Issues For Plaintiffs Settling Private CERCLA Litigation

Law360, New York (July 26, 2012, 2:08 PM ET) -- Mapping out a strategy to settle multiparty environmental litigation brought under the Comprehensive Environmental Response, Compensation and Liability Act is difficult under the best of circumstances. It has been made even more difficult by a slate of recent federal CERCLA decisions that have made the settlement process even more of a minefield.

A private CERCLA plaintiff often walks the tightrope between dealing with local, state and federal regulators overseeing the site remediation and the myriad potentially responsible parties ("PRPs") from whom it seeks contribution to the remediation costs. At bottom, the settling plaintiff must determine with whom it is going to settle, the order of settlement, and what rules to apply to those settlements.

This settlement strategy must be executed cautiously. Settling in the wrong order, or under the wrong standards, can mean the difference between a CERCLA plaintiff successfully offloading a substantial share of the remediation cost burden to other PRPs or inadvertently cutting itself off and bearing the lion's share of the responsibility.

Contribution Protection Provides A Powerful Incentive To Settle Private CERCLA Cases

Under CERCLA, a responsible party that enters into a consent decree with the United States or a state is entitled to "contribution protection." The statute provides that "a person that 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."[1] Contribution is "the tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."[2] Importantly, the contribution protection granted by CERCLA bars certain claims brought under the statute.[3]

CERCLA provides two different causes of action for recovery of response costs. First, under Section 113, a PRP is authorized to seek contribution. Section 113 provides that, "any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of this title, during or following any civil action under Section 9606 of this title or under Section 9607(a) of this title."[4] It further provides that, "a person who has resolved its liability to the United States or a State … in an administrative or judicially approved settlement may seek contribution from any person who is not a party to the settlement."[5]

Second, Section 107 provides that PRPs are liable for any "necessary costs of response incurred by any other person consistent with the national contingency plan."[6]

To distinguish a cost recovery action under Section 107(a) from a contribution action under Section 113(f), the U.S. Supreme Court observed that a Section 107(a) action may lie where a party has itself "incurred" cleanup costs, as opposed to reimbursing costs paid by other parties, which is more appropriately covered by Section 113(f).[7]

A significant practical difference between the two sections presents itself when one or more defendants has settled its liability with the federal government — while Section 113 contribution claims are barred by the CERCLA contribution protection scheme, Section 107 cost recovery claims, whether brought by the government or a PRP, are not barred.[8]

Although a PRP that settles with the federal government or a state is entitled to contribution protection, CERCLA provides no protection for settlements among private parties. To remedy this situation, the courts — recognizing there is little incentive for partial settlements in multiparty cases without such protection — have created common-law mechanisms to provide contribution protection in private CERCLA actions. They rely on one of two competing federal contribution-protection mechanisms: the Uniform Comparative Fault Act ("UCFA") and the Uniform Contribution Among Tortfeasors Act ("UCATA"). Both are model statutes and have not codified in federal law. Nonetheless, the courts rely on them to create a federal common law corollary to the statutory contribution protection found in CERCLA.

UCATA was promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws. Section 1 provides that joint or several tortfeasors have a right to contribution to the extent they have paid more than their pro rata share of common liability. Section 4 explains that when one joint tortfeasor settles with a plaintiff, that tortfeasor's liability for contribution to other tortfeasors is discharged, and the nonsettling tortfeasors' liability to plaintiff is reduced by either the amount stipulated to or paid in the settlement, whichever is greater.

The UCFA was promulgated in 1977 by the National Conference of Commissioners on Uniform State Laws as a replacement to UCATA in jurisdictions adopting the principle of comparative fault.[9] Section 2 of the UCFA provides that liability among tortfeasors is to be allocated according to their respective percentages of fault. Section 6 provides that if one tortfeasor settles with the plaintiff, the settling party is protected against contribution claims by its fellow tortfeasors, and plaintiff's claim against the remaining tortfeasors is reduced by the settlor's "equitable share" of liability.

Statutory Protections For Settling Defendants Require The CERCLA Plaintiff To Carefully Consider The Order Of Settlement

A CERCLA plaintiff is often caught between the regulators seeking to impose liability and the PRPs seeking to avoid it. Thus, the initial question when seeking to resolve the case is whether to settle with the government first, or work out a deal with the PRPs. While the answer is subject to a host of practical considerations — such as the relationship with the regulators, the desire or need to cap potential liability to the government, whether the scope of contamination has been adequately characterized, and whether all PRPs have been identified — the contribution scheme described above adds a further layer of legal complexity to the issue.

This complexity was recently highlighted in Solutia Inc. v. McWane Inc., 672 F.3d 1230 (11th Cir. 2012).

There, plaintiffs brought a Section 107(a) claim against certain PRPs who had entered into settlements with the U.S. Environmental Protection Agency. Prior to asserting these claims, however, plaintiffs had entered into a separate consent decree with the EPA.

Unfortunately, the unintended consequence of that consent decree, according to the Eleventh Circuit, was that it foreclosed plaintiffs' ability to bring claims under Section 107(a) against other PRPs. Instead, plaintiffs were restricted to asserting claims under Section 113(f). But because the defendants had settled with the EPA, they were protected from Section 113(f) claims by operation of Section 113(f)(2). Plaintiffs were thus left without a remedy as to those defendants.

