JANUARY 2018
VOL. 18-1

PRATT'S

ENERGY LAW REPORT

LexisNexis®

Pratt's Energy Law Report

VOLUME 18 NUMBER 1 JANUARY 2018

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at ..... (908) 673-1528
Email: ..... jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call . . . . . (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
Customer Service Website . . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] Pratt's Energy Law Report [page number] (LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 Pratt's Energy Law Report 4 (LexisNexis A.S. Pratt)

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2018–Pub.1898)

Editor-in-Chief, Editor & Board of Editors

Hydraulic Fracturing Developments

Eric Rothenberg
Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

CERCLA Contribution: Ninth Circuit Addresses Two Circuit Splits

By Eric A. Rey*

In ASARCO LLC v. Atlantic Richfield Co., *the U.S. Court of Appeals for the Ninth Circuit addressed two Circuit splits regarding contribution claims under Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act. This article addresses this latest development in CERCLA Section 113(f)(3)(B) caselaw.*

In *ASARCO LLC v. Atlantic Richfield Co.*, the U.S. Court of Appeals for the Ninth Circuit recently addressed two Circuit splits regarding contribution claims under Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] First, the Ninth Circuit joined the U.S. Court of Appeals for the Third Circuit and Environmental Protection Agency ("EPA") in holding that settlement agreements under an authority other than CERCLA (e.g., state law; Resource Conservation and Recovery Act ("RCRA")) can give rise to a CERCLA Section 113 contribution claim.[2] Second, the Ninth Circuit weighed into what does it means for a settlement agreement to "resolve" liability so as to trigger a CERCLA contribution claim, adopting a case-by-case analysis of whether "the 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."[3]

CERCLA SECTION 113(f)(3)(B) CASELAW

The Ninth Circuit's views on both of these Circuit splits will have ramifications on CERCLA litigants both in and outside of the Ninth Circuit. This article addresses what you need to know about this latest development in CERCLA Section 113(f)(3)(B) caselaw.

---

* Eric A. Rey is an associate at Arnold & Porter Kaye Scholer LLP representing clients in environmental litigation, transactional, and regulatory compliance matters. He may be reached at eric.rey@apks.com.

[1] There are two different types of contribution claims under CERCLA Section. Section 113(f)(3)(B) bestows a contribution claim upon a party once it "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. . . ." 42 U.S.C. § 9613(f)(3)(B). Section 113(f)(1) bestows a contribution claim to a party "during or following any civil action under section 9606 of this title or under section 9607(a) of" CERCLA. 42 U.S.C. § 9613(f)(1).

[2] *ASARCO LLC v. Atlantic Richfield Co.*, 866 F.3d 1108 (9th Cir. Aug. 10, 2017).

[3] *Id.* Potentially Responsible Party ("PRP").

The Ninth Circuit Holds that Non-CERCLA Settlements May Trigger CERCLA Contribution Claims, Joining Third Circuit and EPA

Courts have been divided over whether a settlement agreement under an authority other than CERCLA (e.g., state law; RCRA) can give rise to a CERCLA contribution claim.

This issue can be a crucial one for litigants. Most notably, if such agreements do trigger a CERCLA contribution claim, then the settlor must pursue any CERCLA recovery solely through a CERCLA contribution claim and not through a cost recovery claim under CERCLA Section 107.[4] Plaintiffs, however, would generally prefer to bring a CERCLA Section 107 cost recovery claim over a Section 113 contribution claim, since a Section 107 cost recovery claim is subject to a longer statute of limitations for certain costs[5] and is not subject to the CERCLA contribution protection bar.[6]

In *ASARCO LLC v. Atlantic Richfield Co.*, the Ninth Circuit found that CERCLA Section 113(f)(3)(B)'s "text says nothing about whether the agreement must settle CERCLA claims in particular" in order to give rise to a Section 113(f)(3)(B) contribution claims.[7] The Ninth Circuit therefore turned to three sources to conclude that a settlement agreement need not settle CERCLA claims to trigger a Section 113(f)(3)(B) contribution claim: First, the Ninth Circuit contrasted Section 113(f)(3)(B) with the other CERCLA contribution provision at Section 113(f)(1) (which does have an express CERCLA predicate), finding that the textual differences between these two provisions provide "strong evidence that Congress intended no such predicate" in the case of CERCLA Section 113(f)(3)(B) contribution claims.[8] Second, the Ninth Circuit found that such an interpretation was "consistent with CERCLA's broad remedial purpose" and Congress' goal to incentivize parties "to settle and initiate cleanup" contamination.[9] Third, the Ninth Circuit noted that EPA itself endorsed this interpretation and that EPA's view was entitled to

---

[4] *Id.* (citing, in support, decisions from the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits Courts of Appeals).

