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Ninth Circuit Ruling May Aid Challenges To CERCLA Settlements

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In *Arizona v. Raytheon*, the Ninth Circuit considered a district court's obligation to scrutinize the terms of a proposed consent decree under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S. C. § 9601-75 (CERCLA). __ F.3d __, 2014 WL 3765569, No. 12-15691 (9th Cir. Aug. 1, 2014). The Ninth Circuit held that the district court erred in entering the parties' proposed consent decrees because the court failed to independently scrutinize the terms of the underlying settlement agreements, and thus granted undue deference to the Arizona Department of Environmental Quality (ADEQ). *Id.* at 6. The Ninth Circuit remanded the case to the district court with instructions to "independently scrutinize" the terms of the settlement agreements by comparing "the proportion of total projected costs to be paid by the [settling parties] with the proportion of liability attributable to them." *Id.* (citing *United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 747 (9th Cir. 1995) (quotation marks and emphasis omitted)).

1. The District Court Approved Entry of the Consent Decrees

Arizona v. Raytheon involved liability under CERCLA and its state law equivalent for cleanup costs resulting from soil and groundwater contamination at the Broadway-Patano Landfill Site in Tucson, Arizona. *Arizona v. Raytheon,* at 6-7. After a substantial ADEQ investigation, the State filed a petition in federal court seeking to preserve key testimony. Various potentially responsible parties (PRPs) approached the State to negotiate settlement agreements. The proposed agreements required the settling

parties to pay damages to the State in exchange for a full release of liability under CERCLA and its state law counterpart. Under CERCLA § 113(f)(2), a party who has resolved its CERCLA liability through a judicially approved consent decree "shall not be liable [to other responsible parties] for claims for contribution regarding matters addressed in the settlement." 42. U.S.C. § 9613(f)(2). In accord with § 113(f)(2), the proposed agreements released the settling parties from any responsibility to pay contribution to non-settling parties in the future. *Arizona v. Raytheon,* at 7. The State developed the settlement amounts by reviewing over 800 summaries of witness interviews and over 100,000 pages of documents. Joint Answering Br. of Pl.-Appellee State of Arizona and Defs.-Appellees at 12, *Arizona v. Raytheon*, No. 12-15691 (9th Cir. Sept. 19, 2012).

To obtain judicial approval of the proposed agreements under § 9613(f)(2), the State brought suit against the settling parties. *Arizona v. Raytheon,* at 7. Then, the State filed public notice of intent to enter consent decrees with the defendants. After a comment period, the State moved to enter the consent decrees. *Id.* at 8. According to the State, the total estimated cost of remediation was $75 million and the liability of the settling parties was *de minimis*, constituting 0.01% to 0.2% of the total costs. Several non-settling parties moved to intervene and the district court granted their motions over the State's objection. The court denied the intervenors' request for declaratory relief because it was not properly pleaded and approved the consent decrees. Intervenors then appealed the district court decision.

2. The Ninth Circuit Held that the District Court Erred in Entering the Consent Decrees

The Ninth Circuit concluded that while the district court recognized its obligation to independently scrutinize the terms of the settlements, the court failed to engage in substantive analysis of the settlements' terms. *Arizona v. Raytheon,* at 9. The Ninth Circuit was critical of the district court's 12-page opinion observing that "the court declined to even discuss the parties' individual or aggregate settlement amounts, and merely deferred to the ADEQ's judgment that 'the public interest is best served through the entry of th[e] agreement[s].'" *Id.*

Relying on *Montrose,* the Ninth Circuit explained that to approve a consent decree, a court must determine that the agreement is procedurally and substantively "fair, reasonable, and consistent with CERCLA's objectives." *Id.* at 14. The court must find that the agreement is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each

[potentially responsible party] has done." *Id.* (quotations and citations omitted). To fulfill its "obligation to independently scrutinize the terms of [the agreement]," the court must "gauge the adequacy of the settlement amounts to be paid by the settling [parties]" by engaging in comparative analysis. *Id.* at 14-15 (citations omitted).

