

**SECURING CONTRIBUTION PROTECTION
IN PRIVATE PARTY CERCLA LITIGATION:**

A Case Study of *United States of American and the State of Oklahoma v. Union Pacific Railroad Company*, Western District of Oklahoma, Case No. 5:06-CV-00887-C

The Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. §§ 9601 *et seq.* (CERCLA), or Superfund, was enacted in 1980. It created a large-scale national program to identify and clean up sites contaminated from previous hazardous waste management practices. This effort is known as Superfund because CERCLA established a national trust fund to pay for cleanup at sites whose owners were no longer available or financially solvent. CERCLA also established a mechanism to recover cleanup costs from potentially responsible parties (PRPs). Thirteen sites in Oklahoma have been on EPA's National Priorities List (NPL). Sites on the national priorities list are typically referred to as Superfund sites.

CERCLA has two main objectives: (1) to achieve the prompt and effective cleanup of hazardous waste sites; and (2) to allocate the cost of cleanup to those responsible for the contamination. *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 834 F. Supp. 342, 346 (D. Kan. 1993); *City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340, 344 (D. Colo. 1993). Settlements are favored because they have the effect of reducing the amount of time and money spent litigating, and increasing the amount of time and money spent remediating environmental hazards. *Barton Solvents*, 834 F. Supp. at 345; *South Carolina Dep't of Health & Env. V. Atlantic Steel Indus., Inc.*, 85 F.Supp.2d 596, 601 (D.S.C. 1999) (private settlements are encouraged to expedite cleanup and minimize litigation costs). In these respects, settlement is consistent with CERCLA's primary goals of ensuring prompt cleanup and imposing the costs of cleanup on the responsible parties. *See Adolph Coors*, 829 F. Supp. at 344; *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 685 (S.D.N.Y. 1988) (allowing the City to settle private claims

and barring claims for contribution in private settlements "would certainly advance [CERCLA's] remedial purposes by encouraging early and complete settlements.").

CERCLA authorizes private parties, as well as federal and state governments, to conduct cleanup at contaminated sites. *See* 42 U.S.C. §§ 9604(a), 9606. Parties that conduct a cleanup, if not themselves responsible for the contamination, may sue those who were responsible under section 107 to recover all of the costs incurred. *See* 42 U.S.C. §§ 9607(a)(4)(A)-(B). For responsible parties who conduct a cleanup, CERCLA provides a right of contribution under section 113(f) to facilitate an equitable apportionment of the costs. *See* 42 U.S.C. §§ 9613(f)(1).

Many sites, like the Double Eagle Refinery site, involve hundreds of potential PRPs. One particular area of controversy that has generated litigation has been how to determine the liability of nonsettling parties when cost recovery or contribution claims are brought by private plaintiffs who are not able to secure an out of court settlement with all defendants.

The Double Eagle Superfund Site

From 1929 until the early 1980s, the Double Eagle Refinery re-refined used motor oils from truck fleets, garages, automobile dealers, industries, and city, State, and Federal agencies primarily within the State of Oklahoma. The Refinery used a process of acidulation and filtration. At some point in the late 1980s the Refinery was no longer refining, but continued filtering and repackaging used oil until it closed.

Based on soil, sludge, and water samples taken in October 1987, EPA proposed the site to the NPL in June 1988. Inclusion on the NPL was finalized in March 1989. EPA began a Remedial Investigation/Feasibility Study (RI/FS) in March 1990. Studies on the surface wastes were completed in September 1992; studies on the ground water were completed in September 1993.

EPA selected stabilization and off-site disposal as the remedy to address surface contamination. Asbestos abatement was also conducted at the site. EPA selected groundwater monitoring upon completion of the source removal as the remedy to address groundwater contamination. All field cleanup activities have been completed. The final construction completion inspection was conducted on June 29, 1999. The Preliminary Close Out Report (PCOR) for the Source Control OU No. 1, was signed by the Superfund Division Director on September 07, 1999. The Double Eagle site was removed from the NPL this year (2008).

PRPs for Double Eagle

Few documents remained with regard to customers who sent their waste oil to the Refinery. The documents that existed included two years of invoices for transporter Waste Oil Services, the affiliated company that picked up and trucked used oil to the refinery, and a handful of regulatory documents. (Records identifying 46 potentially responsible parties were found in the Oklahoma State Department of Health archives in October 1992.) These documents identified approximately 1500 entities that used Waste Oil Services to transport their used oil during the late 1980s.

