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PERSPECTIVE

Decision could change contamination cleanup litigation

By Brian J. Bergman

Deep pocket contaminators beware! The 9th U.S. Circuit Court of Appeals has held that if you are not among the early settlers in an action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), you could be left holding the bag of increased liability. In an opinion that may alter how CERCLA cases are litigated, the 9th Circuit has held that a government-approved CERCLA settlement based solely on an inability to pay is "encased in a double layer of swaddling" — i.e., nearly unchallengeable on appeal. *U.S. v. Coeur d'Alenes Co.*, 2014 DJDAR 12788 (Sept. 16, 2014).

The Coeur d'Alenes Company (CDA) was partially responsible for contamination cleanup costs at the Conjecture Mine Site in Bonner County, Idaho. In 2011, CDA, along with several other potentially responsible parties, was sued by the United States government for recovery of environmental cleanup costs at the mine pursuant to CERCLA.

CDA quickly entered into a settlement agreement with the U.S. Due to the lack of resources of CDA, the U.S. agreed that CDA would only have to pay $350,000 and interest to resolve its liability for the environmental cleanup costs, which was likely far less than CDA's fair share of liability. The settlement agreement did not take into account the relative fault of CDA for the contamination, only CDA's ability to pay without going into bankruptcy. This settlement agreement, if effectuated, would also provide CDA with protection from lawsuits and contribution claims by other potentially responsible parties who were being sued for the same cleanup costs and shared joint and several liability with CDA.

Federal Resources Corporation (FRC) was one such potentially responsible party. Concerned that it would be burdened with excess liability if the CDA settlement was approved, FRC moved to intervene to prevent approval of the CDA agreement on the ground that there had been no comparative fault analysis to determine whether CDA had, in fact, shouldered its fair share of the cleanup costs. Further, FRC alleged that CDA had access to insurance, which the district court had allegedly not taken into account when determining the appropriateness of the settlement.

The district court approved the CDA settlement over FRC's objections, and the case was appealed. The 9th Circuit upheld the approval of the settlement, finding that (1) under CERCLA, the U.S. was entitled to resolve the liability of potentially responsible parties by taking into account only their ability to pay and without having to evaluate their comparative fault, and (2) the district court had properly considered the alleged CDA insurance when approving the settlement.

While the 9th Circuit acknowledged that many courts have used a comparative fault analysis when determining the appropriateness of a CERCLA settlement, the 9th Circuit held that a district court is not required to undertake a comparative fault analysis when determining whether a proposed CERCLA settlement agreement with the U.S. is fair. Instead, the court upheld the U.S.'s decision to only undertake an ability to pay analysis when determining how much CDA should have to pay. See 42 U.S.C. Sections 9622(e)(3)(A), (f)(6)(B). The court was clear that nothing in its decision prevented a district court from using both an ability to pay analysis and a comparative fault analysis. The court's main point was that an ability to pay analysis did meet basic statutory requirements for approval of settlement under CERCLA.

The court also addressed and rejected FRC's argument that the district court had not fully considered the possible existence of CDA liability insurance, holding instead that the district court had in fact properly considered the possible existence of CDA liability insurance. The court upheld the determination that the existence of coverage was too speculative to be deemed a CDA asset. Further, the court noted that if it was later discovered that CDA had misled the court about its assets, including insurance, the settlement agreement would be voided and CDA's protection from lawsuits from other potentially responsible parties would also disappear.

The decision in *Coeur d'Alenes* strengthens the public policy behind CERCLA to "encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation." *Chubb Custom Ins. Co. v. Space Sys./Loral Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). While allowing the government to effectuate CERCLA settlements only on the basis of the ability to pay will certainly shift the burden of the liability to pay for cleanup costs to potentially responsible parties with lower culpability, but deeper pockets, said policy does have the benefit of encouraging smaller entities trapped in larger cleanup litigation to settle early with the government, thereby reducing litigation costs both for the government and for many potentially responsible parties. Further, small and mid-sized businesses may be more willing to take on the risk of developing and operating contaminated properties if they have a greater level of comfort knowing that potential contamination liability will not bankrupt the company.


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