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CERCLA Recoveries Have A New Limit For Subcontractors

Law360, New York (May 06, 2014, 4:19 PM ET) -- An opinion by the Second Circuit last month once again brought to the fore the question of whether a subcontractor may state a claim against a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act[1] for a payment dispute. The opinion in the case of Price Trucking Corp. v. Norampac Industries Inc.[2] closed a door to such liability.

The panel's decision is a significant development that relieves PRPs engaged in remediation of potentially significant exposure as a quasi-surety of subcontractors. Courts addressing the related issue of CERCLA actions by contractors may seek to build on the Second Circuit's decision and limit such claims where state law contract claims provide a remedy.

Norampac Industries discovered lead and other contamination in the soil of a site it owned in Erie County, New York, and entered into a Brownfield Site Cleanup Agreement with the New York Department of Environmental Conservation.[3] Pursuant to its obligations under this agreement, Norampac engaged AAA Environmental Inc. as a prime contractor to perform excavation and removal of contaminated soil.[4]

Plaintiff Price Trucking transported and disposed of contaminated soil pursuant to a subcontract from AAA Environmental.[5] Norampac paid over $3 million to AAA Environmental for its work.[6] AAA Environmental, in turn, made payments to Price Trucking during the early stages of the project, but eventually refused to pay its outstanding invoices.[7] Norampac, through a separate arrangement directly with Price Trucking,[8] made certain additional payments to Price Trucking. These payments, along with the early payments from AAA Environmental, still left Price Trucking with approximately $780,000 in unpaid bills for its work.[9]

Price Trucking sued Norampac under CERCLA in 2009, and moved for summary judgment in 2010. A magistrate judge considering the motion on referral issued a report and recommendation that granted summary judgment to Price Trucking.[10] The magistrate judge first stated that "the elements for a cost

recovery claim under CERCLA are that the premises are a 'facility,' that there was a 'release' of a 'hazardous substance,' that the remediator was a 'person' under CERCLA, that this person incurred 'costs of response' that were necessary and consistent with the [National Contingency Plan], and the defendant owner is a 'covered person' under CERCLA."[11]

Finding that Price Trucking had established each of these elements, the magistrate judge proceeded to consider the affirmative defenses in Section 107(b) of CERCLA, and determine that "the failure of the PRP's contractor to pay its subcontractors is not a defense recognized under CERCLA. This failure does not fall within the ambit of the third-party actor defense (one of the statutory defenses recognized under CERCLA) since it directly arises from the contractual relationship between the owner/operator defendant and the general contractor AAA."[12]

The magistrate judge concluded that Price Trucking "is a 'person' and an 'innocent private party' that preformed remediation services that [the] defendant as [a] PRP is obliged to pay their response costs."[13] Notwithstanding the fact that Norampac had paid the entire amount due to its prime contractor, the magistrate judge determined that "this is the rare instance of the private party entitled to recover under CERCLA." According to the magistrate judge, Norampac's CERCLA liability "could have [been] avoided ... by requiring the general contractor to bond its payments to its subcontractors and suppliers."[14] The district court adopted the report's findings and recommendations, found in favor of Price Trucking on the issue of Norampac's liability under CERCLA and scheduled a trial to assess damages.[15]

The potential impact of this decision was far-reaching. Subcontractors remediating sites across the country could rely on this precedent to seek resolution of payment disputes in federal court pursuant to a federal statutory scheme with different standards of proof, limitations periods and prejudgment interest mandates than applicable state laws governing contract disputes.

Moreover, certain arguments available to traditional CERCLA defendants would be foreclosed in a subcontractor-against-PRP action. For instance, a defendant PRP would not be wise to assert that the costs allegedly "incurred" by the subcontractor were not consistent with the National Oil and Hazardous Substances Pollution Contingency Plan,[16] as those statements could be deemed admissions in subsequent cost recovery or contribution actions by the PRP. What is more, if the district court's opinion controlled, then there would be no bar against Price Trucking seeking payment from another PRP at the Erie County site with which it had no contractual relationship at all.