EPA sent the first round of requests for information to 453 companies in September 1989 and August 1991 requesting information on their involvement in the Double Eagle facility. Additionally, EPA sent enforcement letters to a number of PRPs, resulting in thirty one (31) "generator" PRPs who stepped up to try to settle with EPA. Because the documents represented only two years out of more than 60 years of operation, all generator PRPs have considered themselves "de minimis." In 2002 EPA completed a final settlement based on waste-in allocation estimates with the 31 de minimis generator PRPs. The PRPs in this pre-remediation group paid approximately \$9.80 per gallon in settlement.

Two (2) major owner/operator PRPs were identified – Double Eagle Refinery (owned and operated by Cameron Kerran) and a railroad that was later acquired by and/or merged into Union Pacific. EPA is currently pursuing Union Pacific in an action filed in 2006.

The Lawsuit

In August 2006, the United States and the State of Oklahoma filed a CERCLA action against Union Pacific, pursuant to 42 U.S.C. § 9601 *et seq.*, to recover response costs incurred at the Double Eagle Refinery Superfund Site in Oklahoma City, Oklahoma. Through four amended third-party complaints, Union Pacific asserted CERCLA contribution claims against nearly two dozen third-party defendants, seeking to recover a share of the response costs, pursuant to 42 U.S.C. § 9613(f).

In the meanwhile, in July 2008, EPA and the State of Oklahoma entered into settlement agreements with forty-four "de minimis" companies identified as potentially responsible parties at the Site (the "Settling PRPs"). Each of these settlements was based on a cost of \$4.60 per gallon of waste oil shipped to the Site by the Settling PRPs. Similarly, EPA and the State of Oklahoma entered into a settlement agreement with BNSF Railway Co. for approximately \$6.00 per gallon of waste oil sent to the Site. Once the Court approves the settlements with EPA and Oklahoma, the Settling PRPs and BNSF will be protected from any claims for contribution relating to Site pursuant to section 113(f)(2) of CERCLA.

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

Union Pacific entered into settlement agreements with a number of the third-party defendants both collectively and individually. With one group the settlements were based upon a

cost of \$8.00 per gallon of waste oil allegedly shipped to the Site by each of these "Settling Third Party Defendants."¹

Under the terms of each of the Settlement Agreements, Union Pacific and each of the Settling Third Party Defendants released each other from claims for contribution and response costs pertaining to the Site.² At the same time, each of the Settling Third Party Defendants was concerned with protection from any further liability to any Non-Settlers who have incurred or may incur response costs at the Site. Therefore, the Settling Third-Party Defendants asked the Court to do three things: (1) approve the settlements; (2) bar with prejudice all future claims for contribution or response costs relating to the Site against any of the Settling Third Party Defendants; and (3) declare that the share of liability for any non-settling persons ("Non-Settlers") is to be reduced by an appropriate credit which the Court determines to be just and equitable. The Third Party Defendants used the All Writs Act, 28 U.S.C. § 1651(a) as the vehicle for these requests.

The Third Party Defendants argued that entering the order they sought was fair to the any Non-Settlers, because it reduced the share of liability of any Non-Settlor by a fair and equitable amount to be determined by the Court (either based upon the dollar amount of each settlement, or based upon the proportional share of liability of each Settling Third Party Defendant, whichever the Court determines to be most equitable under the circumstances). Moreover, the Third-Party Defendants argued that such an order would promote settlement and streamline

¹ Volumes of waste oil attributable to each third-party defendant were based primarily upon invoices detailing waste oil shipments to the Site which were produced to EPA in 1990 by Waste Oil Services Co., the major transporter of waste oil to the Site.

² Certain claims were excluded from the mutual release, including certain personal injury and property damage tort claims, claims for breach of the Settlement Agreement, and claims arising from any criminal liability.

litigation involving the Site – all of which is consistent with, and furthers, the purposes that CERCLA is intended to serve.

