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Asarco LLC v. Atlantic Richfield Company

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Asarco LLC v. Atlantic Richfield Co., 866 F.3d 1108 (9th Cir. 2017)

Ryan L. Hickey

The Comprehensive Environmental Response, Compensation, and Liabiltiy Act, commonly known as CERCLA, facilitates cleanup of hazardous waste sites and those contaminated by other harmful substances by empowering the Environmental Protection Agency to identify responsible parties and require them to undertake or fund remediation. Because pollution sometimes occurrs over long periods of time by multiple parties, CERCLA also enables polluters to seek financial contribution from other contaminators of a particular site. The Ninth Circuit clarified the particuar circumstances under which contribution actions may arise in *Asarco LLC v. Atlantic Richfield Co.*, holding non-CERCLA settlements may give rise to CERCLA contribution actions, and corrective measures imposed under different environmental statutes may qualify as response actions required for a responsible party to seek contribution from another. In addition, the court clarified what constitutes resolved liability in such situations, another prerequisite for contribution actions. That final determination led it to vacate a district court's grant of summary judgment in favor of Atlantic Richfield based on an erroneous conclusion that Asarco, in seeking financial contribution from Atlantic Fichfield for remediating a CERCLA site both had contaminated, exceeded the applicable statute of limitations. The case was thus remanded for further proceedings consistent with this opinion.

I. INTRODUCTION

In August 2017, a three-judge panel of the Ninth Circuit Court of Appeals issued a decision clarifying how non-governmental entities may seek contribution from other potentially responsible parties ("PRPs") in the cleanup and remediation of contaminated sites under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] In that decision, the panel made it easier for parties responsible for contaminating a CERCLA site to hold other polluters of that same site accountable via monetary contributions.[2] Three major companies were relevant to this litigation: the Anaconda [Copper] Mining Company, the Atlantic Richfield Company ("Atlantic Richfield" or "Arco"), and the American Smelting and Refining Company ("Asarco"). Because Atlantic Richfield purchased Anaconda in 1977, thereby not only acquiring the company but also its existing and future environmental liabilities under CERCLA, only Atlantic Richfield and Asarco are named in this litigation.[3]

1. Asarco LLC v. Atlantic Richfield Co., 866 F.3d 1108 (9th Cir. 2017).
2. *Id*. at 1129.
3. *Id*. at 1114-15.

II. FACTUAL & PROCEDURAL BACKGROUND

This case focuses on two facilities in and around East Helena, Montana: a lead smelter operated by Asarco for more than a century, and a zinc fuming plant operated by Anaconda from 1927 to 1972, and subsequently by Asarco from 1972 to at least 1982.[4] Both facilities harmed the surrounding environment throughout their lifespans by emitting lead, arsenic, and other toxic compounds and heavy metals into the air, water, and soil.[5]

Considering the environmental damage, both facilities, along with the City of East Helena, were designated as the East Helena Superfund Site (the "Site") and added to the CERCLA National Priorities List in 1984.[6] Later that decade, the Environmental Protection Agency ("EPA") deemed both Asarco and Anaconda PRPs for the Site's contamination, but only pursued financial contributions from Asarco; consequently, by 1998 Asarco had agreed to pay for portions of Site cleanup in three separate CERCLA settlements with the United States.[7]

Beyond CERCLA, the government also targeted Asarco for polluting the Site by pursuing civil penalties and injunctive relief under the Resource Conservation and Recovery Act ("RCRA") and Clean Water Act ("CWA"), all of which Asarco ultimately settled.[8] Given the U.S. government's pursuit of a RCRA "corrective action," the settlement, known as the 1998 RCRA Decreee, not only charged Asarco fines, but also required that Asarco "remediate, control, prevent, or mitigate the release, potential release or movement of hazardous waste or hazardous constituents into the environment or within or from one media to another," which the Decree defined as "Corrective Measures."[9]

Asarco was unable to meet those obligations and, in 2005, filed for Chapter 11 bankruptcy protection.[10] In 2009, the bankruptcy court's efforts yielded yet another consent decree among the United States, the State of Montana, and Asarco: the "CERCLA Decree."[11] Of that decree's many provisions, most notable to these proceedings was one that saw Asarco pay nearly $100 million to "fully resolve[] and satisf[y]" its remaining obligations under the 1998 RCRA Decree.[12]

The case from which this appeal arose began when Asarco initiated a CERCLA contribution action against Atlantic Richfield in June 2012, through which it sought to offset some of its financial burden under the CERCLA Decree.[13] Because Anaconda had previously been

4. *Id*. at 1114.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. at 1114-15.
11. *Id*. at 1115.
12. *Id*.
13. *Id*.

designated a PRP for the Site, and Atlantic Richfield had taken on Anaconda's liabilities when it bought Anaconda, Asarco pursued financial contribution from Atlantic Richfield under the following section of CERCLA:

> (B) A person who 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 may seek contribution from any person who is not party to a settlement . . .[14]

The phrase, "a person who is not party to a settlement" means any entity that has not yet "resolved its liablity to the United States or a State in an administrative or judicially approved settlement."[15] Asarco wanted Atlantic Richfield to help fund cleanup because it met that description.