[5] *Compare* 42 U.S.C. § 9613(g)(2) (cost recovery claims statute of limitations), *with id.* § 9613(g)(3) (contribution claims statute of limitations).

[6] *Id.* § 9613(f)(2).

[7] *ASARCO*, *supra* note 2.

[8] *Id.* ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

[9] *Id.*

Skidmore deference.[10] For these reasons, the Ninth Circuit held that ASARCO's RCRA settlement triggered a CERCLA Section 113(f)(3)(B) contribution claim.[11]

With this opinion, the Ninth Circuit joins the Third Circuit Court of Appeals, which held in 2013 in *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, that a settlement that resolved state law liability for a response action triggered a CERCLA Section 113(f)(3)(B) contribution claim.[12] District courts, including the court below in *ASARCO LLC v. Atlantic Richfield Co.*, also have endorsed the interpretation advanced by the Ninth Circuit.[13]

On the other side of the Circuit split is the U.S. Court of Appeals for the Second Circuit; however, the Second Circuit appears willing to rejoin its sister Circuits on the other side of the split once given the opportunity to do so. In 2005, the Second Circuit in *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, held that CERCLA Section 113(f)(3)(B) creates a "contribution right only when liability for CERCLA claims . . . is resolved."[14] The Second Circuit's interpretation rested heavily upon a 1986 House of Representatives Committee report. But, as both the Ninth and Third Circuits have noted when they subsequently split with the Second Circuit on this issue, this report reported to "a different provision—§ 113(f)(1)" and not Section 113(f)(3)(B) which is at issue.[15] Indeed, the Second Circuit in its 2010 opinion *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, strongly hinted that the Second Circuit's interpretation first expressed in *Consolidated Edison* was incorrect and that EPA's contrary view had a "great deal of force . . . given the language of the statute."[16] In other words, the Second Circuit appears poised to reconsider its prior interpretation and resolve the Circuit split once it is confronted with this issue again.

With the Ninth Circuit's recent opinion, the clear trend in caselaw is toward finding that non-CERCLA settlement agreements (including those issued under state law or RCRA) may trigger CERCLA Section 113(f)(3)(B) contribution claims. Consequently, non-CERCLA settlors that hope to turn to CERCLA to recover some of their response costs may find themselves subject

---

[10] *Id.*

[11] *Id.*

[12] 735 F.3d 131, 136 (3d Cir. 2013).

[13] *ASARCO LLC v. Atl. Richfield Co.*, 73 F. Supp. 3d 1285, 1292 (D. Mont. 2014); *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 510 (S.D. Tex. 2015).

[14] 423 F.3d 90, 95 (2d Cir. 2005).

[15] *Trinity Indus.*, 735 F.3d at 136.

[16] 596 F.3d 112, 126 n.15 (2d Cir. 2010).

to, among other things, a shorter statute of limitations than what might have been available had they been able to pursue recovery under CERCLA Section 107.

The Ninth Circuit Adopts a Substance over Form Case-by-Case Approach to Whether a Settlement Agreement Resolves Liability

The second Circuit split at issue in the Ninth Circuit's recent opinion pertained to what does it mean to "resolve" liability to the United States or a State for a response action in a settlement agreement? Only if the settlement agreement resolved such liability does the settlement trigger a CERCLA Section 113(f)(3)(B) contribution claim.[17] Both the U.S. Courts of Appeals for the Sixth and Seventh Circuits have opined on this issue and have reached different conclusions depending on the language of the settlement agreements at issue.[18]

The Ninth Circuit weighed into this morass by first agreeing with the Seventh Circuit that to "resolve" liability means that "the nature, extent, or amount of a PRP's *liability* must be decided, determined, or settled, at least in part, by way of agreement with the EPA."[19] Ultimately, the Ninth Circuit held 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" and "[w]hether this test is met depends on a case-by-case analysis of a particular agreement's terms."[20]

Along the way, the Ninth Circuit disagreed with courts that relied upon two boilerplate settlement agreement provisions to tip the scales against a finding that a settlement agreement resolved liability and triggered a CERCLA Section 133(f)(3)(B).