**The All Writs Act provides the legal basis
for granting contribution protection to settlors
in private party CERCLA litigation.**

Using a variety of approaches, federal courts – including many district courts in the Tenth Circuit – have dismissed and barred claims against settling defendants for contribution or response costs in order to facilitate settlements of multi-party CERCLA cost recovery actions. *See, e.g., Atlantic Richfield Co. v. Am. Airlines, Inc.*, 836 F. Supp. 763, 764-66 (N.D. Okla. 1993) (collecting cases and analyzing various approaches), *aff'd in part, rev'd in part on other grounds*, 98 F.3d 564 (10th Cir. 1996); *United States v. Hardage*, Case No. CIV-86-1401 W (W.D. Okla. Jan. 24, 1991). *See also Western Sky Indus. LLC v. Eaton Hydraulics Inc.*, Case No. 04-1239-JTM (D. Kan. Jan. 19, 2006); *Signature Combs, Inc. v. United States*, Case No. 98-CV-2777 D (W.D. Tenn. Mar. 14, 2003); *City of Wichita, Kan. v. Aero Holdings, Inc.*, Civil Action No. 98-1360-MLB (D. Kan.) (Two separate orders, dated September 20, 2001, and August 1, 2000, approving settlement agreements and entering contribution bars); *Burlington N. & Santa Fe Ry Co. v. Cargill, Inc.*, Civil Action No. 98-2435-KHV (D. Kan., Jan. 5, 2000); *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 834 F. Supp. 342, 346 (D. Kan. 1993); *City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340, 344 (D. Colo. 1993); *United States v. SCA Servs.*, 827 F. Supp. 526, 533-36 (N.D. Ind. 1993); *American Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 219 (D.R.I. 1993); *Comerica Bank-Detroit v. Allen Indus.*, 769 F. Supp. 1408, 1414-16 (E.D. Mich. 1991); *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 222 (N.D. Ill. 1990); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 693-94 (S.D.N.Y. 1988).

The settlements for which the courts approved contribution bars in the above CERCLA cases were each private party settlements – neither EPA nor any state government was a participant in any of them. Regardless of the approach adopted, these courts recognized that the measure of finality which a contribution bar provides makes settlements more desirable. *Signature Combs*, Case No. 98-CV-2777 D, slip op. at 3 ("[C]ourts have a strong interest in promoting all types of settlement, particularly in complex CERCLA claims, yet a defendant to a CERCLA action would not be willing to settle 'if after settlement, it would remain open to contribution claims from other defendants. The measure of finality which a cross-claim bar provides [] make[s] settlements more desirable.'" (Quoting *Acme Solvent*, 771 F. Supp. at 222)); *Barton Solvents*, 834 F. Supp. at 346 ("federal courts have long recognized a strong interest in promoting settlement, especially in complex matters such as CERCLA claims.").

The basis for a Court's power to enter an order providing contribution protection for settlors is the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act authorizes United States federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act is most commonly used as authority for federal courts to issue injunctions to protect their jurisdiction or effectuate their judgments.

**The Uniform Contribution Among Tortfeasors Act ("UCATA"),
and the Uniform Comparative Fault Act ("UCFA") provide the basis
for crediting the settlement amount to the continued litigation.**

A. The question also addressed in private party CERCLA settlements includes the appropriate credit to assign to the settling parties' settlements. The choices are equitable apportionment as outlined in the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 98

(1975) ("UCATA"), or proportionate apportionment called for in the Uniform Comparative Fault Act, 12 U.L.A. 44 (West supp. 1992) ("UCFA").

The UCFA approach in a settlement between a plaintiff and a liable person discharges that person from all liability for contribution, and any claims of the plaintiff against other liable persons are then reduced by the amount of the released person's share of the obligation.

Section 6. [Effect of Release] A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Uniform Comparative Fault Act, § 6. If the plaintiff settles for an amount that is too low, then the plaintiff ends up making up the difference.

The UCATA § 4, provides:

“When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.”

Following the UCATA approach requires equitable apportionment regardless of settlement amount. Credit given to non-settling defendants is not based on the settlement amount. A “fairness hearing” is required to determine fairness of settlement, which may mean that liability is apportioned before the actual trial. And series of settlements results in several mini-trials on the equitability of the settlements.

In the Double Eagle/Union Pacific case, the Third Party Defendants did not argue for one rule over another, but asked that it be left to the Court's discretion, for three reasons.

