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A Cautionary Tale Of CERCLA's Settlement Limitation Period

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Law360, New York (August 11, 2015, 12:12 PM ET) -- Potentially responsible parties (PRPs) engaged in § 107(a) cost recovery or § 113 (f) contribution actions under the Comprehensive Environmental Response, Compensation, and Liability Act[1] often enter into settlements with other PRPs to conclude the litigation. In entering into such settlements, it is important to understand whether they trigger any of the limitation periods set forth in CERCLA § 113(g) and, if so, by when they need to bring any additional CERCLA claims they may have before they are time-barred.

In Asarco LLC v. Celanese Chemical Co., filed July 10, 2015, the Ninth Circuit held that when Asarco settled CERCLA claims with two other private parties in 1989, without any agency involvement, but with judicial approval, the three-year limitation period in CERCLA § 113(g)(3)(B) was triggered.[2] Consequently, the Ninth Circuit affirmed the district court's grant of summary judgment to defendant CNA Holdings LLC[3] against Asarco's § 113(f) contribution claim filed in 2011, holding it was time-barred.

The Ninth Circuit also found that Asarco's 1989 settlement allocated all past and future cleanup costs to be incurred to address the same contamination that was the basis for Asarco's subsequent contribution claim against CNA, rejecting Asarco's claim that such costs were too uncertain to be time-barred. Additionally, both courts found that Asarco's 2008 commitment to pay $33 million to the state of California in its bankruptcy proceeding to liquidate its future response cost liability under the 1989 settlement agreement did not resolve any additional response cost claims not covered by the prior settlement, and so could not revive its already time-barred contribution claim against CNA.

Asarco puts settlors of private-party CERCLA cost recovery and/or contribution matters on notice that judicial approval of their settlements may trigger the CERCLA § 113(g)(3) three-year limitation period for pursuing further contribution actions concerning the response costs addressed in the settlement. The limitation period applies to response costs addressed in the settlement even if they are yet to be incurred and are uncertain in type or amount. Moreover, post-Asarco, once the limitation period expires, the time-barred claims cannot be revived by a subsequent bankruptcy payment.

Background Facts

Asarco's corporate predecessor owned and operated a smelter on a 66-acre industrial site (the Selby site) on San Pablo Bay in Contra Costa, California, until 1970. Smelter slag containing hazardous substances were released on the Selby site and the adjacent tideland that Asarco leased from the California State Lands Commission (State Lands). After closing its smelter, Asarco briefly leased a small 1.33 acre subparcel of the Selby site, and the sulfur dioxide plant located on it (Asarco previously had operated it), to Virginia Chemicals, a corporate predecessor to CNA.

In its CERCLA § 113(f) contribution suit against CNA, Asarco alleged that as a result of plant operations that occurred before and during Virginia Chemical's lease, sulfuric acid was released into the soil around the plant. After the plant shut down and the lease terminated, Wickland Oil Co. purchased the Selby site from Asarco in 1977 to build and operate a marine fuel terminal. Wickland later learned the Selby site

was contaminated with hazardous substances and that substantial further investigation and response actions were required. The Selby site was placed on the State Superfund list and Wickland incurred response costs.

In 1983, Wickland filed a cost recovery lawsuit under CERCLA § 107 against Asarco and State Lands. In 1989, Wickland, Asarco and State Lands entered into a settlement agreement allocating past and future costs on two different percentage bases. Although the three settlors knew Virginia Chemicals had been named in a prior cleanup order and was repeatedly referenced in Wickland's lawsuit, it was never made a party. The district court entered a consent judgment, effectively approving the 1989 settlement agreement.

In 2005, Asarco filed for bankruptcy. State Lands, C.S. Land Inc. (Wickland's successor), and the California Department of Toxic Substances Control (DTSC) asserted claims for Asarco's share of past and future Selby site environmental response costs. DTSC's claim indicated that remediation was incomplete and sought to recover funds to implement a final remedy at the Selby site. In 2008, the bankruptcy court approved a $33 million settlement of the past and future response cost claims asserted against Asarco.

In 2011, Asarco belatedly filed a CERCLA § 113(f) lawsuit against CNA seeking contribution to its $33 million 2008 bankruptcy settlement. CNA moved for summary judgment, asserting that Asarco's entire suit was barred by the CERCLA § 113(g)(3)(B) three-year statute of limitations because all response costs sought were covered by the 1989 settlement agreement. In 2012, the district court entered summary judgment for CNA.

Arguments Presented by Asarco, Rejected By Ninth Circuit

1. CERCLA's § 113(g)(3)(B) limitation period requires that a "judicially approved settlement" include the United States or a state in order to be triggered.

Asarco first argued that the right to bring contribution claims conferred by CERCLA § 113(f)(2) and (3) on persons that settle liability or costs with the government suggest, when read in conjunction with the rest of CERCLA, that private-party settlements do not trigger the statute of limitations for contribution claims. Specifically, Asarco argued that only judicially approved settlements involving the United States or a state can trigger the § 113(g)(3)(B) limitation period, not private-party settlements. In effect, Asarco suggested that the court infer a requirement in § 113(g)(3)(B) that a judicially approved settlement include the United States or a state in order to trigger it, just as the settlement bar in § 113(f)(2) and the accrual of contribution rights under § 113(f)(3)(B) each explicitly require that a judicially approved settlement include the United States or a state as a party to be applicable.

