

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WESTINGHOUSE ELECTRIC COMPANY,)

Plaintiff,)

v.)

UNITED STATES OF AMERICA, UNITED)
STATES DEPARTMENT OF ENERGY, and)
NUCLEAR REGULATORY COMMISSION,)

Defendants.)

CIVIL ACTION NO. 00-CV-895
Judge Gary L. Lancaster

**REPLY MEMORANDUM IN SUPPORT OF
UNITED STATES' MOTION FOR SUMMARY JUDGMENT**

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division

STEVEN E. RUSAK, Senior Attorney
KENT E. HANSON
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
Tel: (202) 514-9275

OF COUNSEL:

JAMES CAREY, Chief Counsel
Pittsburgh Naval Reactors Office
United States Department of Energy
P.O. Box 109
West Mifflin, PA 15122-0109
Tel: (412) 476-7202

CHARLES MULLINS, Senior Attorney
Office of the General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555
Tel: (301) 415-1606

HARRY LITMAN
United States Attorney
Western District of Pennsylvania

JESSICA LIEBER SMOLAR
PA Bar # 65406
Assistant United States Attorney
Western District of Pennsylvania
633 U.S. Post Office and Court House
Pittsburgh, Pennsylvania 15219
Tel: (412) 644-3500

DATED: May 18, 2001

template 00001

ERIPDS0001

INTRODUCTION

Plaintiff Westinghouse Electric Company (“WEC”) asserts two claims under CERCLA: a claim for recovery of response costs under section 107 (Count III) and a claim for contribution under section 113 (Count IV). The United States of America, the United States Department of Energy (“DOE”), and the United States Nuclear Regulatory Commission (“NRC”) (collectively “Federal Defendants”) have moved for summary judgment dismissing both claims. WEC concedes that Count III should be dismissed. Br. in Opp’n at 13-14.

The remaining question is whether Count IV is barred by the general release of claims that is contained in the “GEN-14” contract.¹ The salient language of the release provides that “the Contractor, hereby remises, releases, and discharges, the Government, its officers, agents, and employees, of and from all claims whatsoever arising from or under the said contract from its inception on December 10, 1948 through July 31, 1983,” subject to certain exceptions not invoked by WEC. Exh. 32. WEC concedes that there are no disputed issues of material fact that preclude entry of summary judgment dismissing Count IV. See Br. in Opp’n at 2. Instead, WEC argues only that, as a matter of law, WEC’s CERCLA claim accrued outside the time period covered by the release, id. at 5-9, and does not arise “from or under” the contract, id. at 10-13. These arguments are wrong for the reasons discussed below.

¹ WEC, while not a party to the contract, alleges that it succeeds to the interests of Westinghouse Electric Corporation (“Westinghouse”) under the contract. Complaint ¶¶ 2, 78-89. These allegations are assumed to be true for the purposes of this Motion for Summary Judgment. See Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 138 (3d Cir. 2001).

ARGUMENT

I. WEC's CERCLA Claim Accrued Within the Time Period Covered by the Release.

WEC's CERCLA claim arose on or before July 31, 1983 and is, therefore, barred by the general release of claims. WEC inappropriately relies on state law to argue that its CERCLA claim for contribution arose at some later date. Section 113(f) of CERCLA dictates that contribution claims "shall be governed by Federal law." 42 U.S.C. § 113(f). Indeed, CERCLA preempts common law contribution claims. Matter of Reading Co., 115 F.3d 1111, 1117 (3d Cir. 1997). In addition, CERCLA contribution claims are, in important ways, unlike state law contribution claims.

CERCLA provides two kinds of claims to recover costs incurred in responding to releases or threatened releases of hazardous substances: innocent parties may recover response costs pursuant to section 107, while potentially responsible parties ("PRPs") may pursue a contribution claim pursuant to section 113(f). The elements of liability under each claim are identical. The primary difference is that a judgment under section 107 is joint and several while a judgment under section 113 is limited to each PRP's allocable share of liability. The Third Circuit Court of Appeals concisely set forth the elements of each claim in New Jersey Turnpike Authority v. PPG Industries, Inc., 197 F.3d 96 (3rd Cir. 1999):

In order to prove CERCLA liability under section 107, a plaintiff must prove: 1) that the defendant is a PRP; 2) that hazardous substances were disposed of at a "facility"; 3) that there has been a "release" or "threatened" release of hazardous substances from the facility into the environment; and 4) that the release or threatened release has required or will require the plaintiff to incur "response costs." A section 107 cost recovery action may only be pursued by an innocent party that has undertaken hazardous waste cleanup, and section 107 imposes strict liability and joint and several liability on PRPs for costs associated with cleanup and remediation.

Section 113 of SARA provides for recovery by way of contribution by one PRP from another PRP. A section 113 contribution action allows a PRP to recover a portion of its expenditures when that PRP believes that it has assumed a share of the costs that is greater than its equitable share under the circumstances. A section 113 plaintiff must demonstrate that the defendants are liable or potentially liable under 107; *the elements for both claims are essentially the same.*

197 F.3d at 103-04 (citations omitted; emphasis added).

Here, the essential facts alleged to satisfy the elements of WEC's CERCLA contribution claim occurred before July 31, 1983.² First, WEC alleges that the Federal defendants are PRPs because they either operated the Blairsville facility or arranged for disposal of hazardous substances, *i.e.*, radioactive materials, at the facility between 1956 and 1961. Complaint ¶¶ 5, 15, 29-31, 95, 96. Second, all alleged disposal of radioactive materials occurred between 1956 and 1961. *Id.* ¶¶ 29-31, 62. Third, releases or threatened releases of radioactive materials necessitating decontamination occurred before 1961. *Id.* ¶¶ 62- 68. Some residual radioactive contamination was known to have remained after decontamination. *Id.* ¶ 69.