Solutia demonstrates that the order of settlement is critical. Had the plaintiffs entered into litigation with the defendants prior to those defendants settling with the EPA, or had plaintiffs waited to settle with EPA (or at least to enter the consent decree), then they would have been able to seek contribution. Thus, a CERCLA plaintiff seeking to recover from other PRPs must carefully evaluate whether entering into a settlement with the EPA or state regulators provides sufficient benefits to offset the potential that other PRPs will enter their own deals with the regulators to avoid CERCLA contribution liability.[10]

Common Law Protections For Settling Defendants Can Have Unintended Consequences And Must Be Factored Into The Settlement Process

While the competing UCATA and UCFA schemes are superficially similar in that both provide contribution protection, the differences between the two can have a dramatic effect on settlements with other PRPs.

Under the UCFA, the potential liability of nonsettling parties is reduced by the proportionate share of fault attributed to the settling parties (the "proportionate share" method).[11] In contrast, UCATA reduces the liability of nonsettling defendants by the dollar amount of third-party settlements (the "pro tanto" method).[12]

The effect of these provisions is to place on different parties the risk that plaintiff settled for less than the settling defendant's real share of liability. Under the UCFA, plaintiff bears the risk that the settlement was too low. Under UCATA, the nonsettling defendants bear that risk (because, at trial, they may be held jointly and severally liable for amounts that otherwise would have been allocated to the settling defendant).

A CERCLA plaintiff will typically find UCATA substantively more beneficial, given that the risk of a "lowball" settlement is born by the defendants. Nonetheless, the procedural hurdles of using this mechanism can often outweigh the benefits. For example, if the parties seek to apply UCATA to the settlement, the court likely will hold a hearing "to determine the fairness of settlements and decide if they are collusive or unfair as to amounts."[13] This can greatly complicate and lengthen the settlement process, as fairness hearings "are generally long, complex evidentiary hearings" which can be "a deterrent to settlement."[14] But when the UCFA applies, courts have rejected requests to hold such fairness hearings or to make determinations regarding the reasonableness of settlements.[15]

Moreover, the benefits of UCATA are limited if the litigation does not involve all of the principal PRPs. Because UCATA places the risk of a "low" settlement on the nonsettling PRPs, courts are unlikely to enforce a contribution bar against PRPs that did not receive a meaningful opportunity to contest approval of the settlement.[16] Thus, to obtain the full benefit of a UCATA settlement, the parties may be forced to either provide notice to (and potentially invite opposition from) nonsettling PRPs, or run the risk that those PRPs can later bring a claim for contribution.

It is thus critical to determine early in the settlement process whether UCATA or theUCFA will apply. While CERCLA sets out a uniform rule — adopting UCATA with respect to settlements where the United States or a state is a party[17] — the district courts have split over which doctrine applies to private settlements.[18] The majority apply UCFA in the context of private settlements. But some district courts have opted for UCATA, and two circuits have held that the district courts are free to apply UCATA rather than UCFA.[19] Given that the case law is unsettled in many jurisdictions, the courts will often consider whether the parties have selected which method should apply.[20]

Settling CERCLA litigation is a minefield, but armed with a carefully developed and executed strategy, a CERCLA plaintiff can successfully bring finality to the government's claims without hindering its ability to seek contribution from other PRPs for an equitable share of remediation costs.

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[1] 42 U.S.C. § 9613(f)(2).

[2] United States v. Atlantic Research Corporation, 127 S. Ct. 2331, 2338 (2007) (quoting Black's Law Dictionary).

[3] See Atlantic Research, 127 S. Ct. at 2337, United States v. Colorado & Eastern Railroad Co., 50 F.3d 1530, 1537 (10th Cir. 1995).

[4] 42 U.S.C. § 9613(f)(1).

[5] 42 U.S.C. § 9613(f)(3)(B).

[6] 42 U.S.C. § 9607(a)(4)(A), (B).

[7] Atlantic Research, 127 S. Ct. at 2338.

[8] Atlantic Research, 127 S. Ct. at 2337.

[9] See UCATA, Commissioners' Prefatory Note.

[10] On July 19, 2012, Solutia filed a petition for writ of certiorari with the U.S. Supreme Court seeking to overturn the Eleventh Circuit's decision.

[11] UCFA §2.

[12] UCATA §4.

[13] ITT Commer. Fin. Corp. v. Harsco Corp., 2000 U.S. Dist. LEXIS 13376, at *8 (N.D.N.Y. 2000); Hillsborough County v. A & E Rd. Oiling Serv., 853 F.Supp. 1402, 1409 (M.D. Fla. 1994).

[14] Acme Fill Corp. v. Althin CD Med. Inc., 1995 U.S. Dist. LEXIS 22308, at *24 (N.D. Cal. 1995).

[15] See, e.g., Patterson Envtl. Response Trust v. Autocare 2000 Inc., 2002 U.S. Dist. LEXIS 28323, at *21 (E.D. Cal. 2002); Barton Solvents Inc. v. Southwest Petro-Chem Inc., 834 F.Supp. 342, 349 (D. Kan. 1993); Comerica Bank-Detroit v. Allen Industries Inc., 769 F.Supp. 1408, 1414 (E.D. Mich. 1991).

[16] See General Time Corp. v. Bulk Materials, 826 F.Supp. 471, 478 (M.D. Ga. 1993).

[17] 42 U.S.C. § 9613(f)(2)

[18] See Adobe Lumber Inc. v. Hellman, at *3 (E.D. Cal. 2009); Tosco Corp. v. Koch Industries Inc., 216 F.3d 886, 897 (10th Cir. 2000).

[19] Azko Nobel Coatings Inc. v. Aigner Corp., 197 F.3d 302, 308 (7th Cir. 1999); American Cyanamid Co. v. Capuano, 381 F.3d 6, 20-21 (1st Cir. 2004); Action Mfg. Co. Inc. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 327 (E.D. Pa. 2006).

[20] See Tyco Thermal Controls LLC v. Redwood Indus. (N.D. Cal. Aug 12, 2010).