The Ninth Circuit observed that the district court's opinion lacked an analysis comparing each party's estimated liability with its settlement amount. *Id.* at 16. Also missing was an explanation of why the settlements are "fair, reasonable, and consistent with CERCLA's objectives." *Id.* (citation omitted). The district court's entire numerical analysis was in one footnote: "The State's analysis indicates that based upon a preliminary estimate of remedial action costs of $75 Million, the range of liability for each settling party extended from 0.01% of the estimated total cleanup costs to 0.2%, or as expressed in dollar figures, from $10,000.00 to $150,750.00." *Id.* The State did not provide any evidence supporting the liability estimate, information from which the court could confirm that the settling parties are in fact *de minimus* contributors, or the parties' individual or aggregate settlement amounts. The district court based its ruling on the State's general representations of the factual bases (files, interviews, documents) for its conclusions and general descriptions of methods (software, past costs, estimates) to reach remediation costs. *Id.* at 16. In this way, the district court failed to fulfil its duty to independently assess the adequacy of the agreements and to provide a reasoned explanation for its decision.

The Ninth Circuit also held that,

> "where state agencies have environmental expertise they are entitled to 'some deference' with regard to questions concerning their area of expertise. But '[a] state agency's *interpretation of federal statutes* is not entitled to the deference afforded [to] a federal agency's interpretation of . . . statutes' that it is charged with enforcing."

Id. at 20 (citations omitted). Thus, if a district court finds that a state agency has expertise concerning the cleanup of a site, then it may afford "some deference" to the agency's judgment. But such deference will not extend to that state agency's interpretation of CERCLA and other federal statutes. *Id.*

3. The Dissent Concluded that the District Court did not Abuse its Discretion in Approving the Consent Decrees

The dissent concluded that the district court did not abuse its discretion in approving the consent decrees and that it improperly focused on the degree to which a court

should defer to a state's decision to settle with PRPs. *Arizona v. Raytheon,* at 22, 40. According to the dissent, the majority "expands the level of scrutiny required for state-sponsored CERCLA settlements" and makes it more difficult for states to play their proper role in remediating hazardous sites under CERCLA. *Id.* at 22-23. The rationale for deferring to EPA, which the dissent considers applicable to state environmental agencies, is a) CERCLA's policy of encouraging settlements; b) recognition that settlements are constructed by a party acting in the public interest; c) respect for the EPA's expertise; and d) respect for an arms-length agreement. *Id.* at 26-27, 34. Relying on First, Third, and Eighth Circuit precedent, the dissent supports extending significant deference to state environmental agencies. *Id.* at 37. In the dissent's view, "while the degree of deference may vary depending on the circumstances of a particular case, state-sponsored settlements are entitled to deference when a court assesses the settlement's fairness, reasonableness and benefit to the public." *Id.* at 38.

4. The Ninth Circuit Expanded the Required Level of Judicial Scrutiny for CERCLA Consent Decrees

Arizona v. Raytheon may aid non-settling parties in objecting to proposed CERCLA consent decrees when the state relies on general descriptions of methods and formulas to support settlement amounts. In *Arizona v. Raytheon,* the following bases were insufficient to support settlement: an expert's explanation that ADEQ relied on EPA guidelines that allocate responsibility by PRP category, an expert's breakdown of the total $75 million cost estimate, and the explanation that ADEQ multiplied each PRP's share by the cost estimate to arrive at individualized settlement offers. *Id.* at 23-24. In the Ninth Circuit, a state should avoid general descriptions of information supporting settlements. Instead, settling parties and the state should carefully document and explain the procedural and substantive bases for proposed settlements. Specifying the development of each PRP's specific allocation or settlement figure will help the court fulfill its obligation to independently scrutinize the terms of an agreement and approve a consent decree.

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