Buchalter
CLIENT ALERT

May 24, 2023

Is a Release of CERCLA Claims Ever Really "Full and Final?"

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When Potentially Responsible Parties (PRPs) settle CERCLA cases, they want finality. They don't expect to be asked to pay a second time for a claim they have already resolved by settlement. However, a concurring opinion in a recent Ninth Circuit decision casts doubt on the ability of a PRP to achieve finality through settlement.

The Ninth Circuit's decision in *GP Vincent II v Beard* was issued on May 17, 2023. GP Vincent had purchased and then foreclosed on a note securing contaminated property, GP Vincent intended to remediate the property for development and recover the remediation costs from the former operators via a CERCLA §107 cost recovery action. GP Vincent knew when it purchased the note that the former owners and operators had settled their contamination claims. It also knew that the former owner had failed to remediate the property with the settlement funds and was now insolvent. For a number of reasons, GP Vincent was confident the settlement would not bar its CERCLA cost-recovery claim against the former operators.

The District Court disagreed. It dismissed GP Vincent's case, holding that, as the successor to the former owner's title, GP Vincent was "in privity" with the former property owner. Thus, the settlement of claims by the former owner and the dismissal with prejudice of claims against the former operators was *res judicata* as to GP Vincent. GP Vincent was bound by the release given to the former operators and it was barred from pursuing those former operators for the cost of remediation. GP Vincent appealed.

The Ninth Circuit reversed the dismissal. Two Justices concluded that the earlier case had resolved only liability for off-site contamination but had not resolved liability with respect to remediating the property itself. As a result, the issues resolved by the settled case were not identical to the current case so the earlier settlement did not create a *res judicata* bar.

Notably, as the concurring opinion pointed out, the prior settlement was clearly intended to resolve claims for both off-site and on-site contamination. Nonetheless, and without addressing this point, the majority persisted in its view that only liability for off-site contamination was resolved. While the fact pattern relied on by the majority greatly narrows the applicability of its opinion, it also heightens the significance of the concurrence, which does not limit itself to an unusual "partial" settlement.

In his concurring opinion, Justice Carlos Bea agreed with the majority's result but for a very different reason. He concluded that a property owner's rights under CERCLA are *in personam*, not *in rem*. They arise out of the property owner's status as an owner, not out of the property itself. Therefore, each

successive owner has an independent right to recover remediation expenses they may incur, regardless of any settlement by earlier owners. Justice Bea also noted that a current owner could not represent a future owner's interests in settlement negotiations without the future owner's consent. Thus, any purported release on behalf of future owners would be ineffective.

The view articulated by Justice Bea potentially opens up every CERCLA settlement whenever the title to contaminated property is transferred. Even the strategy of memorializing a settlement and release "on behalf of all current and future owners" in the chain of title is now called into question. GP Vincent was fully aware of the release of the former operators. Nonetheless, under the concurring opinion's analysis, even actual notice of a settlement of all claims arising out of the contamination does not bar a subsequent owner from re-asserting those exact same claims against the exact same parties. It seems unlikely that constructive notice of a release of claims recorded in the chain of title would be given greater effect. A court might declare such a release to be void as the owner purporting to release future owners' claims was without authority to do so on their behalf.

Although the concurring opinion did not carry the day this time, it is not without its logic. With different facts, a majority could adopt that reasoning to preserve a future "innocent" owner's right to seek cost recovery. Should that happen, every CERCLA settlement purporting to give a full and final release to a PRP would be subject to being reopened over and over again every time a property changes hands.

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