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Western District of Pennsylvania Limits Party's Ability to Recover Response Costs

Toxic Tort and Environmental Law Update

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The U.S. District Court for the Western District of Pennsylvania determined that a potentially responsible party conducting a site cleanup pursuant to both a state court order and an administrative settlement with a state agency that "incurs" remediation costs under CERCLA § 107(a) may not recover the response costs from a site owner or operator. The decision in *Trinity Industries, Inc. v. Chicago Bridge and Iron Co*., Civil Action No. 08-1709 (W.D. Pa., April 4, 2012), resolved an issue of first impression in the Third Circuit.

For more than 70 years, Chicago Bridge and Iron (CBI) had owned the site at issue and used it for steel manufacturing, including painting and sandblasting. Following an intermediate owner, Trinity purchased the property and, for more than a decade, manufactured railcars there. After the Pennsylvania Office of the Attorney General filed criminal and civil charges against Trinity for violations of environmental laws stemming from the railcar manufacturing, Trinity entered into a consent order and agreement with the Pennsylvania Department of Environmental Protection and was ordered by the Court of Common Pleas of Mercer County to remediate the site in accordance with its terms. The consent order included findings that a release and threatened release of hazardous substances had occurred and that Trinity was a responsible person under Pennsylvania's Hazardous Sites Cleanup Act (HSCA). According to the cleanup work plan compiled by an environmental consultant, one of the contaminants of concern was lead, which the consultant attributed to paint drying and sand blasting (both activities performed by CBI when it owned the property), among other causes.

Trinity brought claims requesting injunctive and monetary relief for the remediation of an industrial site under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation Recovery Act (RCRA), and the HSCA. In one of its claims, Trinity sought recovery against CBI for the cleanup costs under Section 107(a) of CERCLA, which allows a potentially responsible party to recover (from a previous owner or operator of a site at which hazardous substances were disposed) "necessary costs of response incurred" in remediating the site.

At issue was whether Trinity had actually "incurred" the remediation costs as anticipated by the statute. The court noted that while cost recovery claims under Section 107(a) had previously only been available to "innocent parties," more recent decisions had made it clear that potentially responsible parties who had voluntarily undertaken remediation could also be eligible. Citing the Supreme Court in *U.S. v. Atlantic Research Corp*., 551 U.S. 128 (2007), and the Third Circuit Court of Appeals in *Agere Systems, Inc. v. Advanced Envtl. Tech. Corp*., 602 F.3d 204 (3d Cir. 2010), the court found that in order to incur cleanup costs under Section 107(a), a party must have voluntarily accepted the obligation to pay. Because Trinity was remediating and paying cleanup costs in response to the Pennsylvania court's order, the court held that Section 107(a) did not permit a cost recovery action.

Trinity will likely be cited in the future when courts are faced with deciding whether a potentially responsible party may recover remediation costs from another under Section107(a). Companies that proactively undertake remediation may be successful, but those solely complying with a court order or a consent order may not be eligible to recover costs from another, at least in the Third Circuit.

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