First, the Tenth Circuit has not yet addressed the issue of which rule should be applied in CERCLA cases to determine the amount by which the share of the non-settling parties' liability

should be reduced. At least two federal district courts in Oklahoma have concluded that they had "the discretion to apply the credit rule which under the facts of the instant case will best achieve the overriding purpose and objectives of CERCLA." *Sun Co., Inc. v. Browning-Ferris, Inc.*, 919 F. Supp. 1523, 1534 (N.D. Okla. 1996) (quoting *Atlantic Richfield Co. v. Am. Airlines*, 836 F. Supp. 763, 766 (N.D. Okla. 1993)), *aff'd in part, rev'd in part on other grounds*, 124 F.3d 1187 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998). See also *U.S. v. Hardage*, CIV-86-1401 W, slip op. at 4 ("This court expresses no opinion at this time and expressly reserves for later determination all substantive and procedural issues concerning the effect of these Settlement Agreements and the allocation of costs among the remaining liable parties.")

Second, the Court's reasoning in *TBG, Inc. v. Bendis*, 36 F.3d 916 (10th Cir. 1998) – involving joint and several liability for security fraud claims – is helpful by analogy. In *TBG*, the Court refused to approve a contribution bar which required a *pro tanto* credit for the amount of the settlement to the non-settling defendants.³ After first noting that the Court's authority to issue contribution bars may derive from the All Writs Act, 28 U.S.C. § 1651(a), the Court concluded that orders barring contribution are only permissible where a court or jury has or will have properly determined proportional fault and awarded the equivalent of a contribution claim. *Id.* at 923, 925. The Court was constrained from modifying the contribution bar to provide a proportionate credit, because the settlement agreement specified that it was contingent upon the court approving a *pro tanto* credit. *Id.* at 923. The Court also distinguished *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994), cited in Associate Justice White's concurring opinion, because "the court in *McDermott* had the freedom to weigh and choose from various possible credits because the settlement itself did not mandate a credit." 36 F.3d at 923.

³ By contrast, in this CERCLA contribution action, each contribution defendant or third-party defendant may only be allocated its equitable share of the liability. 42 U.S.C. § 9613(f); *United States v. Colorado & Eastern R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995).

Third, Union Pacific agreed, as part of the consideration for the settlement agreements, that the Settling Third Party Defendants could file a motion seeking a contribution bar from the Court pursuant to the Court's power under the All Writs Act. Leaving the applicable rule to the Court affords the Court the flexibility and discretion to apply the credit rule which under the facts of the case will best achieve the overriding purpose and objectives of CERCLA.

In response to the Motion for Approval of Settlements and Entry of Contribution Bar, Union Pacific asked the Court to approve the settlements, enter the contribution bar, and defer the decision about which credit rule to apply.

Contribution protection in private party CERCLA actions should be fair and reasonable and consistent with the purposes of CERCLA.

The court ultimately must determine to whom fairness in private CERCLA litigation is really due. Resolving the settlement credit issue under either the UCATA or the UCFA leaves someone at risk – either the plaintiff or the later settling defendant – for disproportionate liability or unrecovered costs.

The Settling Third Party Defendants in the Union Pacific/Double Eagle case argued that a contribution bar in the circumstances of the case would be fair and reasonable based on the higher costs per gallon of waste oil than the amounts being paid by the forty-four Settling PRPs and the BNSF Railway in their settlements with EPA and the State of Oklahoma. The Settling Third Party Defendants paid \$8.00 per gallon; the forty-four Settling PRPs paid \$4.60 per gallon; and BNSF paid \$6.00 per gallon. Moreover, the contribution bar sought by the Settling Third Party Defendants was similar to the contribution bar afforded to the Settling PRPs and BSNF pursuant to section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2). Finally, the contribution protection sought by the Settling Third Party Defendants gave finality to the litigation, and left to

the court's discretion the selection of the most appropriate credit rule to be applied to reduce the share of liability of any non-settling persons.

Approval of private party settlements promotes the purposes of CERCLA of prompt, effective cleanup and allocation of the cost of cleanup to those responsible for the contamination. *See Barton Solvents*, 834 F. Supp. at 346; *Adolph Coors*, 829 F. Supp. at 344. If settling parties remain potentially liable to other persons for contribution, the incentive to settle diminishes. There is no peace to be purchased through settlement since late-comers to the litigation could bring settlors back into the litigation. Such an approach would lead to cases being litigated to completion, which would waste money and resources that are better used for environmental cleanup. Promoting and including contribution protection for the settlors then, further promotes settlement, and conserves judicial resources, while allowing settlors to buy peace and avoid the expense and uncertainty of litigation.