavor. Uncertainty over how private settlements might be enforced and how costs will be allocated makes the finality that all parties seek in settlement often elusive in the CERCLA context. The good news, however, is that courts are starting to coalesce around a common sense approach to allocating settlement proceeds, which aids finality. As a consequence, counsel have more options for maximizing their clients' settlement value and achieving finality.

Under Section 113 of CERCLA, parties that settle their liability with the government (federal or state) are entitled to protection from contribution claims brought by other potentially responsible parties (PRPs) as a matter of law.[1] This statutory protection provides PRPs

[1] 42 U.S.C. § 9613(f)(2) provides: ''A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable

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strong incentive to settle early with the government to avoid potentially being saddled with a disproportionate share of cleanup costs down the road.

But CERCLA provides no similar protection to settling parties in private party litigation. Instead, despite settling with private plaintiffs, defendants remain subject to the threat of contribution claims from codefendants, as well as potential claims by other PRPs in future litigation. While CERCLA mandates that in private party litigation all parties who are liable shall be responsible for their proportional share based on ''such equitable factors as the court determines are appropriate,''[2] this mandate is far from a guarantee that costs will not be divided disproportionately. And CERCLA is otherwise silent as to how private party settlements are to be accounted for and credited.

To remedy this uncertainty, the courts—recognizing there is little incentive for settlements in multiparty cases without protection against future claims—have created common law mechanisms to provide contribution protection in private party CERCLA actions. Courts generally rely on one of two competing federal contribution protection schemes: the Uniform Comparative Fault Act (UCFA) and the Uniform Contribution Among Tortfeasors Act (UCATA). Both are model laws; neither has been codified in federal law. And both provide contribution protection. As a practical matter, however, application of the UCFA in the CERCLA context provides settling defendants with significantly broader protection.

Courts Increasingly Adopt UCFA Approach

Under the UCFA, non-settling parties are responsible only for their proportionate or ''equitable'' share of liability for total response costs at a CERCLA site. Unif. Comparative Fault Act § § 2, 6. That is, the potential liability of each non-settling party is reduced by the proportionate share of fault attributed to the settling parties (the ''pro rata'' method), even if the settling party settled for less than its fair share. Under this approach, it is the plaintiff that bears the risk of not obtaining a full recovery of its response costs.[3]

In contrast, UCATA reduces the liability of non-settling defendants by the dollar amount of third-party settlements (the ''pro tanto'' method). Unif. Contribution Among Tortfeasors Act § 4. Therefore, if the settling party settles for less than its proportionate share, non-settling parties bear the risk of paying more than their proportionate share of any remaining unreimbursed response costs.

Given these competing approaches and their differing effects, it has been challenging for CERCLA litigants to predict how settlements will be treated and how set-offs might be apportioned. The majority of district courts that have addressed the issue to date have concluded that the UCFA's pro rata approach is most appropriate.[4] As these courts have recognized, the UCFA offers several incentives for defendants in CERCLA cases to settle versus continue litigating.

First, if the UCATA approach is used, any settlement typically requires the court to hold a hearing to determine the fairness of the settlement and decide if it is collusive or improper in some manner. This can complicate and greatly lengthen the settlement process, as fairness hearings often involve complex written and evidentiary showings, which alone can be a deterrent to settlement. In contrast, when the UCFA approach is used, no fairness hearing is required because the plaintiff remains responsible for each settling defendant's equitable share. As a result, courts have generally found it is unnecessary to make any determination regarding the fairness or reasonableness of CERCLA settlements governed by the UCFA.

Second, the UFCA pro rata approach provides for equitable apportionment of CERCLA liability—non-settling parties are only liable up to their equitable share of the plaintiff's response costs. Therefore, they will not be routinely left with the risk and unfair burden of potentially covering costs that greatly exceed their true liability.

Third, and most importantly, the UCFA approach is more consistent with the language and policy goals of CERCLA. Because settling parties do not bear the risk of further claims and because the procedural burdens

for claims for contribution regarding matters addressed in the settlement.''

[2] 42 U.S.C. § 9613(f)(1).

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[3] *Patterson Envtl. Response Trust v. Autocare 2000, Inc.*, 2002 BL 3151, at *5 (E.D. Cal. July 8, 2002) (the plaintiff ''bears the risk that the ultimate liability of the settling defendant may exceed the settlement amount.'').

