In this update:

- ⇒ Asarco's Settlement Representations Not An Admission Contradicting Its Contribution Claim
- ⇒ Commercial General Liability Policy Did Not Provide Coverage For Investigation and Remediation Occurring Before the Policy's Purchase
- ⇒ Drain Assessment Cost Which May Be Imposed On Plaintiffs To Address Groundwater Contamination May Constitute CERCLA "Response Costs"

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Article One

Asarco's Settlement Representations Not An Admission Contradicting Its Contribution Claim

Asarco, LLC v. Noranda Mining Co.
(Case No. 16-4045, 10th Cir. Jan. 3, 2017)

Asarco, LLC ("Asarco") appealed a lower court's entry of judgment in favor of Noranda Mining, Inc. ("Noranda") in Asarco's contribution action under CERCLA section 113 (f). The district court held that Asarco was judicially estopped from pursuing its contribution claim against Noranda because of representations Asarco made in bankruptcy court regarding its settlement agreement with EPA for the cleanup of the site. Essentially, the lower court held that Asarco's comments, as a matter of law, were proof that it could not establish that it paid more than its fair share of cleanup costs in settling with EPA. The Court of Appeals for the Tenth Circuit reversed the lower court's entry of judgment. The Court rejected Noranda's argument that Asarco's representation to the bankruptcy court that the settlement was fair, thereby contradicted Asarco's later position that it was entitled to contribution from Noranda. The Court accepted Asarco's contention that the statement made by its former director of environmental services that, "I understand that there may be other PRP's associated with this site, and the settlement amount reflects only Asarco's share of the response costs," to have been poorly phrased. CERCLA permits a party to settle for an inexact amount and later seek contribution from other PRPs for any amounts it overpaid. *Id.* The case is remanded.

Background

Asarco filed for Chapter 11 bankruptcy in August 2005. Its filing arose from having the "dubious distinction" of having the largest amount of environmental claims brought against it in any bankruptcy proceeding, totaling some $6.5 billion. *Id.* In 2009, the bankruptcy court approved a comprehensive settlement agreement by which Asarco resolved environmental claims at 52 sites in 19 states for $1.79 billion. The settlement was global, but was divided into five independent settlement groupings of related sites. The subject site, the Lower Creek/Richardson Flat Site ("Site") was in a grouping settled for a combined $94.6 million.

In reviewing Asarco's proposed global settlement, the bankruptcy court was guided by two legal standards: (1) an obligation to ensure that the settlement was "fair, equitable, and in the best interests of the estate"; and, (2) CERCLA which encourages settlement that reflects a reasonable compromise of the litigation. *Id*.

To be fair to other non-settling parties, the bankruptcy court wanted to ensure that the settlement recover at least an amount "roughly correlated with [] some acceptable measure of comparative fault, apportioning liability according to rational (if necessarily imprecise) estimates of fair share of liability for a given facility." *United States v. Cannons Eng'g Corp.,* 899 F.2d 79, 87 (1st Cir. 1990). To meet these standards, Asarco and EPA presented evidence to the bankruptcy court that the settlement

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Article One (cont.)

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agreements were fair and equitable, both to the estate and its creditors, i.e. that the estate was not paying substantially more than it owed, and regarding CERCLA, that the government was recovering enough to meet the public interest in cleanup of the environmental sites and that other potentially responsible parties would not be saddled with liability far beyond their comparative fault. *Id.*
Court's Rationale

Asarco's former director of environmental services was one of the 47 witnesses who testified. Mr. Robbins discussed all of the sites individually, providing the amount the government initially sought, the range of Asarco's projections of remedial costs, and other relevant issues. Regarding the Site, on the issue of whether Asarco would be 100% liable for the response costs, Mr. Robbins understood that there may be other potentially responsible parties associated with the Ste, and that the settlement amount reflected Asarco's share of the response costs.

The bankruptcy court approved the global settlement on June 5, 2009.

In June 2013, Asarco filed suit against Noranda seeking contribution under section 113(f) of CERCLA for monies Asarco paid under the settlement agreement for cleanup costs associated with the Site - alleging that $8.7 million it paid was more than its fair share of the of the cleanup costs, and that Noranda, as another potentially responsible party, should pay Asarco its share.