Last month, a panel of the Second Circuit issued an opinion reversing the district court's grant of summary judgment.[17] The panel's decision first sought to clarify the question before the court: "[T]he issue in this case is not whether CERCLA requires Norampac to pay for the cleanup. The sole question is whether — under the circumstances presented here — CERCLA also requires Norampac to ensure that Price is made whole for its work."[18]

The court limited Norampac's potential liability, determining that the district court's reading of CERCLA would transform PRPs that discharge their liability into quasi-sureties: "Once these payments are made,

and the cleanup is complete, their liability under the statute is discharged. There is no need — and CERCLA is not designed — to hold the responsible party perpetually liable as a surety in any dispute relating to the cleanup between or among contractors, subcontractors, employees or suppliers."[19]

In other words, the panel's opinion strongly rebuffed Price Trucking's contention that it may litigate a contract dispute with a prime contractor under the guise of CERCLA. To wit, the court held that "neither [CERCLA's] terms nor [its] legislative history contain a comparable suggestion that the statute is meant to provide a substitution for the usual manner in which contractors and subcontractors are paid. The statute's drafters were doubtless aware that CERCLA responses would be carried out through public and private contracts. ... [I]t seems to us unlikely that the legislators would have displaced only implicitly the existing state law rules regarding contractors and subcontractors working for private parties."[20]

The Second Circuit declined to decide, however, whether prime remediation contractors may state a claim under CERCLA to recover costs of remediation incurred under contract from a PRP. Courts may seek to build on the Second Circuit's opinion when reaching this question in the future.

To be sure, prime contractors and subcontractors, like Price Trucking, are private parties that fall within the ambit of CERCLA's "any other person" language.[21] However, it could be argued that prime contractors and subcontractors, like Price Trucking, do not "incur[]" "necessary costs of response," as required under Section 107(a)(4)(B).

To state a successful claim, a plaintiff must demonstrate that "the release or threatened release has caused the plaintiff to incur response costs."[22] However, it could be argued that Price Trucking's expenditure of costs to haul and dispose of contaminated soil was incurred exclusively pursuant to its contract with AAA Environmental, and that it was Norampac that had "incurred" these costs and the obligation to pay them.

As noted above, the Second Circuit panel deemed this argument too sweeping: "This argument would have the practical effect of foreclosing contractors' recourse to CERCLA's cost-recovery provisions, insofar as a contractor's only involvement with the site is as a participant in the response effort."[23] Some courts agree that contractors may assert such claims,[24] while other courts have held in similar instances that "[a] contract [for remediation] that references [a] [c]onsent [d]ecree does not become enforceable via a CERCLA action merely by reference to the remediation efforts undertaken pursuant to that [c]onsent [d]ecree, particularly where [the p]laintiff attempts to sue a party to the [c]onsent [d]ecree that is not also a party to the contract."[25]

More fundamentally, it could be asserted that a PRP like Norampac is the only party that has "incurred" the necessary "costs of response" by contracting with AAA Environmental to perform this work. Norampac has an existing legal obligation — pursuant to its contract with AAA Environmental — to pay AAA for the costs of remediation work. These costs need not be paid in order to be "incurred." To the contrary, an existing legal obligation is sufficient.[26]

Thus, if a PRP that has incurred costs through contracting for remediation services with a prime

contractor fails to pay that contractor, the legal obligation remains and the prime contractor may pursue traditional state contract remedies in order to recover its unpaid bills. Such a resolution would avoid the conundrum of more than one party — in this case, Norampac, AAA Environmental and Price Trucking — each "incurring" the exact same costs, which would allow each of these parties to proceed under CERCLA to recover these costs against other PRPs. Although the Second Circuit panel was unwilling to reach beyond the facts of the Price Trucking case in order to resolve this question, other courts that have not yet confronted the issue may be receptive to such an argument in the face of claims by prime contractors.

The Second Circuit's opinion is significant for PRPs with subcontractors working to investigate or remediate a facility. It serves to limit the potentially wide-reaching liability recognized by the district court and removes claims traditionally adjudicated under state contract law from CERCLA's province.