The Ninth Circuit looked to the plain language of § 113(g)(3)(B) to reject this argument. "While [CERCLA's] statutory language may be baffling and the structure mazelike, [§ 113(f)(3)(B)] clearly indicates that any contribution claim for particular remedial costs is subject to a three-year statute of limitations once liability for a potentially responsible party becomes recognized through a judicially approved settlement."

The Ninth Circuit held that while § 113(g)(3)(B) includes judicially approved settlements involving the United States or a state among those triggering the limitations period, it is not limited to those types of settlements on its face. Also, by interpreting the § 113(g)(3)(B) statute of limitations to be triggered by judicially approved private-party settlements, the Ninth Circuit ensured that every word in that section has operative effect.

"To do otherwise would confer a right of contribution following private-party judicially approved settlements that would never expire," which would encourage private parties to settle with each other, rather than with the government, rendering the statute of limitations for contribution actions meaningless.

2. Because future response costs required by state in its bankruptcy claim differ from those proposed in settlement agreement, they are not subject to § 113(g)(3)(B) limitation period.

Asarco next contended that because some of DTSC's remedial action objectives in its bankruptcy claim differed from the measures proposed in the 1989 settlement agreement, the differences placed the "new" remedial costs outside the scope of the § 113(g)(3)(B) time bar. Asarco also contended that the phrase "such costs or damages" in the § 113(g)(3)(B) statute of limitations meant that its claim for contribution only came about when "such costs or damages" became fixed, citing American Cyanamid Co. v. Capuano,

381 F.3d 6 (1st Cir. 2004) and RSR Corp. v. Commercial Metals Co., 496 F.3d 552, 559 (6th Cir. 2007). Asarco asserted that the future costs it sought from CNA were not fixed, therefore placing them outside the 1988 settlement agreement and the § 113(g)(3)(B) limitation period.

The Ninth Circuit disagreed, based on its analysis of the respective scopes of response costs allocated in the 1989 settlement agreement and the response actions proposed by DTSC in it bankruptcy filing. The parties to the 1989 settlement agreement agreed to undertake site remediation to investigate, monitor, and abate actual or threatened contamination at the Selby site, caused by or related to the conditions at the site addressed by the remedial action plan, including remediation of acid-affected soils in the Virginia Chemicals lease area. Asarco, Wickland and State Lands agreed to share the costs of implementing the initial part of this plan in equal one-third percentages.

To the extent that a government agency responsible for oversight of the cleanup effort ordered additional work, or the parties mutually agreed that additional work was required to accomplish the remedial action plan, those costs would also be shared equally as a "subsequent modification." Therefore, the Ninth Circuit found that the cleanup work underlying Asarco's contribution claim against CNA was addressed in the 1989 settlement agreement.

"When read in total, it is evident from the terms of the [1989 Settlement] Agreement that the agreement was meant to be a final determination of each agreeing party's liability for costs associated with cleaning up the Selby Site, in accordance with the oversight and requirements of California DTSC." Moreover, the court easily distinguished American Cyanamid and RSR Corp., relied upon by Asarco, on their facts.

3. CERCLA § 113(f)(3)(B) creates a separate right for Asarco to seek contribution following its bankruptcy settlement with DTSC, even for costs that Asarco previously could have sought contribution, but was time-barred from doing so.

Finally, Asarco argued that even though it failed to pursue a CERCLA § 113(f)(1) claim against CNA during or following the litigation that led to the 1989 settlement agreement, it should be able to pursue a § 113(f)(3)(B) contribution claim against CNA as a result of the 2008 bankruptcy settlement. Asarco claimed that CERCLA § 113(f)(3)(B) creates a separate and absolute right to seek contribution after Asarco's costs of response and liability vis-a-vis the government were fixed in the 2008 bankruptcy settlement, even for the same costs for which Asarco could have sought contribution following the 1989 settlement agreement.

The Ninth Circuit acknowledged it had not previously considered whether a settling party has an absolute right to pursue an otherwise expired claim following a settlement with the government, but held that no such right exists. The court found that adopting Asarco's position would allow a bankruptcy settlement with the United States or a state to revive an otherwise expired CERCLA claim, circumventing the statute of limitations.

If the principal purpose of the limitations period is to ensure that responsible parties get to the "bargaining and clean-up table" sooner rather than later, then potentially responsible parties must be brought to that table within three years of the statute of limitations triggering event, and once the statute of limitations has expired on that cause of action, potentially responsible parties cannot revive the expired contribution claim through a subsequent bankruptcy settlement with the United States or a state.

Conclusion

Asarco should remind all settlors of private-party cost recovery or contribution actions ending in a stipulated judgment or judicial approval that they may have triggered the § 113(g)(3)(B) three-year limitation period for further contribution claims regarding the response costs addressed in the settlement. It does not matter if the future response costs are unknown in type or quantity, so long as they have been addressed and allocated in the settlement. Nor does a federal or state government have to have been involved in the settlement. Moreover, liquidation and payoff of that future response liability in a subsequent bankruptcy action cannot revive previously time-barred claims.

—By John D. Edgcomb, Edgcomb Law Group LLP

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DISCLOSURE: The author represented defendant and appellant CNA Holdings LLC throughout this matter and argued the appeal before the Ninth Circuit.

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[1] 42 U.S.C. §9601, et seq.

[2] Asarco has not yet indicated whether it plans to seek U.S. Supreme Court review.

[3] CNA Holdings LLC, the corporate successor in interest to Virginia Chemical Co. for purposes of this matter, was the proper defendant in this litigation, but was improperly sued by Asarco as Celanese Chemical Corp.