Noranda moved for summary judgment on the grounds that: (1) Asarco failed to preserve the contribution claim when it was discharged in bankruptcy; (2) Asarco was judicially estopped from seeking contribution because it represented to the bankruptcy court that it was paying only its fair share of liability for the Site; (3) Noranda was protected by a partial consent decree; and (4) Asarco's claim failed as a matter of law because Asarco could not establish it paid more that its fair share of cleanup costs for the Site.

The district court held that Asarco has preserved its claim but that it was judicially estopped from now seeking contribution because of Mr. Robbins' statements, and that Asarco could not establish that it paid more than its fair share of costs.

Court's Rationale

Judicial estoppel is an equitable remedy designed to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). Three factors typically inform the court's decision to judicially estop a party. First, a party takes a position that is "clearly inconsistent" with its earlier position. *Id.,* at 750. Second, adopting the later position would create the impression that "either the first or second court was misled." *Id.* Third, allowing a party to change its position would give it "an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751.

A. Inconsistency of Positions The crux of Noranda's argument comes from Mr. Robbins' one declaratory sentence that "I understand that there may be other PRPs associated with the site, and the settlement amount reflects on Asarco's share of the response costs." *Id.* Asarco admitted that the statement was poorly phrased but was only intended to indicate its belief that the $7.4 million represented Asarco's potential joint and several liability for the Site. That is, "Robbins was explaining that Asarco's allocable share of the response costs was one of the key uncertain issues that would not be resolved through litigation because the parties decided to settle." *Id.*

Here the Court held that CERCLA allows a party to settle for an inexact amount and later seek contribution from other PRPs for any amounts overpaid. The lower court's decision is, therefore, inconsistent with this principle.

B. Impression that a Court was Misled The "simpler inquiry is whether allowing Asarco to proceed with its contribution claim would create the impression that either court was duped - for it is this unfairness with which the equitable doctrine is concerned." *Id.* Here, the Court rejected this notion. Asarco had preserved its contribution claims in the form of a general reservation in the settlement agreement. Moreover, its actual positions were not deemed by the Court to conflict. Therefore, what the bankruptcy court did, in effect, was approve Asarco's reservation of rights with regard to its contribution claim, as opposed to never having advised the bankruptcy court of the asset or potential claims. The second is fast and loose, the first not.

C. Unfair Advantage Asarco's complaint alleged claims against Noranda based on its Site involvement. Therefore, there are facts for holding it responsible, arguably, for a portion of Asarco's cleanup costs. Moreover, Asarco presented evidence to dispute Noranda's interpretation of Mr. Robbins' declaration. The parties should continue their contribution action.

Conclusion

Representations to the court, on settlement or otherwise, should be clear, concise, and precise - or ambiguity or, worst, and admission, can be the result.

Article Two

Commercial General Liability Policy Did Not Provide Coverage For Investigation and Remediation Occurring Before the Policy's Purchase

Atlantic Casualty Insurance Company v. Juan and Maria Garcia
(Case No. 2:15-CV-66-JEM, N.D. Ind. Jan. 5, 2017)

Juan and Maria Garcia ("Garcia") purchased two commercial general liability ("CGL") policies from Atlantic Casualty providing coverage for the years 2009 and 2010, of a commercial center the Garcia's purchased in 2004. The site contained a former dry cleaning facility operating from 1945 to 2000. Environmental testing performed in 1999 or 2000 detected solvent leaking from underground storage tanks housed under the former dry cleaner. Testing continued into 2004, the year of the Garcia's purchase. Alleging no knowledge of any preexisting, the Garcia's leased the site to tenants who operated an auto repair shop and day spa. In September of 2014, the state agency responsible for environmental enforcement sought to have the Garcias conduct and pay for environmental investigation and remediation of the solvent-related cleanup arising from their site. The Garcia's tendered to Atlantic Casualty which denied the claim based on a pollution exclusion and a claims-in-process exclusion. On cross motions for summary judgment the court granted Atlantic Casualty a declaratory relief judgment on the applicability of the claims-in-process exclusion, holding, that there was no question that the pollution at issue - and hence the damage to the Garcia's property - began long before the Garcias even bought their property.