Atlantic Richfield fought Asarco's actions, primarily by alleging the relevant statute of limitations had passed; they believed the three-year timer started ticking when Asarco entered the RCRA Decree in 1998, not the CERCLA Decree in 2009.[16] Asarco responded with two arguments: 1) RCRA and CERCLA are separate statutes, so RCRA actions cannot start the CERCLA statute of limitations clock, and 2) the CERCLA Decree created new obligations for Asarco different from those in the RCRA Decree, requiring a new statute of limitations regardless.[17] In the United States District Court for the District of Montana, Judge Dana Christensen determined the statute of limitations had run and granted Atlantic Richfield's motion for summary judgment.[18] This appeal followed.

III. ANALYSIS

The Ninth Circuit panel explained its approach to this case in a section entitled "Statutory Context."[19] There, the opinion addressed the history and legislative intent of CERCLA, relevant results of the "Superfund Amendments and Reauthorization Act of 1986," term-of-art definitions, and statutory interpretation, among other topics.[20] Then, reviewing the district court's decision *de novo,* the panel divided its discussion into four sections: three regarding whether Asarco could have brought a contribution action against Atlantic Richfield based solely on the 1998 RCRA Decree, and one evaluating Asarco's resolution of liability under the CERCLA Decree.[21]

The court began by addressing whether a CERCLA contribution action may arise out of a non-CERCLA settlement agreement because

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14. 42 U.S.C. § 9613(f)(3)(B) (2018).
15. *Id*. at § 9613(f)(2).
16. *Asarco*, 866 F.3d at 1115.
17. *Id*.
18. Asarco LLC v. Atlantic Richfield Co., 73 F.Supp.3d 1285 (D. Mont. Aug. 26, 2014).
19. *Asarco*, 866 F.3d at 1115.
20. *Id.* at 1115-17.
21. *Id*. at 1118-29.

Atlantic Richfield alleged that Asarco's window for seeking a CERCLA contribution action began after the 1998 RCRA settlement, not the 2009 CERCLA one.[22] The opinion provided three reasons why a non-CERCLA settlement may give rise to a CERCLA contribution action.

First, the court noted that §113(f)(1) of CERCLA expressly provides that contribution actions in those circumstances are only proper after a CERCLA settlement, whereas the section in question—113(f)(3)(B)—lacks any similarly restrictive language.[23] Per the statutory construction principle that word choice is deliberate and meaningful, the court took this to support allowing non-CERCLA settlements to initiate CERCLA contribution actions.[24] Second, the court pointed to CERCLA's broad purpose, stating, "An interpretation that limits the contribution right under § 113(f)(3)(B) to CERCLA settlements would undercut private parties' incentive to settle . . . thereby thrwarting Congress' objective and doing so without reaping any perceptible benefits."[25] Finally, the court determined this statutory interpreatiation matches the EPA's administrative one, which in its opinion "merits some deference."[26]

After discussing the circuit split over CERCLA/non-CERCLA settlements and contribution actions[27], the opinion evaluated whether the 1998 RCRA Decree met the second prerequisite to a contribution action: requiring response actions or costs from Asarco.[28] This court answered that in the affirmative.[29] Beyond fines and mandates, the court noted, "The agreement's requirement that Asarco take various 'corrective measures' is particularly noteworthy because RCRA expressly defines 'corrective action' as a *type of* 'response' action."[30] Thus, it held the 1998 RCRA Decree included response actions for CERCLA contribution purposes.[31]

Taking up the third 1998 RCRA Decree issue—resolution of liability via that settlement—the court agreed with Asarco that the company had not thereunder "resolved its liability to the United States or [State of Montana] for some or all of [its response action] or the costs of such action."[32] This point governed the statute of limitations issue; if Asarco had resolved its liability via the 1998 RCRA Decree and the company's subsequent response actions or expenditures, it would have met all three prerequisites to bring CERCLA contribution actions against other potential or known PRPs at that point.[33] In that case, because of the

