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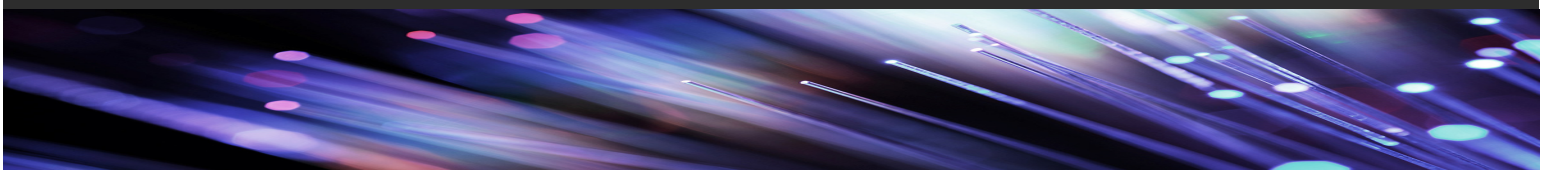
Credits for Superfund Settlement Payments, and What that Means for Settlement Strategy



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When several parties are responsible for a Superfund site, often some parties resolve their obligations to the government before other parties. How the government and the courts account for those settlements matters to the exposure of the remaining parties. Therefore, credits for those settlement payments (or work done in settlement) affects the tactics of settlement order. Conventional wisdom has it that the earliest settling parties and the party with the largest share necessary to completing the work receive the most favorable settlements. But, it is also possible that the party who settles last can do quite well.

By David G. Mandelbaum | May 7, 2019 | The Legal Intelligencer

As is familiar, parties enumerated in section 107(a)(1-4) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(1-4), are liable to respond to releases of hazardous substances. Those responsible parties typically bear joint and several liability. The United States may order them to implement the response under section 106(a), 42 U.S.C. § 9606(a), and the United States or a state may sue them to recover any costs that the government incurs, *id.*, § 9607(a)(1-4)(A). If the United States or a state sues to recover costs or the United States sues to enforce an order, the judgment against a responsible party would typically be for the entirety of the response and all of the response costs.

However, the parties do not each have to pay 100 percent of the total costs of the cleanup. The cleanup is only performed once and paid for once. The responsible parties will ultimately allocate the costs of that cleanup among themselves through a combination of three mechanisms: (1) an agreement among the responsible parties; (2) contribution litigation among the responsible parties; or (3) settlements with the

United States or a state that impose costs or obligations on some responsible parties and provide contribution protection against private actions for more.

The United States' preferred strategy, known as "enforcement first," is to induce responsible parties to do the work, rather than to have the government do the work and then to pursue its costs. A settlement for work poses special issues. In order to achieve the objective, the settling party or parties must agree to implement the entire subject of the settlement. That is, the settling parties have to agree to implement the entire response action.

A party settling with an agreement to do work, will only want to absorb that party's fair share of the total costs of addressing the site. If the work at a site can be divided up into separate actions, then settlements can address those actions one at a time. For example, when the responsible parties voluntarily implement the remedial action and feasibility study, they conventionally do so without any commitment to implement the remedial action once it is selected. Parties may agree to implement the remedial action at one operable unit, but not others. But at a site with multiple responsible parties, only by sheer serendipity would the costs of a separable portion of the remedy match the fair share of any party.

For that reason, the government faces a problem at every multi-party site. The government must contrive some way to get some group of parties to agree to agree to implement each big part of the response, no matter what it costs. Contractors will not work for dollars that do not contain 100 cents.

The availability of contribution assists in reaching that agreement. But contribution can be uncertain, and is often delayed and expensive. Therefore, even though the government typically represents to reviewing courts that a settling defendant has agreed to pay more than its fair share of the total costs, conventional wisdom has it that settling parties – particularly parties that agree to absorb large individual shares – get a discount. The discount will typically come in the form of a covenant not to sue for past or future government costs or other portions of a cleanup. The "fair share" represented to the court by the government may be calculated using methodologies that the court itself would not have adopted and that favor the settling party.

If that sort of "large-party discount" occurs, a party that settles later can find itself shouldering more than the share it would have otherwise obtained in litigation. It will face a governmental claim for what is left and, if it does not settle and obtain contribution protection from the government, a contribution claim from the prior settling party.

Sometimes, however, the government will enter into early smaller-share settlements. A settlement with the government, of course, confers contribution protection. An early cash-out settlement conventionally requires the settling party to pay a premium over its fair share. The premium accounts for uncertainty in the estimation of a party's fair share and in the cost of the work. So, if the small-share settling party has an expected allocated share of 1 percent and the cost of the remedy is estimated at $100 million, that party would likely cash out for far more than $1 million in order to be fair to all the non-settling parties in case the settling party's fair share were somewhat higher or the true costs of the cleanup turn out to be more.

Most of the time, the government underestimates the cost of cleanup. Therefore, even after the premium payment, early cash-out settling parties often receive a favorable deal. The government agrees to those deals for a variety of reasons. It may wish to simplify the matter by reducing the number of parties. It may face political pressure to get certain kinds of parties – municipalities, small businesses, or the like – out of the case.

More strategically, however, the government may want to generate a fund with which it can assist the large-share parties with the bulk of the work. By placing the funds in a Superfund Special Account, the

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government may then use those settlement payments to defray some costs not covered under an anticipated large-party settlement.

By policy, Superfund Special Accounts may not be used to assist parties in implementing a remedy *unless* the parties doing the work are proceeding under a consent decree. If they refuse to enter into the consent decree and are instead complying with a unilateral order, then the government will not spend the money on the parts of the remedy that they are implementing. And recall that the amount in the Superfund Special Account is intended to *exceed* the fair shares of the cash-out settling parties.

Which brings us to the last man standing. Section 113(f)(2) of CERCLA provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, *but it reduces the potential liability of the others by the amount of the settlement*.

42 U.S.C. § 9613(f)(2) (emphasis added). Arguably, that means that if the government receives a dollar in settlement, the liability of the non-settling parties has to be reduced by that dollar; the government cannot get a double recovery. When only one non-settling party remains, its liability cannot exceed the total costs of the site less the sum of the preceding settlements.

Settlements for work reduce the liability of non-settling parties by the cost of the work, whatever it is. Settlements for cash, however, only organically reduce the liability of non-settling parties if the government uses the cash to defray costs that would otherwise be recoverable by the non-settling parties. If that does not happen, then the non-settling party must defend against any claim by the government by claiming that there is money in the bank (or money improperly spent) for which the non-settling party ought to receive credit. It does not matter whether the use of the funds was endorsed in an earlier consent decree. There *must* be a dollar-for-dollar reduction.

Parties left unsettled at the end of a Superfund matter should take careful account of the prior settlements. They may not have reduced the potential liability adequately. They provide the opportunity for the last party standing to settle at a discount from its fair share.

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