Background

Atlantic Casualty's policies contained a total pollution exclusion where the definition of excluded "pollutants" includes all material required by federal law to have a Material Safety Data Sheet ("MSDS"). Both policies define a "pollutant" as:

> "[A] solid, liquid, gaseous, or thermal irritant or contaminant or all material for which a [MSDS] is required pursuant to federal, state, or local laws, where ever discharged, dispersed, seeping, migrating or released, including but not limited to petroleum, oil, heating oil, gasoline, fuel oil, carbon monoxide, industrial waste, acid, alkalis, chemicals, waste, treated sewage; and associated smoke, vapor, soot and fumes from said substance. Waste includes material to be recycled, reconditioned, or reclaimed."

The Garcias contend that the pollution exclusion is ambiguous because it refers to federal law, rather than printing the excluded chemicals within the four-corners of the exclusion. Also, the Garcias allege that even if the references to federal law are proper, it is too difficult to determine which chemicals require MSDS, and therefore, the Garcias believe the exclusion is ambiguous.

The claims-in-process exclusion appears in both policies. In relevant part, this exclusion states that insurance does not apply to: (1) any loss or claim for damages arising out of or related to bodily injury or property damage, whether known or unknown, that (a) first occurred before the policy's inception date, or (b) is or is alleged to be in the process of occurring as of the policy's inception date; of (2) any loss or claim for damages arising out of or related to bodily injury or property damage, whether known or unknown, that is the process of settlement or suit as of the policy's inception date."

Here, the Garcias allege that the claims in process exclusion does not apply as the applicable loss or claim is the state environmental action against the Garcias which did not occur until the Garcias entered into a voluntary remediation program in 2014, after they had purchased coverage in 2009 and 2010.

Court's Rationale

A. Pollution Exclusion

The chemicals at issue are Stoddard solvents, PCE solvents, and heating oil. Heating oil is specifically listed in the policy's pollution exclusion, and OSHA has identified Stoddard solvents and PCE and hazardous. 29 CFR 1910.1000. Atlantic Casualty alleges that as the policy specifically lists the heating oil and because Stoddard solvents and PCE solvents are required by have MSDSs under federal law, the policy excludes coverage for the pollutants found at the Garcias' site.

The Garcias allege that under Indiana law, court have held pollution exclusions to be ambiguous and have construed them to not exclude coverage. For instance, *American States Ins. Co. v. Kiger*, 662 N.E. 2d 945 (Ind. 1996) held that standard pollution exclusions - "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" - is ambiguous. Here, however, Atlantic Casualty's pollution exclusion is more specific than this type of exclusion, and Indiana law has not held that pollution exclusions are unenforceable. The Garcias counter that even Atlantic Casualty's more specific exclusion language is ambiguous as it refers to pollutants by citing to federal law rather than identifying specific pollutants within the policy itself.

Atlantic Casualty responded by citing to Indiana cases upholding the practice of reference federal law to exclude pollutants. In *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 854 (Ind. 2012) the Indiana Supreme Court provided guidance as to what Indiana Courts would look for in an unambiguous pollution exclusion. *Flexdar, Inc.* was a manufacturer of rubber stamps and printing plates. *Flexdar* used chlorinated solvents, TCE in particular, to clean some of its equipment. As a result, the soil and groundwater under its former facility was contaminated with TCE. The Indiana Department of Environmental Management informed *Flexdar* that it was liable for the cleanup.

Flexdar tendered to its carrier to defend and indemnity its against the state's claims. The carrier denied coverage citing to its pollution exclusion which defined pollutants as any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste included materials to be recycled, reconditioned or reclaimed. The Indiana Supreme Court

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Article Two (cont.)

Commercial General Liability Policy Did Not Provide Coverage For Investigation and Remediation Occurring Before the Policy's Purchase

found that the pollution exclusion ambiguous and found coverage for the insured. After finding for the insured, the Indiana Supreme Court took the liberty of evaluating a form endorsement which was not before the court in this case, but would resolve the question of ambiguity in the pollutants definition. Essentially, the Court made reference to federal and state environmental statues. Atlantic Casualty alleged that the Indiana Supreme Court had explicitly blessed its practice of referring to federal law to define "pollutants" in an insurance policy exclusion.