22. *Id*. at 1118.
23. *Id*. at 1118-19.
24. *Id*.
25. *Id*. at 1119.
26. *Id*.
27. *Asarco*, 866 F.3d at 119-121.
28. *Id*. at 1121.
29. *Id*.
30. *Id*. (emphasis in original).
31. *Id*.
32. 42 U.S.C. § 9613(f)(3)(B) (2018).
33. *Asarco*, 866 F.3d at 1121.

three-year statute of limitations for contribution actions, Asarco's chance to seek financial help from other PRPs would have expired in 2001.[34]

Analyzing this issue, the court first rejected Atlantic Richfield's argument that Asarco had waived this point by not raising it during lower court proceedings.[35] While true, the judges noted that waiver "is not an absolute bar to our consideration of arguments on appeal."[36] Given the desire to avoid miscarriage of justice, need to maintain confidence in judicial processes, and exclusively legal nature of this appeal, the court forgave Asarco's oversight and took up the issue's merits.[37]

Once again, the court began with statutory language, particularly precedent 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" before that liability can be considered resolved for purposes of contribution actions.[38] The court then delved into Sixth and Seventh Circuit precedent, seeking to stake out its own circuit's position.[39] Ultimately the panel fell "somewhwere in the middle of these various cases," [40] deciding "[s]ettlement agreement[s] must determine a PRP's compliance obligations with certainty and finality," the government may retain its ability to enforce agreements, agreements may be considered "resolved" even if conditioned on completed performance that is not yet completed, and a PRP's refusal to concede liability in an agreement does not impact the resolution status of that agreement.[41]

With their definition established, the court applied it to the 1998 RCRA Decree, deciding it failed to resolve Asarco's liability at the Site.[42]

> Because the Decree did not settle definitively *any* of Asarco's response obligations it did not "resolve[] [Asarco's] liability." Accordingly, Asarco could not have brought a contribution action pursuant to the 1998 RCRA Decree and the corresponding limitations period did not run with that agreement.[43]

The court then turned to the final issue: whether the 2009 CERCLA Decree succeeded where the 1998 RCRA Decree had not, thereby resolving Asarco's Site liability.

Reiterating the factors necessary for a timely contribution claim, this panel determined the lower court erred in holding Asarco had not satisfied those when making its contribution claim against Atlantic

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34. 42 U.S.C. § 9613(g)(3) (2018).
35. *Asarco*, 866 F.3d at 1122.
36. *Id*. (citing In re Mercuruy Interative Corp. Sec. Litig., 618 F.3d 988, 992 (9th Cir. 2010)).
37. *Asarco*, 866 F.3d at 1122.
38. *Id*. (quoting Bernstein v. Bankert, 733 F.3d 190, 212 (7th Cir. 2013) (emphasis in original)).
39. *Asarco*, 866 F.3d at 1122-24.
40. *Id*. at 1124.
41. *Id*.
42. *Id*. at 1125-26.
43. *Id*. at 1126.

Richfield under the 2009 CERCLA Decree.[44] With that established as the point when Asarco resolved its Site liability, the court held Asarco's seeking of contribution from Atlantic Richfield in June 2012 timely.[45] As for the other two criteria, the court noted the roughly $100 million Asarco was required to pay into a trust for Site cleanup as evidence the CERCLA Decree covered response actions or, at absolute least, response costs.[46] Finally, the court held the CERCLA Decree also resolved Asarco's liability at the Site by meeting the reqirements they laid out in the preceding section.[47]

Having rejected all of Atlantic Richfield's arguments seeking to undermine or discredit Asarco's contribution claim against them for the Site, the panel took up one last point: Atlantic Richfield's contention that deciding in favor of Asarco would be unfair.[48] The opinion responded:

> Whether a right of contribution is available does not depend on whose ox gets gored: the fact that Asarco and not some other party was liable under the RCRA Decree does not change the fact that that agreement did not give rise to a right of contribution, whereas the CERCLA Decree did.[49]

Despite alleging Asarco was ducking justice, Atlantic Richfield did not prevail on that claim, nor any others in these proceedings.

IV. CONCLUSION

Because the district court had granted Atlantic Richfield summary judgment in the earlier phase of this case, this Ninth Circuit opinion could only vacate the grant of summary judgment and remand the case for further proceedings, though it also specifically direted the lower court to adhere to the law as it had been clarified.[50] Overall, this holding served to clarify a confusing part of CERCLA, establish precedent throughout the Ninth Circuit on issues of first impression there that have caused disagreement among other Circuits, and emphasize one particular set of circumstances in which PRPs may seek contribution from other PRPs for costs related to remediating contaminated areas.

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44. *Id*. at 1127.
45. *Id*.
46. *Id*. at 1127-28.
47. *Id*. at 1128.
48. *Id*. at 1129.
49. *Id.*
50. *Id*.