Court Ruling Shows That PRP Group Accounting Can Be Confusing

At the ideal Superfund site, all potentially responsible parties (PRPs) would form a single PRP Group at one time, members would all remain in the Group from beginning to end, and would not be divided into different classes. However, PRP groups in the real world are much more complicated. Some members withdraw, declare bankruptcy, negotiate separate settlements with the government, or join late after being forced to do so by a lawsuit. Such changes in the composition of a PRP Group can result in accounting nightmares and disputes over who owes how much money for cleanup expenses, as illustrated in a recent case involving the Organic Chemicals Site in western Michigan.

The United States Environmental Protection Agency (EPA) placed the Organic Chemicals Superfund Site (the Site), located in Grandville, Michigan, on the National Priorities List (NPL) in 1983. The Organic Chemicals Site PRP Group (Group) was formed in 1991. Initially, the Group included some members who later were determined to have generated less than 1% each of the waste at the Site (*de minimis* members), and other members each of whom was determined to have generated more than 1% of the total waste sent to the Site (non-*de minimis* members). In January, 1992, EPA issued a Unilateral Administrative Order to 175 PRPs, including the members of the Group, which required them to remediate groundwater contamination. In September, 1992, 100 *de minimis* members entered into an Administrative Order on Consent with the EPA under which the *de minimis* parties paid cash into a trust fund administered by EPA for the purpose of paying some of the costs for groundwater remediation at the Site. These orders required the Group to take over responsibility for remediating groundwater, but allowed it to receive partial reimbursement from the trust fund for some of the Group's expenses in doing so. Thus, funds in the trust were used to pay for response costs which the members of the Group would otherwise have had to pay.

In November, 1998, the *de minimis* members formally withdrew from membership in the Group so that they could pursue a second settlement with EPA concerning their liability for soil contamination at the Site.

In 1996, the Group, acting in its own name as an unincorporated voluntary association, sued Uniroyal Chemical Company, Inc. ("UCCI") contending that UCCI had disposed of substantial quantities of hazardous substances at the Site and should have joined the Group as a non-*de minimis* member. In

1999, the Group and UCCI entered into a settlement agreement providing that UCCI's percentage share of response costs would be determined by binding arbitration. The arbitrator issued his written decision in August, 1999, finding that UCCI should be responsible for 15% of the Group's costs.

Unfortunately, the arbitrator did not define in his decision exactly what he considered to constitute the Group's costs. The Group interpreted the arbitrator's decision to mean that UCCI owed approximately $755,000, while UCCI interpreted it to mean that it owed the Group only about $451,000. The principal reason for the discrepancy was that the Group believed that the costs should include the amounts which the PRP Group initially paid, but which were reimbursed to the Group from the trust fund which had been established by the *de minimis* PRPs under their settlement with EPA. In contrast, UCCI contended that the costs should include only the amounts that the Group assessed directly to its own members, and should not include amounts that were reimbursed from the trust fund.

This issue was presented to the district court for resolution because the court retained jurisdiction to enforce the settlement agreement between the Group and UCCI. The court held that the issue was essentially a matter of contract law, and depended on the correct interpretation of the settlement agreement between the Group and UCCI and the PRP Organization Agreement. The Group argued that the "Shared Costs" of which UCCI had to pay 15% should include reimbursements that the Group received from the trust, because UCCI had been released from all potential claims by all PRPs against UCCI, including all claims by *de minimis* PRPs who had funded the trust. In return, UCCI argued that Group members that were in the same position as UCCI, that is, non-*de minimis* members, had not been required to pay toward the costs represented by payments from the trust fund. UCCI's strongest argument was that none of the costs paid by the trust fund had ever been assessed as costs to Group members. The settlement agreement between the Group and UCCI stated that UCCI was to "obtain and be bound by all of the rights, duties and obligations imposed on or accruing to the Members of the Group as set forth in the PRP Agreement . . . as if UCCI was a Member from the creation of the Group." The settlement agreement also provided that "the costs and fees which shall be the subject of the Arbitration Award shall be all Shared Costs which have been assessed against Members to date . . . ." The PRP Agreement defined "Shared Costs" as costs for "activities authorized by the Steering Committee or the Group to be incurred on behalf of the Group."

The court concluded that the costs of which UCCI had to pay 15% could not include the costs for which the Group had been reimbursed by the trust. It reasoned that, under the settlement agreement, UCCI became a member of the Group and was to be put in a position equal to those members who had joined the Group at the start. The PRP Agreement provided that Group members were only required to pay amounts that had been specifically assessed against them by the Group, and noted that the Group had not shown that any of its original members had ever been "assessed" for costs that were reimbursed by the trust. The court determined that in the settlement agreement, UCCI had "clearly negotiated . . . the right to be treated as similarly situated members," and that because the original Group members had not been assessed for monies reimbursed from the trust, UCCI could not be assessed for them either.

The court also noted that on at least two occasions, representatives of the Group sent letters to UCCI summarizing the assessments that the Group had issued to members. Significantly, neither of these letters made any reference to the payments that had been reimbursed from the trust as being an "assessment." The court pointed out that these letters demonstrated, through the Group's own conduct, what the Group really considered to be its "Shared Costs."

Organic Chemicals Site PRP Group v. CDU Holding, Inc. Liquidating trust, et al. (Oct. 30, 2000)

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