—By David Fotouhi, Gibson Dunn & Crutcher LLP

David Fotouhi is an associate in Gibson Dunn & Crutcher's Washington, D.C., office, where he is a member of the firm's environmental litigation and mass tort practice area.

[1] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.

[2] Price Trucking Corp. v. Norampac Indus., No. 11-2917-cv, slip-op at 2-3 (2d Cir. Mar. 18, 2014)

[3] Id. at 3

[4] Id. at 4

[5] Id.

[6] Id. at 5

[7] Id.

[8] Id.

[9] Id.

[10] Price Trucking Corp. v. Norampac Indus., No. 09-cv-990, 2010 U.S. Dist. LEXIS 113216, at *24-25 (W.D.N.Y. June 17, 2010)

[11] Id. at *14

[12] Id. at *15-16. The manner in which the court rejected the applicability of these defenses reveals the difficulty of Price Trucking's CERCLA claim. The affirmative defenses in Section 107(b) are applicable insofar as "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by" one or more of the enumerated factors. 42 U.S.C. § 9607(b). There is no allegation that either AAA Environmental or Price Trucking played any part in the release at the Erie County site. The third party actor defense could play a role if either AAA Environmental or Price Trucking disposed of the waste from the Erie County site in such a manner that it led to a release at the disposal site, in which case the third party actor defense might shield Norampac from potential arranger liability at the disposal site. Id.; see also, e.g., Missouri v. Northrop Grumman Guidance & Elecs. Co., No. 10-04268-CV-S-DGK, 2011 U.S. Dist. LEXIS 58606, at *12-13 (W.D. Mo. July 1, 2011) (Consent Decree and Settlement) ("With regard to the Work undertaken pursuant to this Consent Decree, each contractor, subcontractor and consultant shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA")

[13] Price Trucking, 2010 U.S. Dist. LEXIS 113216, at *19-20

[14] Id. at *20

[15] Price Trucking Corp. v. Norampac Indus., No. 09-cv-990, 2011 U.S. Dist. LEXIS 18631, (W.D.N.Y. Feb. 25, 2011)

[16] NCP, 40 C.F.R. 300, et seq.

[17] Price Trucking, No. 11-2917-cv, slip-op at 2

[18] Id. at 13

[19] Id. at 19

[20] Id. at 22 (internal citations omitted)

[21] United States v. Atl. Research Corp., 551 U.S. 128, 136 (2007) ("[T]he plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs.")

[22] New York v. Lashins Arcade Co., 91 F.3d 353, 359 (2d Cir. 1996) (quoting Town of Munster v. Sherwin-Williams Co., 27 F.3d 1268, 1273 (7th Cir. 1994))

[23] Price Trucking, No. 11-2917-cv, slip-op at 23 n. 12

[24] Veolia Es Special Servs., Inc. v. Techsol Chem. Co., No. 3:07-0153, 2007 U.S. Dist. LEXIS 88127, at *21-22 (S.D. W. Va. Nov. 30, 2007) ("While [contractor] Veolia may not have gotten involved in the

cleanup effort had it not been party to a contract with Techsol, this fact alone should not preclude it from recouping the costs it expended while responding to the CTLO spill. . . . In short, the plaintiff has properly alleged and will plausibly be able to show that it incurred necessary response costs within the meaning of CERCLA § 107(a).")

[25] D.L. Braughler Co. v. Kentucky, 271 F. Supp. 2d 937, 941 (E.D. Ky. 2003)

[26] Trimble v. Asarco, Inc., 232 F.3d 946, 958 (8th Cir. 2000) overruled in part on other grounds by Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546 (2005); see also U.S.V.I. Dep't of Planning & Natural Res. v. St. Croix Renaissance Group, 527 Fed. App'x 212, 215 (3d Cir. 2013) (unpublished) ("[A] reasonable jury could conclude that [the plaintiff] was obligated to reimburse the advanced costs. . . . [Thus,] a jury may conclude that [the plaintiff] has incurred response costs . . . .")