However, the U.S. District Court for the Southern District of Indiana disagreed with Atlantic Casualty's interpretation of *Flexdar*. *St. Paul Fire & Marine Ins. Co. v. City of Kokomo*, 2015 WL 3907455 (S.D. Ind. June 25, 2015), defined pollutants by referring to federal and Indiana law, providing a list of law as examples. Although the revised policy language quoted the approved language in *Flexdar,* the *Kokomo* court found that the *Flexdar* opinion did not demonstrate that the Indiana Supreme Court's approval of defining "pollutant" in insurance policy exclusions by referring to federal and state law was not sufficiently specific. *Id*.

Here, the court held that it was a close call but being mindful of the rule against finding nearly all of the pollution exclusions unenforceable, resulting in great distress within the insurance industry, the court found narrower grounds for resolving this case - on the claims-in-process exclusion.

The Garcias alleged that the relevant "loss" or "claim for damages" did not arise until the state demanded that they pay for the investigation and remediation costs. Accepting this argument, however, would ignore the claims-in-process exclusion's plain language, which excludes losses or claims for damages arising out of property damage whether known or unknown, that first occurred or began occurring before the policy's inception. That could only mean that the damage in this case, the pollution at issue, began before the Garcias purchased the policy. The court, therefore, granting Atlantic Casualty a declaratory relief judgment.

Conclusion

This exception also goes by the term "known injury exclusion" which, essentially bars coverage when the insured does not know about the injury/damage during the policy period. Such policies are also litigated in the environmental and construction defect context.

About Thierry R. Montoya

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Thierry also represents clients in natural resources issues involving water, oil and gas interests, air and water permitting and violations including NPDES and Title V.

On the land use side, Thierry provides permitting, zoning, CEQA/NEPA, and eminent domain expertise. Thierry also represents public and private sector clients in construction biddings, contracting, and litigation.

Article Three

Drain Assessment Cost Which May Be Imposed On Plaintiffs To Address Groundwater Contamination May Constitute CERCLA "Response Costs"

Charter Township of Lansing and Lansing Township Downtown Development Authority v. Lansing Board of Water and Light
(Case No. 1:14—cv-515, W.D. Mi. Jan. 6, 2017)

This case arises out of a long running effort to resolve water run-off problems in Lansing Township and is now manifest in a disagreement of apportioned costs for a $12 million drain project among the affected governmental entities and landowners. Plaintiffs allege that the cost to install a storm drain in the Groesbeck Drain District, which encompasses a landfill, is the result of the landfill's contamination of the groundwater such that the storm drain is necessary to prevent the threatened future releases of contamination into the groundwater. Absent the landfill's contamination of groundwater, Plaintiffs' allege that the storm drain would not be required to divert away water from the landfill. Plaintiffs are suing for the ever increasing cost to build and maintain the storm drain, costs Plaintiffs allege will be passed on to the landowners in assessment costs - costs Plaintiffs allege are an essential component of Defendant's remediation plan. Defendants filed a motion to dismiss Plaintiffs' CERCLA claim as Plaintiffs have no suffered any "response costs" as statutorily defined. The court disagreed holding that Plaintiffs' had sufficiently alleged that they have incurred "response costs" as that term is defined in CERCLA.

Background

To establish a prima facie case for CERCLA, a plaintiff must prove that: (1) a polluting site is a "facility" within the statute's definition; (2) the facility released or threatened to release hazardous substance; (3) the release caused the plaintiff to incur necessary costs of response; and (4) the defendant falls within one of four categories of potentially responsible parties. *Id*., citing to *Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 933 (6th Cir. 2004). Thus, a plaintiff must prove "that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d 648, 655 (6th Cir. 2000).

CERCLA does not define "necessary costs of response" and only defined "response" in an indirect way. CERCLA defines "response" as "remove, removal, remedy, and remedial action," including "enforcement activities related thereto." 42 U.S.C. section 9601 (25). The definition relies on the definitions of "remove" or "removal," and "remedy" or "remedial action." In order to sustain a claim for cost recovery under CERCLA a [plaintiff] must have incurred "necessary costs of response," including costs of removal or remedial action. *Id*.

