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As Superfund Turns 40, Courts Are Still Puzzling Over It

By **Peter Keays** (January 21, 2021, 5:45 PM EST)

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December 2020 marked the 40th anniversary of the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law.

After four decades, courts are still regularly confronted with novel questions and new issues related to CERCLA and its notoriously enigmatic provisions. 2020 was no exception in this regard.

While the Superfund world focused heavily on several major decisions issued by the U.S. Supreme Court and federal courts of appeals, federal district courts quietly churned out scores of opinions in CERCLA cases over the past year. The majority of those opinions involve familiar fact patterns, run-of-the mill legal issues and conventional, if not predictable, outcomes.

However, there are a handful of outliers that, although they largely flew below the radar, are worth noting. This article discusses four such opinions.

The court's opinion in Regents of University of Minnesota v. U.S.[1] involves a dispute over whether an indemnification provision in a 1948 deed encompassed CERCLA liability. Generally speaking, an indemnification that predates CERCLA can cover CERCLA claims, if the indemnification is deemed broad enough to cover CERCLA liability.

Under the provision at issue, the university agreed to indemnify the U.S. "against any and all liability claims, causes of action or suits due to, arising out of, or resulting from, immediately or remotely, the possible contaminated condition … upon the property." This is the type of language that other courts have found to be both unambiguous and broad enough on its face to cover CERCLA liability.

Although the court in Regents acknowledged that the indemnification provision is "undeniably broadly worded," the court found the term "possible contaminated condition" to be ambiguous, and thus it turned to extrinsic evidence to determine what the parties understood that term to mean at the time the deed was executed.

The court concluded that the language in question stemmed from the government's concern over tort claims for personal injury and property damage related to the contamination, and that the evidence did

not show that the parties "were aware of or contemplated the possibility of future environmental cleanup relating to the site."

It is noteworthy not only that the court found this language pertaining to contamination ambiguous, but that it drew such a sharp distinction between liability for environmental cleanup and liability for environmental tort claims. This case is still pending before the district court, as the court's decision with respect to the indemnity provision was not dipositive of all claims.

In U.S. v. Pioneer Natural Resources Company,[2] the court took the fairly unusual step of denying (without prejudice) the government's motion for the court to enter a CERCLA consent decree. Although judicial approval of a CERCLA consent decree requires a thorough and substantive review, approval is granted far more often that it is denied. In 2020, district courts approved nearly a dozen such consent decrees, whereas Pioneer is the only example of a consent decree being denied last year of which the author is aware.

Courts review consent decrees to determine, among other things, if its terms are substantively reasonable. As part of this inquiry, the court must assess whether the settlement amount reflects a reasonable approximation of the settling party's relative liability for the harm and cleanup costs at the site. The consent decree must also be found to be in the public interest.

In Pioneer, the court determined that the government failed to demonstrate that the proposed consent decree was substantively reasonable and in the public interest. With respect to substantive reasonableness, the court found that the consent decree was problematic in two ways.

First, although it covered both operable units at the site, OU-1 and OU-2, it merely applied the purported share of the defendants' responsibility for OU-1 — 6.84% of costs — to both OUs, rather than looking at OU-2 independently. The litigation that led to the consent decree pertained only to OU-1, and there had been no separate assessment of the scope or magnitude of the defendants' responsibility for OU-2.

Second, although the 6.84% was purported to reflect the defendants' equitable share of the OU-1 cleanup costs, the government provided no evidence and conducted no analysis regarding other potentially responsible parties, or PRPs, and their relative shares of liability. The court essentially concluded that the share of response costs attributed to the settling parties must truly be assessed relative to the shares of other PRPs — which in turn requires some level of inquiry into and consideration of such other PRPs for the settlement amount to be considered substantively reasonable.

For similar reasons, the court found that the government failed to show that the consent decree was in the public interest. Specifically, the court took issue with the fact that it "would resolve all liability of Defendants without so much as explaining the extent of their liability for costs at OU2" or "whether there are other [PRPs]."

Moreover, the court pointed out that the government did not address how or if it would obtain funds to cover the remainder of its response costs, and determined that recovering only 6.84% of its costs from the defendants — with no other potential source of compensation having been identified — would not be in the public interest.

Pioneer provides a useful reminder of the level of scrutiny to which consent decrees are subject, as well the thoroughness that is required to obtain judicial approval. This case is still pending before the district court, the parties having submitted a revised consent decree for approval at the end of 2020.

