

Second Circuit Revisits Limitations Period for CERCLA Cost Recovery

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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is frequently criticized for its imprecise drafting and the resultant difficulty in its implementation. A critical element of the CERCLA regime is a mechanism by which parties who have or will spend large sums of money remediating contamination at a site can attempt to recoup some or all of its costs from other parties alleged responsible for the contamination. Notwithstanding its reputation, the Superfund Amendments and Reauthorization Act of 1980 (SARA) clearly sets forth the statute of limitations periods for a party to commence such a lawsuit, with the applicable limitations period dependent upon the nature of the clean up.

CERCLA, as modified by SARA, provides for a limitations period of three years from the completion of a removal action and six years from the completion of a remedial action. 42 U.S.C. §9613(g)(2). The two types of responses, removal and remedial, are distinguishable based on the relative immediacy of the harm or potential harm the response is intended to address and the scope or comprehensiveness of the response. Removal actions are intended to address threats to human health and the environment that require immediate response and are generally targeted at mitigating the effects of contamination. Remediations, on the other hand, are intended to provide a permanent remedy, often following months if not years of diligence, planning, and regulatory oversight, targeted to address the source of the contamination.

As CERCLA caselaw has developed, it has become generally understood that a site would undergo a single remedial action as part of its Superfund cleanup, and a party would have six years from its commencement of on-site construction of the remedial response to bring a cost recovery action against other potentially responsible parties. Last month, however, the U.S. Court of Appeals for the Second Circuit took a more nuanced approach to evaluating the limitations period in the event of a remedial action in *MPM Silicones, v. Union Carbide*, — F.3d — (2d Cir. 2020) (*MPM v. UCC*).

Factual Background

Because CERCLA caselaw is generally highly fact-dependent, it is important to understand the historical context of the use and waste disposal practices of the site and steps taken to clean up the site. The Union Carbide Corporation (UCC) owned and operated a chemical products manufacturing facility in Friendly, West Virginia, referred to as the Sistersville site, from 1955 until 1993. UCC's manufacturing processes until 1972 used hundreds of thousands of pounds of toxic polychlorinated biphenyls ("PCBs") which resulted in large amounts of hazardous PCB-contaminated waste. UCC burned some of the waste and disposed of the rest in neutralization tanks or lime pits. When such pits were filled, UCC used the PCB-laden sludge to backfill other areas across the site, some of which are presently unknown.

In 1979, seven years after UCC stopped using PCBs in its manufacturing process, a soil sample analysis revealed the presence of PCBs. A UCC employee charged with investigating UCC's past waste disposal practices learned about UCC's disposal in lime pits and the use of sludge for backfill. He prepared a **memorandum** in 1980 summarizing his findings, including a statement that it is reasonable to conclude that the site contains approximately 250,000 pounds of buried waste contaminated with PCBs.

Shortly thereafter in 1981 following the enactment of the Resource Conservation and Recovery Act, UCC submitted an application to the Environmental Protection Agency ("EPA") for a permit to treat, store, or destroy hazardous waste at its facility. Although the permit application required the disclosure of any hazardous substances that had been stored, treated, or disposed of at the site, UCC did not disclose its prior use or disposal of PCBs. In 1988, EPA required UCC to submit a workplan to remediate other non-PCB hazardous waste at the site, and as such, none of the corrective actions taken pursuant thereto in the early 1990s were designed to address the buried PCBs.

In 1993, an affiliate of the plaintiff purchased the site from UCC. The purchaser conducted its own environmental due diligence. When asked about the presence of PCB in soil samples, UCC employees explained that the PCBs had leaked from electrical equipment previously used on the site but that had been removed. It was not until 2008 when the plaintiff discovered the backfill that was found to be contaminated with PCBs.

MPM Silicones Challenges the Single-Remediation Principle

Plaintiff MPM Silicones, LLC (MPM) filed suit in 2011 against UCC seeking reimbursement for its past costs incurred in investigating and cleaning up the PCBs and a declaratory judgment as to UCC's liability for future remediation costs under CERCLA. The U.S. District Court for the Northern District of New York concluded that UCC's cleanup in the early 1990s constituted a remediation since it was included in a "final remedy" for addressing contamination at the site.

The district court held that MPM's past and future decontamination efforts must be part of the same remediation as UCC's efforts in the 1990s because, as it interpreted the Second Circuit's opinion in *New York State Electric and Gas v. FirstEnergy*, 766 F.3d 212, 235 (2d Cir. 2014) (NYSEG), "there can only be one remedial action at any given site." As such, the district court held that the six-year limitations period began to run when UCC commenced on-site construction in the early 1990s.

Second Circuit's Re-evaluation of the Single-Remediation Principle

On appeal, the Second Circuit vacated the district court's finding that MPM's remedial actions were part of UCC's earlier remedial actions, explaining, "we do not understand NYSEG to mean that, for purposes of determining the timeliness of a cost recovery action, all remediation activity as a single site regardless of circumstances is deemed to be part of a single remediation, so that the six year limitations period necessarily begins to run at the start of the first remedial activity."

In NYSEG, the Second Circuit held that each phase of a three-phase remedial measure to take place over the course of several years comprised a single action. It did not matter in that case that the plaintiff had initiated the action within six years of the commencement of the third phase, since the Second Circuit rejected the plaintiff's argument that the third phase was a "separate and distinct remediation" from the remedial work done nine years earlier. While the single-remediation principle was applicable to the "conventional circumstances" to which it was applied in NYSEG, the Second Circuit reasoned in *MPM v. UCC* that it "cannot have been intended to apply in very different circumstances, in which application of that proposition would make little sense."

Where, as in NYSEG, the plaintiff takes sequential remedial steps addressing contamination identified at the outset of a remediation, the court explained its prior holding means "simply and logically that the plaintiff cannot escape the six-year limitations period and endlessly postpone the bringing of suit by characterizing subsequent phases of the initial project as new remediation." NYSEG, and the precedent cases on which the court relied in articulating its single-remediation principle, all involved the "conventional circumstance" in which the plaintiff had a general understanding of the contamination problems at the outset, and subsequent steps were either directed toward the same, original problem or to "different aspects" of the originally known problem.

Determining Whether the Single-Remediation Principle Applies

Despite the administrative ease of implementing the single-remediation principle, the Second Circuit acknowledged there would be circumstances in which application of the principle would be illogical, unfair or inconsistent with CERCLA's statutory objectives. For example, the court noted the obvious instance in which a site operator creates a new contamination, subsequent to the completion of the original remediation. Similarly, the court suggested it would be inappropriate to apply the principle where a previously unsuspected contamination is discovered that is unrelated to or distant from a previously remediated contamination (if, for example, the site is large and the earlier remediation addressed contamination on one portion of the site).

Further, analogizing to the *MPM v. UCC* case, the court found it would be inappropriate to apply the single-remediation principle where "an inadequate remediation" was implemented pursuant to a regulatory approval "procured by inadequate disclosure." So long as the polluted retained possession of the site for six years after the "misguided project began" it would escape liability to a subsequent owner.

The Second Circuit provided some guidance for determining whether a later remedial activity should be characterized as a continuation of a previous remediation or as a separate and distinct remediation (such as the scope of the initial remediate as characterized in communications between the original remediators and the EPA). It can therefore be reasonably anticipated that parties whose cost-recovery claims may have previously been time barred will attempt to demonstrate that subsequent remedial actions are in fact separate and distinct from any such earlier remediation, and it is worth watching to see if other circuits adopt the Second Circuit's reasoning.

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