Claims for Environmental Contamination Under CERCLA

Any business, whether a landowner, motor carrier, product manufacturer, contractor or engineer, may be liable under the Comprehensive Environmental Response, Contribution and Liability Act ("CERCLA") 42 U.S.C. § 9601 for contaminating the environment through release of a hazardous substance.

CERCLA is a complex federal law which provides a mechanism for the clean-up of environmental contamination and imposes liability for the remediation costs upon those parties responsible for the contamination. A landowner that is not responsible in any manner for the contamination may bring a cost recovery action to hold all responsible parties jointly and severally liable for the response costs. *Newcastle County vs. Halliburton Acronyms NUS Corp*., 111 F3rd 1116 (3rd Cir. 1997). CERCLA liability is based upon strict liability, and causation requirements are relaxed to effectuate the remedial purpose of CERCLA. *C.U. vs. Alcan Alluminum Corp*. 99 F2d. 711 (2nd Cir. 1993); *Reichhold Chemicals, Inc. vs. Textron, Inc*., 888 F.Supp. 1116 (N.D. Fla. 1995); *Goodrich vs. Murtha*, 958 F2d 1192 (2nd Cir. 1992). If a private party is itself responsible for the contamination, it may not maintain a cost recovery action to impose joint and several liability on defendants, but may bring a contribution action. *Gould, Inc. vs. A&M Batteries & Tire Service*, 987 F.Supp. (N.D. Pa. 1997). Most environmental actions are claims for contribution. The right to bring a CERCLA contribution act claim belongs to a potentially responsible party ("PRP") whom has assumed a share of cleanup costs that may be greater than its equitable share under the circumstances. *Id*. In a contribution action brought by a PRP, each defendant's contribution in liability will correspond to that party's equitable share of the total, and will not be joint and several. *Union Station Associates, LLC. vs. Puget Sound Energy*, 238 F.Supp.2nd 1218 (W.D. Wash. 2002).

In a contribution action, a Plaintiff must prove that: (1) the site in question is a "facility" as defined by § 101(9); (2) the defendant is a responsible person under § 107(a); (3) a release or threatened a release of a hazardous substance has occurred; (4) the release or threat of a release has caused the plaintiff to incur response costs, and (5) the response costs were incurred consistent with the National Contingency Plan. *Kerr-McGee Chemical Corp. vs. Lefton Iron & Metal Co.*, 14 F.3rd 321 (7th Cir. 1994); *American Color & Chemical Corp. vs. Tennico Polymers Inc*., 918 F. Supp. 945 (D.S.C. 1995).

Contractors and engineers performing work on contaminated property may be liable under CERCLA when their work disturbs and exacerbates pre-existing contamination. In such cases, the contractor or engineer may be a "responsible party" subject to CERCLA liability because of its role in the response effort by being deemed an "arranger" under CERCLA § 107 (a). *Entry on SMI's Motion for Partial Summary Judgment on Liability Under CERCLA*. Indeed, while no 7th Circuit case specifically addresses this issue, a long line of cases from other jurisdictions hold that parties, such as engineers or consultants, who did not directly release contaminants on a site, may, nonetheless, be liable under CERCLA when their response efforts exacerbate the contamination of the

site. See *K.C. Limited Partnership vs. Reade Manufacturing*, 33 F.Supp. 2nd 1143 (W.D. Miss. 1998) (holding that exemption for CERCLA liability does not exist for environmental engineers, and engineering consulting which allegedly caused accelerated migration into the bedrock by improperly placing monitoring wells through aquitard could be a responsible party under CERCLA as an operator given its control of boring operations); *Geraghty & Miller Inc. vs. Conoco*, Inc. 234 F3rd 917 (5th Cir. 2000); *Ganton Technologies, Inc. vs. Quadion Corp.*, 834 F.Supp. 1018 (N.D. Ill. 1993).

Contribution actions are actions in equity with the court, without the aid of the jury, determining the parties' respective equitable shares of response costs. *Weyerhaeuser Co. vs. Koppers Co., Inc*., 771 F. Supp. 1420 (D. Md. 1991). Plaintiff must carry the burden of establishing the parties equitable shares. *Service Co. vs. Acme Scrap Iron & Metal Corp*., 153 F.3rd 344 (6th Cir.1998); *American Color & Chemical Corp. vs. Tenneco Polymers*, 918 F.Supp. 945 (D.S.C. 1995). In allocating response costs among liable parties in CERCLA contribution actions, District Courts may consider and rely upon a wide variety of factors that arise from testimony and evidence that the court deems appropriate in fashioning an equitable degree, and the court is not limited to the parties' suggestions or equitable factors used by other courts. *Gould*, 987 F.Supp. 353. Equitable factors relied upon by courts include the current owner's acquiescence in contaminating activities following its purchase of the site, the degree of care exercised by the respective parties, the degree of cooperation with officials to prevent harm, any financial benefit to parties from the remediation, the extent of reasonable efforts undertaken to mitigate environmental damage, and any benefits the parties received from the activities that lead to the environmental damage. *Hatco Corp. vs. W.R. Grace & Company, Co*., 836 F.Supp. 1049 (D.N.J. 1993).

Parties cannot recover for damage to property in a CERCLA action, but rather the measure of recovery is the economic losses incurred in the cleanup and removal of hazardous substance or amounts necessary to prevent or minimize the release of hazardous substances so that they do not migrate or cause substantial danger to the environment. *U.S. vs. Conservation Chemical Co*., 653 F.Supp. 152 (W.D. Mo. 1986). Furthermore, a plaintiff may seek a declaration of a defendants' liability for a portion of future response costs properly attributable to defendants, even if the exact amount of future cost is uncertain. See *Organic Chemical Site Group vs. Total Petroleum Inc*., 58 F.Supp. 2nd 755 (W.D. Mich. 1999). A declaratory judgment action can be entered against a defendant for contribution liability for future response costs, regardless of the speculative nature of future costs. *Sherwin-Williams Co. vs. Artra Group, Inc.*, 125 F.Supp. 2nd 739 (D. Md. 2001). Attorney fees are not recoverable in a contribution action brought by a private party against other PRPs, as no fee-shifting provision is contained in the contribution statute. *Tetronic Corp. vs. U.S.*, 1114 S. CT. 1960 (1994). There is an exception for attorney fees for services closely tied to cleanup operations which may well be performed by other professionals, such as "engineers, chemists, or private investigators." *Id*; see also *AM International, Inc. vs. Data Card Corporation*, 106 F.3rd 1342 (7th Cir. 1997). However, Indiana's Environmental Legal Action Act, I.C. § 13-30-9-1, supplements CERCLA by expressly providing for an award of attorney's fees.