First, the Ninth Circuit departed from the Sixth Circuit's decision in *Florida Power Corp. v. First Energy Corps* that a disclaimer of liability in a settlement agreement weighed in favor of concluding that the agreement did not "resolve" liability.[21] The Ninth Circuit instead concluded "that it matters not that a PRP refuses to concede liability in a settlement agreement" and adding that, in fact, "requiring a PRP to concede liability may discourage PRPs from entering into

---

[17] 42 U.S.C. § 9613(f)(3)(B).

[18] *See, e.g.*, *Florida Power Corp. v. FirstEnergy Corps*, 810 F.3d 996, 1004 (6th Cir. 2015); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014); *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014); *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013); *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552 (6th Cir. 2007).

[19] *ASARCO*, *supra* note 2 (quoting *Bernstein*, 733 F.3d at 212) (emphasis in the original).

[20] *Id.* (quoting 42 U.S.C. § 9613(f)(3)(B)) (emphasis added).

[21] 810 F.3d 996, 1004 (6th Cir. 2015).

settlements because doing so could open the PRP to additional legal exposure," which in turn would frustrate Congress' intent of encouraging settlements and expediting cleanups.[22] Consequently, at least in the Ninth Circuit, boilerplate disclaimer of liabilities found in most all settlement agreements, including EPA's model CERCLA settlement agreements,[23] will not bar a CERCLA Section 113(f)(3)(B).

Second, the Ninth Circuit disagreed that the "government must divest itself of its ability to enforce the agreement's terms" in order for an agreement to "resolve" the settlor's liability, concluding that such a view would make it "unlikely that a settlement agreement could *ever* resolve a party's liability" "because CERCLA prevents a covenant not to sue from 'tak[ing] effect until the President certifies that remedial action has been completed.' "[24] For further support, the Ninth Circuit relied upon a 1986 Committee report that "expresses Congress' intent to encourage settlements by creating a right to contribution" and also encouraged EPA to include in settlement agreements the ability pursue further enforcement action.[25] As the Ninth Circuit explained, "having sung the praises of settlements providing for a right of contribution in one part of the report, it would make little sense for Congress to encourage EPA to craft settlements in a way that nullifies that right in another."[26] Indeed, EPA's model CERCLA settlements reserve EPA the right to take action against the settlor if the terms of the settlement agreement are not satisfied.[27]

CONCLUSION

Even beyond the Ninth Circuit, the recent opinion in *ASARCO LLC v. Atlantic Richfield Co.* provides a persuasive interpretation of two existing Circuit splits regarding CERCLA Section 113(f)(3)(B) of which CERCLA litigants should be mindful.

---

[22] *ASARCO*, *supra* note 2.

[23] *E.g.*, EPA, Model Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study ¶ 3 (April 2017) ("[T]he actions undertaken by Respondents in accordance with this Settlement do not constitute an admission of any liability."), *available at* https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=792.

[24] *ASARCO*, *supra* note 2 (quoting 42 U.S.C. § 9622(f)(3)).

[25] *Id.*

[26] *Id.*

[27] EPA, Model Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study ¶ 86 (April 2017) ("*These covenants are conditioned upon the complete and satisfactory performance by Respondents of their obligations under this Settlement.*") (emphasis added), *available at* https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=792.

The Ninth Circuit's holding that settlement agreements under an authority other than CERCLA (e.g., state law; RCRA) can give rise to a CERCLA Section 113(3)(f)(B) contribution claim now constitutes the majority position among the Circuits and may not remain a Circuit split once the Second Circuit can revisit its prior interpretation and join the Ninth and Third Circuits.

The Ninth Circuit's interpretation on what it means for a settlement agreement to "resolve" liability should provide settlors (including those who enter into EPA's CERCLA settlement agreements) greater confidence that their agreement bestows a right to contribution. Although whether a specific settlement agreement resolves liability and therefore triggers a CERCLA Section 113(f)(3)(B) contribution claim remains a "case-by-case analysis," the Ninth Circuit has directed that such analysis should focus not on boilerplate provisions, but on a more holistic analysis of whether "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."[28]

---

[28] *ASARCO*, *supra* note 2 (quoting 42 U.S.C. § 9613(f)(3)(B)).