Appeals Court Upholds CERCLA Settlement

The U.S. Court of Appeals for the 6th Circuit has held that a district court erred when it failed to order a corporation to adhere to the terms of a settlement agreement it reached with a city regarding CERCLA and state-law cost recovery claims, but affirmed the district court's decision to limit cost recovery to the amount required to comply with cleanup levels for industrial property.

For several decades, corporate predecessors of Eaton Corporation (Eaton) owned and occupied a piece of industrial property (the Property) located in the City of Detroit. There were various buildings on the Property, including a factory, a warehouse, a garage, a boiler house and some office buildings.

Several companies occupied the Property before and after Eaton occupied it. Different occupants disposed of assorted hazardous wastes on the site, including polychlorinated biphenyls (PCBs), petroleum, and petroleum by-products such as ethyl benzene, toluene and xylene.

During a period that ended in 1989, the Property was occupied by U.S. Equipment Co., a subsidiary of U.S. Group, Inc., which is related to various members of the Simon family. Collectively, these parties are referred to as the Simon Group.

The City of Detroit (the City) acquired the Property by condemnation in 1989 to clear flight paths for Detroit City Airport. The City demolished the buildings on the Property, cleaned up the PCBs, and conducted an environmental assessment of the remaining contaminants.

The City then sued the Simon Group, Eaton and other past users of the Property, seeking to recover the environmental cleanup and investigation costs already incurred, and entry of a declaratory judgment with respect to future remediation costs. The City's claims were based on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the former Michigan Environmental Response Act (MERA), which has now been codified as part of the Natural Resources and Environmental Protection Act (NREPA).

The City moved for partial judgment before trial on a claim that the Simon Group was responsible for all of the City's PCB cleanup costs. The district court awarded the City $156,619.91 for reimbursement of these costs.

In March 1995 the case went to trial on the remaining claims against the Simon group and Eaton. Shortly before the trial was to resume on the second day, the court was informed that Eaton and the City had reached a settlement. The terms of the settlement agreement were memorialized on the record at the court's request. The terms included a statement that the City would protect Eaton against any claim for contribution arising from a claim by the City against the party seeking contribution. The City's counsel stated that the City would not indemnify Eaton against claims by third parties that did not arise from claims asserted by the City. According to court records, Eaton's counsel agreed to these terms.

However, almost two months after making the terms of the settlement agreement a part of the court record, Eaton's counsel sent a letter to the City's counsel claiming that "[t]he form of protection Eaton would receive was never clarified by the City…." Along with the letter was a proposed settlement agreement containing a broad indemnity agreement.

After the City refused to sign the agreement, Eaton moved to have the case rescheduled for trial. The City moved for an entry of settlement judgment, which would have required the City to "defend and hold Eaton harmless from and against any and all claims or demands for contribution or lawsuits or other actions for contribution *brought against Eaton as a direct result of any claim, demand, lawsuit or other action brought by the City* …" in connection with contamination of the Property.

Eaton opposed the City's motion in a brief accompanied by two affidavits from Eaton's lawyers. One affidavit stated that in the environmental legal community, "contribution protection" meant that the liability of the settling party for <u>all</u> claims would be extinguished upon settlement, and that "[s]ince it was clear to both counsel for Detroit and the Court that the settlement between Eaton and Detroit needed to be reduced to writing, [Eaton's counsel] did not regard the comments of counsel before the Court in open court to set forth the details of the parties' proposed settlement."

After hearing motions by both sides, the district court granted Eaton's motion to set the case for trial, and denied the City's motion to enforce the settlement, as a result of "the inability of the Court to determine precisely what the parties came to agreement on March 7th, 1995."

After trial, the district judge entered a final judgment, fixing Eaton's total liability at $301,415, added interest to the Simon Group's previous judgment, and declared Eaton and the Simon Group liable for

specified percentages of future recoverable response costs limited to those costs incurred to achieve an "industrial clean up" as defined in NREPA. The City appealed to the 6th Circuit.

The City raised two issues on appeal. The first was whether the district court erred in refusing to enforce the settlement agreement recorded in the March 7, 1995 proceedings, and the second was whether the district court erred in limiting the liability of Eaton and the Simon Group for future cleanup costs to those incurred to achieve an industrial cleanup as defined by NREPA.

After thorough review of the transcripts from March 7, 1995, the appeals court found that, whether or not there had been a meeting of the minds on the scope of contribution protection prior to the court proceedings conducted on March 7, the transcript clearly displayed a meeting of the minds on that particular day. The summary of the terms of the agreement stated on the record by the City's counsel clearly showed that the City's commitment to protect Eaton from contribution claims was limited to claims brought by parties as a result of claims asserted by the City itself. The appeals court found that, regardless of whether or not Eaton actually sought broader protection, it was clearly not offered by the City's counsel.

The City's counsel explained, in no uncertain terms, that the City would provide contribution protection "with respect to any claims brought . . . by the city of Detroit" –both the pending claims against the Simon Group and "any other claim that might be brought by the city of Detroit against other parties." The City's counsel clearly stated that such contribution protection would not extend to third-party claims not arising from demands by the City, as he stated on record that "there would not be any guarantee of indemnity as to third-party claims."

The appeals court explained that if Eaton was unwilling to accept this limitation, it had an obligation to say so while the agreement was being read into the court record. However, Eaton raised no objection on the record, and Eaton's counsel clearly stated that Eaton agreed, "in principle", with what the City's counsel had said. Further, when the City's counsel in reiterated that the City's contribution protection would not extend to third-party claims, Eaton's counsel replied on record, "That's correct." Therefore, the appeals court held that the district court erred when it failed to order Eaton to adhere to the terms of the settlement agreement read into the record on March 7, 1995.

With respect to the City's allegation that the district court also erred in limiting Eaton's and the Simon Group's liability for future cleanup costs to what would be necessary to reach the "industrial"

cleanup level as defined by NREPA, the appeals court held that the district court had not erred. The City argued that there is no statutory authority for limiting liability for future cleanup costs, and that NREPA expressly provides that the person proposing to conduct a cleanup may select residential, commercial, industrial, or other cleaning levels.

According to the appeals court, the types of response costs recoverable under CERCLA are limited to those that are "necessary" in light of the nature and type of property to be cleaned up. Similarly, NREPA provides that the cleanup proposed should be "appropriate" taking into account the facility's categorical criteria, and also provides that recoverable costs must be "necessary." The court reasoned that because the Property had a long history of industrial use, and it would be unfair to require the former occupants of the Property to assume liability for cleanup costs beyond the level necessary to make the property safe for industrial use, and would provide an unwarranted windfall to the beneficiary of the cleanup.

Therefore, the appeals court affirmed in part and vacated in part the district court's judgment, and remanded the case for further proceedings.

***City of Detroit v. Simon,* 247 F.3d 619; 2001 WL 369946, Apr. 16, 2001**

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