Defendant alleges that Plaintiffs' complaint includes on a single conclusory allegation that Plaintiffs' drain assessment costs constitute "recovery costs" under CERCLA and the state equivalent law, which is insufficient to withstand dismissal.

Court's Rationale

There are no cases addressing the issue of what constitutes "response costs" in this particular instance where Plaintiffs are alleging the cost of future drain pipe assessments. The court is, therefore, limited to the general legal framework as applied to CERCLA cost recovery actions.

Here, the court disagreed with Defendant regarding its allegation as to the paltry nature of Plaintiffs' allegations. Quoting from the complaint's allegations, the court held that Plaintiffs' had sufficiently alleged that the drain was being built because of the release and threatened releases of contaminates from the landfill. Moreover, Plaintiffs had sufficiently alleged that the drain was necessary as part of the remediation to prevent the threatened future release that will occur if the drain is not built and water is not diverted away from the landfill, and that the drain was an essential component of Defendant's remediation plan at the landfill. Plaintiffs argued that although Defendant could argue with the facts alleged in the complaint, that disagreement was not one that could be resolved through a motion to dismiss requiring, instead, lay and expert witness discovery.

Contrary to Defendant's allegations, Plaintiffs had sufficiently alleged that they have incurred "response costs" as defined under CERCLA - as part of the remediation of the landfill site where the release occurred.

The court rejected Defendant's allegation that Plaintiffs did not, and could not allege response costs when they failed to spend any money cleaning up the landfill site. Defendant relies on *Ellis v. Gallatin Steel Co.,* 390 F.3d 461, 482 (6th Cir. 2004) for that principle. *Ellis*, infra, however dealt with a claim to compensation to the plaintiffs for the time they spent observing and videotaping the operations of the "polluting companies" from January 1997 through December 2000. *Id*., at 481. The district court rejected that claim holding that "to recover any costs, the 'citizen must prove' that the costs were not 'primarily for litigation', which [the district court] concluded [the plaintiffs] had failed to do." *Id*. at 481-82.

The Sixth Circuit agreed that the costs "incurred" by *Ellis, supra*, were not "necessary response costs" noting:

> "CERCLA provides for recovery from liable persons of any 'necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. section 9607(a)(4)(B). Generally speaking, legal fees and litigation-related costs are 'not recoverable'; only 'work that is closely tied to the actual cleanup…may constitute a necessary cost of response…." *Id*. at 482, [internal citation omitted].

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Article Three (cont.)

Drain Assessment Cost Which May Be Imposed On Plaintiffs To Address Groundwater Contamination May Constitute CERCLA "Response Costs"

Here, Plaintiffs sufficiently alleged that the drain was necessary, as part of the remediation, to prevent the threatened future release that will occur if the drain was not built and water not diverted away from the landfill; the drain was, therefore, an essential component of Defendant's remediation.

Conclusion

The Sixth Circuit focused on a case holding that only work that is closely tied to the actual cleanup could constitute a necessary cost of response. What constitutes necessary is still in development. In the Eleventh Circuit case of *Stratford Holding, LLC v. Fog Cap Retail Investors LLC*, 516 F. App'x 874 (11th Cir. 2013), the Court reversed a lower court dismissal holding that cost of investigating the presence of solvents in groundwater at actionable levels was not a "necessary" cost simply because the state declined to list the site on its hazardous sites inventory. The Court overturned this decision holding that the state's failure to list the site was insufficient for concluding that this investigation was not necessary.

About AlvaradoSmith

AlvaradoSmith is experienced in all facets of public and private project development and implementation, environmental review and compliance, and natural resource law. We represent public utilities, public agencies, private developers, commercial property owners, and private landowners in major facilities and infrastructure development projects, land acquisition, pipeline development, soil and groundwater cleanups, and renewable energy projects. We know the ins and outs of environmental and natural resource law compliance.

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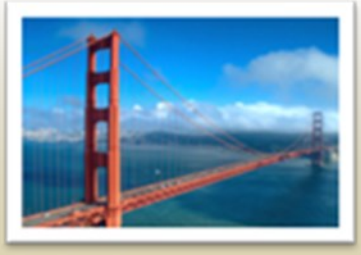

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