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ASARCO LLC v. Atlantic Richfield Co.—Ninth Circuit reverses judgment requiring contribution for future, speculative CERCLA response costs but affirms allocation of 25% liability to defendant responsible party

In 1984, the Environmental Protection Agency added a lead smelting site in East Helena, Montana to the CERCLA National Priorities List. ASARCO LLC (Asarco) then owned and operated the facility that had existed since 1888 and would not be shut down until 2001. Following 1990 and 1998 settlements and consent decrees under CERCLA, RCRA and CWA, EPA, the Montana Department of Environmental Quality and Asarco entered into a 2009 consent decree in the latter's bankruptcy proceeding under which the company tendered $111,403,743 divided among two accounts and separate payments to the Department of the Interior for natural resource restoration and oversight costs and to Montana for natural resource damages. The Montana Environmental Trust Group was designated as the custodial trustee and lead agency responsible for selecting, approving and authorizing all work and expenditures at the site. According to the most recent accounting, METG has expended less than half of the approximately $105.98 million in the trust funds, producing a balance of approximately $50 million. Defendant Atlantic Richfield Co., from which Asarco sought contribution, and METG estimated the total cleanup cost would be approximately $61.4 million. Asarco's expert opined that that estimate "vastly" understated the likely costs.

Asarco's contribution action against Atlantic Richfield, after an appeal on a statute-of-limitations issue (*ASARCO LLC v. Atlantic Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017)), went to a bench trial. *ASARCO LLC v. Atlantic Richfield Co.*, 353 F. Supp. 3d 916 (D. Mont. 2018). In its lengthy decision, the district court assessed contribution against Atlantic Richfield in the amount $27,850,936—or 25% of the $111.403,743 amount paid by Asarco under the bankruptcy consent decree.

Atlantic Richfield appealed, and the Ninth Circuit reversed in part and affirmed in part. *ASARCO LLC v. Atlantic Richfield Co.*, No. 18-35934, 2020 WL 5509748 (9th Cir. Sept. 14, 2020). Reviewing under the clear error standard, the panel first held that "the district court erred when it counted the full settlement amount—including about $50 million of funds that had not been, and might never be, spent on the Site cleanup—as response costs subject to contribution at this stage of the Site cleanup." Focusing on the term "incurred" in 42 U.S.C. § 9607(a)(4)(B), it agreed "[o]n this factual record" that Atlantic Richfield—which "contend[ed] that those funds not yet spent or earmarked for specific, imminent work cannot qualify as costs 'incurred'"—had "the better of the argument":

> We have held that the full dollar value of a settlement agreement to discharge CERCLA liability is not automatically subject to contribution. ... In many cases, the full settlement amount may equate with the necessary response costs incurred—but that is not inherently so. Thus, funding a settlement obligation, on its own, does not

> automatically render the entire sum compensable in a contribution action, even if that payment is irrevocable. A party seeking contribution must still show that the settlement amount represents "necessary response costs incurred consistent with the NCP." ... Although the meaning of "incur" is sufficiently broad that it does not require that an expense already be paid, it is also not so broad that it encompasses future expenses that are mere potentialities.

The panel thus adhered to Ninth Circuit precedent that "historically has refused to award future response costs" and stated that "a declaratory judgment, whereby liability for future response costs would be allocated at a set percentage across responsible parties, is the proper mechanism for recouping future response costs in the CERCLA regime." Under this approach, "a party in Asarco's position ultimately can recover the corresponding response costs from its fellow responsible parties. But until further information is known about the nature and costs of that 'something more,' those future costs are not eligible for contribution." The panel stressed that its holding was "a narrow one" given the "cash-out bankruptcy proceeding" and other unique factors, but Asarco simply "failed to adequately support its asserted response costs." It remanded "for further consideration of what necessary response costs were actually incurred within the meaning of CERCLA."

The panel held, however, that the trial court did not abuse its discretion in applying the six "Gore factors" in determining Atlantic Richfield's response-cost allocation. *See, e.g., Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 507-08 (7th Cir. 1992). It further held that the "the district court did not clearly err in its factual findings supporting its allocation decision" under those allocation factors. So, to illustrate, the court found with respect to the first Gore factor that "the record generally 'revealed enough information to understand the history of operations ... at the Site,' coupled with the aid of expert testimony, such that it could make a rough assessment of the parties' respective contributions." As to the second through fourth factors, it "made detailed findings about the historical operations of Asarco and Atlantic Richfield, including the manners in which each used and released arsenic at the Site." With respect to the fifth factor, which "assesses the degree of care exercised by the parties with respect to the hazardous waste concerned[,]" the court "reviewed the precautions taken by both Asarco and Atlantic Richfield to protect against environmental contamination, as well as the failures of certain preventive measures taken by each party—such as leakages in the protective infrastructure and the careless handling of contaminated wash-down water" and credited "Asarco's adoption of relatively intensive preventive measures toward the later years of its operation." The panel upheld under the sixth factor a $1 million uncertainty premium against Atlantic Richfield in view of its "repeatedly evad[ing] responsibility for any environmental contamination at the Site[,]" its "flagrantly" misleading representations to EPA concerning Site releases, and its "ongoing misrepresentations throughout the course of the litigation." The court, finally, considered the testimony of the parties' experts about the allocation issue, and, as the panel explained in the decision's penultimate paragraph:

> Ultimately, the court used the Gore factors—as well as the general equitable principle that the cooperating, settling party should receive the benefit of the doubt—to support its decision to adopt an allocation that erred on the side of over-compensation rather than under-compensation for the contamination emitted by Atlantic Richfield. Because these equitable factors weighed in Asarco's favor, and the court found [the Asarco expert's] "Strategy III" to be the most compelling of the proffered allocation strategies, it decided to stand by a twenty-five percent allocation of responsibility to Atlantic

Richfield. Because the district court assessed the record evidence and underlying equities with sufficient rigor and care, we affirm.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/14/18-35934.pdf