[4] *See, e.g., Lewis v. Russell*, No. 2:03-2646 WBS CKD, *1 (E.D. Cal. Nov. 8, 2012); *Tyco Thermal Controls, LLC v. Redwood Indus.*, No. C 06-07164 JF (PVT), *8 (N.D. Cal. Aug. 11, 2010); *Adobe Lumber v. Warren Hellman*, No. CIV 05-1510, at *3 (E.D. Cal. Feb. 3, 2009) (citing Ninth Circuit district court cases applying UCFA); *U.S. v. W. Proc. Co., Inc.*, 756 F. Supp. 1424, 1432 (W.D. Wash. 1990); *Barton Solvent, Inc. v. Sw. Petro-Chem, Inc.*, 834 F. Supp. 342, 348-49 (D. Kan, 1993); *Comerica Bank-Detroit v. Allen Indus. Inc.*, 769 F. Supp. 1408, 1414 (E.D. Mich. 1991).

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of UCATA are not at issue, parties are encouraged to settle more swiftly and more frequently. As one district court has explained, ''[b]y protecting settling defendants from claims of contribution, [the UCFA] . . . encourages settlements. It does not, however, hang the non-settling defendants out to dry.'' *Comerica Bank-Detroit*, 769 F. Supp. at 1414.

To date, neither the Supreme Court, nor many of the Courts of Appeals, have addressed which approach – UCATA or UCFA – is best-suited to CERCLA settlements. The Courts of Appeals that have reached a conclusion are split. The Seventh Circuit has held that the UCATA approach is proper. *Akzo Nobel Coatings Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999). The Tenth Circuit has landed on the UCFA approach. *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 897 (10th Cir. 2000). And the First Circuit has held that the selection of the proper method is a matter best left to the discretion of the district court. *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 19–21 (1st Cir. 2004).

AmeriPride District Court Reaffirms UCFA as the More Equitable Approach

Last year, the Ninth Circuit weighed in on the issue. In *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, 782 F.3d 474 (9th Cir. 2015), the court joined the prior holding of the First Circuit. The court explained that CERCLA itself does not specify how private party settlements affect the liability of non-settling parties. Holding that discretion to determine the most equitable method for accounting for settlements rests with the district court, the circuit remanded to the Eastern District of California to make that determination.

On remand, the district court added to the mounting chorus of courts that have concluded the most equitable approach in the private settlement context is offered under the UCFA. *See AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, No. 2:00-cv-00113-MCE-EFB (E.D. Cal. Sept. 25, 2015). In addition to the case-specific reasons for its determination, the court echoed the sentiments of other courts regarding the UCFA approach. It eliminates the need for a good faith and fairness hearing, encourages settlement, does not prejudice remaining (non-settling) defendants and liability is in each instance limited to parties' fair share. For these reasons and others, the court explained, the UCFA approach is most consistent with CERCLA's remedial purposes.

Recommendations for Settlement in CERCLA Actions

Given the current uncertainty that still exists in most jurisdictions surrounding private party settlements in CERCLA cases, defendants must be particularly thoughtful in considering potential settlement terms. Below are a few recommendations, along with some common pitfalls to be avoided:

- Given that the case law remains unsettled in many jurisdictions, courts will often give strong consideration to the allocation method selected by the parties. *See Tyco Thermal Controls LLC v. Redwood Indus.* (N.D. Cal. Aug 11, 2010). Parties are therefore advised to identify and specify in their filings the specific allocation method – UCFA or otherwise – they want applied to the settlement.

- Explore whether an indemnity is an option. Many times, the plaintiff has an agreement in place with the governmental agency supervising the cleanup work not to pursue PRPs that settle the plaintiff's claims. In those situations, an indemnity that covers potential claims by government agencies is warranted.

- Request that the court enter an order expressly barring contribution claims by all current and future PRPs, either through insistence that the UCFA approach apply or by including settlement terms that enforce a pro rata allocation of settlement proceeds.

- Frame the scope of the release as broadly as possible. CERCLA litigation has the potential to involve multiple, comingled and related ''sites,'' with potentially overlapping environmental concerns. Therefore, it is important to ensure that the settlement covers primary and potentially migratory sites, where possible.

- Require that the plaintiff remain responsible for all procedural filings to protect the settling defendant in the event that the contribution bar or any indemnity is triggered.

More than three decades after its enactment, there is still a great deal of uncertainty in the CERCLA arena. And CERCLA settlements are no exception. Complete finality in any settlement, particularly CERCLA settlements, is never guaranteed. Careful thought and planning as highlighted above, however, can help practitioners achieve a greater measure of finality for their clients.