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Your Settlement Should Not Come Back to Haunt You

In a January 3, 2017, opinion the United States Court of Appeals for the Tenth Circuit reversed the United States District Court for the District of Utah's grant of summary judgment in favor of Noranda Mining Inc., holding that Asarco LLC was not precluded from asserting its Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 113(f) contribution claim against Noranda Mining. *See Asarco LLC v. Noranda Mining Inc.* (10th Cir. 2017) 2017 WL 24609. The district court found that Asarco was estopped by certain statements it had made to a bankruptcy court from bringing its claim, and further that Asarco could not as a matter of law prove that it had paid more than its fair share of cleanup costs in settling with the government.

In 2005, Asarco filed for Chapter 11 bankruptcy. In 2009, the bankruptcy court approved a comprehensive agreement settling environmental claims for 52 sites located in 19 states founding its approval in the reasonableness of the settlement and its consistency with CERCLA. Asarco filed a declaration in support of the settlement in which it provided remediation costs, settlement numbers and information about each of the individual sites. The site at issue in the CERCLA action against Noranda Mining settled for \$7.4 million. Asarco's declaration stated that, "there may be other PRPs associated with this site, and the settlement amount reflects only ASARCO's share of the response costs." The bankruptcy court found that the settlement amounts were "substantively fair because they are roughly correlated with [Asarco's] comparable fault, taking into account the litigation risks and additional factors." The settlement agreement specifically reserved Asarco's claims for contribution against other PRPs.

In the contribution claim filed by Asarco four years later, Noranda Mining moved for summary judgment on two grounds: (1) Asarco was judicially estopped from seeking contribution because it represented to the bankruptcy court that it was paying only its fair share of liability; and (2) Asarco's claim failed as a matter of law because Asarco could not establish it paid more than its fair share of cleanup costs.

In reversing the district court on the judicial estoppel ruling the Court of Appeals discounted Noranda Mining's argument that Asarco's representation to the bankruptcy court that the settlement was fair was clearly inconsistent with its position taken in its contribution claim. The appeals court accepted Asarco's contention that this statement was poorly phrased--yet it indicated Asarco's belief that that figure represented Asarco's potential joint and several liability for the site. "CERCLA allows a party to settle for an inexact amount and later seek contribution from other PRPs for any amounts it overpaid." The Court of Appeals also concluded that allowing Asarco to proceed with its contribution claim would not create the impression that either the bankruptcy court or district court were duped—in significant part because the

bankruptcy court had approved Asarco's preservation of contribution claims. Noranda Mining also failed in its argument that allowing Asarco to pursue its contribution claim would give Asarco an unfair advantage. Rather the Court of Appeals concluded "that it would be unfair to Asarco to prevent it from pursuing a claim it expressly reserved in bankruptcy" and for which it was relying on CERCLA's contribution framework to recoup. The Court of Appeals also reversed the district court's holding that Asarco could not establish that it had paid more than its fair share of costs for the site or that Noranda would be liable for the difference. The Court of Appeals remanded the action to the district court for further proceedings.

CERCLA encourages settlement and the courts like to uphold settlements. This decision shows how important it is provide clear, precise and comprehensive information to the court. Asarco's declaration was robust and detailed such to demonstrate that its settlement with the government was well within its comparative fault for the site. Had Asarco been clearer in its wording of its declaration, however, it may have avoided some of Noranda Mining's argument and saved some of its litigation costs. Keep your language clear and your settlements will not come back to haunt you.

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