One of the more confounding aspects of CERCLA jurisprudence deals with the distinction between claims for cost recovery under Section 107, and claims for contribution under Section 113. Driven largely by the different statute of limitations provisions governing each type of claim, disputes regularly arise as to which claim is proper in a given situation, and whether there may be multiple claims at a given site pertaining to different geographic areas or cleanup activities. The remaining two cases confront novel questions related to these familiar issues.

The court's opinion in State of New York v. Crescent Group Realty Inc.[3] was based on the well-established principle that where a party has a viable Section 113 contribution claim, that is its exclusive remedy under CERCLA — and it will thus be precluded from bringing a Section 107 cost recovery claim.

A contribution claim arises when a party is sued under CERCLA, or when a party enters into a settlement with the government resolving its CERCLA liability. Such settlements also provide the settling party with protection against Section 113 contribution claims brought by other parties.

In Crescent Group, the state filed a Section 107 claim against several parties, including Crescent Group and Flex Automotive USA Manufacturing, which then filed Section 113 crossclaims against each other. Flex Automotive settled with the state. Crescent Group then sought to bring a Section 107 claim against Flex Automotive, because the Section 113 claim it originally brought had been barred by Flex Automotive's settlement.

At issue in this opinion was the novel question of whether Crescent Group could in fact pursue a Section 107 claim against Flex Automotive once its Section 113 claim was no longer available. The court ruled that it could not.

It concluded that once a Section 113 claim is triggered, it becomes the plaintiff's exclusive avenue for relief, regardless of whether "other provisions in Section 113 — such as the contribution protection bar and statute of limitations — might ultimately preclude recovery" on the Section 113 claim. In other words, the court determined that once a Section 113 claim is triggered, a Section 107 claim can never be asserted with respect to the same subject matter.

This principle makes intuitive sense when it comes to Section 113 claims that have expired due to the statute of limitations. After all, why should a party that allowed its Section 113 claim to lapse be given a second bite at the apple in the form of a Section 107 claim?

Although perhaps less intuitive, application of this principle is also arguably logical in situations where, as in Crescent Group, the Section 113 claim has been lost as a result of contribution protection. Because this ruling was not dispositive of all pending claims, this case remains pending before the district court.

In BASF Corporation v. Albany Molecular Research,[4] the court was confronted with the question of whether to extend the single-remediation principle, widely applied to Section 107 claims, to the plaintiff's Section 113 claim. The single-remediation principle, broadly stated, is that subject to certain site-specific factual inquiries, there can be only one remedial action — and thus one Section 107 claim with a single statute of limitations period — for a given site.

This principle has been applied to bar Section 107 claims related to one operating unit where the Section 107 statute of limitations has run due to work performed at a different operating unit at the same site.

BASF involves contamination at a facility along the Hudson River, which was designated as OU-1, and sediment in the river and other offsite areas, which was designated as OU-2. The plaintiff undertook remediation of OU-1 pursuant to an administrative order of consent, or AOC, with the state entered in 2003, and remediation of OU-2 pursuant to an AOC entered in 2017.

The plaintiff then brought a contribution claim against various parties related to OU-2 only. The defendants relied on the single-remediation principle to argue that plaintiff's claim for the OU-2 costs was untimely, because the statute of limitations began to run with respect to the entire site when the 2003 AOC was entered.

The court rejected this argument, declining to extend the single-remediation principle to Section 113 claims, and concluding that the contribution claim "brought under the 2017 AOC [is] governed by a different statute of limitations than claims brought under the 2003 AOC."

Although it remains to be seen how much traction this court's interpretation of the single-remediation principle will gain — because similar questions regarding the availability and interplay between various CERCLA claims are quite common — the court's decision is noteworthy. This case, too, remains pending before the district court.

Only time will tell what impact, if any, these opinions will have on CERCLA jurisprudence more widely. Regardless, they stand on their own as an illustration of the types of novel questions and arguments that still abound as we mark CERCLA's 40th anniversary.

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[1] Regents of University of Minnesota v. U.S., Civil No. 17-3690 (D. Minn. Oct. 14, 2020).

[2] U.S. v. Pioneer Natural Resources Co., 17-cv-168 (D. Colo. April 7, 2020).

[3] State of New York v. Crescent Group Realty Inc., 17-CV-6739 (E.D.N.Y. Nov. 30, 2020).

[4] BASF Corp. v. Albany Molecular Research, 1:19-CV-134 (N.D.N.Y. Feb. 12, 2020).