WEC contends that the fourth element of CERCLA liability was not satisfied until sometime before December 1993,³ arguing that "WEC's claim for contribution did not arise until monies were *actually* spent remediating the Blairsville Facility." Br. in Opp'n at 6 (emphasis added). This argument ignores the rule in this Circuit "that the release or threatened release has

² WEC's allegations are assumed to be true for the purposes of this motion for summary judgment.

³ The Complaint is ambiguous in its allegations about when WEC first incurred response costs. WEC conducted an investigation for radiation "[s]everal years ago." Complaint ¶ 72. It conducted "additional investigations" at an unspecified time." *Id.* ¶ 76. The allegation that WEC cleaned up one sump in December 1993, *id.* ¶ 74, does not establish when WEC first incurred response costs, and WEC presents no evidence showing that response costs were not incurred before July 31, 1983.

required or *will require* the plaintiff to incur 'response costs.'" New Jersey Turnpike Auth., 197 F.3d at 103-04 (emphasis added); see, e.g., Aluminum Co. of Am. v. Beazer East, Inc., 124 F.3d 551, 560 (3d Cir. 1997) ("A party in the position of [a PRP] can bring a declaratory judgment action in which it unilaterally asks the court to adjudicate only the liability issues relevant to a particular claim"). The facts alleged to establish the first three elements of liability also establish the fourth element. It was apparent by July 31, 1983 that PRPs at the Blairsville facility would be required to incur response costs to remediate the remaining radioactive releases or threatened releases, regardless of the quantity of radioactive material. CERCLA "does not, on its face, impose any quantitative requirement or concentration level on the definition of 'hazardous substances.' Rather, the substance under consideration must simply fall within one of the designated categories." United States v. Alcan Aluminum Corp., 964 F.2d 252, 260 (3d Cir. 1992). WEC could not unilaterally delay when a contribution claim would arise "from or under" the GEN-14 contract by deciding to address the residual radioactive contamination after July 31, 1983.

WEC cites Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997), to support its contention that a section 113 contribution claim does not arise until response costs have been incurred. Sun, however, addressed only when the section 113(g) period of limitations is triggered. Section 113(g)(2) provides that a contribution claim such as WEC's must be commenced within specified times "after completion of the removal action" or "after initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2). By definition, a party will have incurred some response costs before triggering the statute of limitations. The statute of limitations is not at issue here. The question is when a PRP might first bring a

contribution claim, not when such a claim becomes barred. Moreover, the binding precedent of New Jersey Turnpike preempts any language in Sun that might suggest that a contribution claim does not arise until a PRP has incurred response costs.⁴

As WEC states, the Court in Reading, *supra*, held that it would be unfair for a December 23, 1980 bankruptcy order to discharge Conrail's contribution claim because that "would penalize Conrail for failing to register a claim which would not be judicially recognized for two years." 115 F.3d at 1123 (citing City of Philadelphia v. Stepan Chem. Co., 544 F. Supp 1135, 1141-43 (E.D. Pa. 1982)). Reading is inapplicable to the present case because it involved equitable considerations in bankruptcy rather than legal rights under a contract. More important, the general release of claims in this case was executed on September 16, 1983, nearly three years after the discharge date in Reading and the passage of CERCLA, and after Stepan Chemical recognized private rights of action under CERCLA. By September 1983, PRPs at contaminated sites were actively litigating contribution claims. See, e.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983); United States v. Ward, 22 Env't Rep. Cas. (BNA) 1235 (E.D.N.C. 1984).

WEC also incorrectly contends that CERCLA contribution claims did not exist until the passage of SARA in 1986. "As originally enacted, CERCLA lacked any express mechanism by which one party could recover from another for paying more than its *pro rata* share of the costs of a clean-up. Courts filled this gap by interpreting § 107(a)(4)(B) as providing a private right of

⁴ In addition, the Sun court noted that its approach to contribution cases differed from the approach of the Third Circuit. 124 F.3d at 1193 ("we believe the Third Circuit's concern reflects a misconception of the relationship between §§ 107 and 113").

action by which a party, who had expended resources on cleanup efforts, could obtain contribution from others.” Reading, 115 F.3d at 1118 (citations omitted). “Thus, the language of § 113(f), permitting contribution, replaced the judicially created right to contribution under § 107(a)(4)(B).” Id. at 1119. Consequently, WEC could have prosecuted a contribution claim against the Federal Defendants prior to the enactment of SARA.

II. The Release of “All Claims Whatsoever Arising From or Under” the Contract Encompasses WEC’s Contribution Claim.

Contract GEN-14 provides for the release of “all claims whatsoever arising from or under the said contract,” subject to only specifically identified exceptions. WEC ignores the word “from” in order to argue that its contribution claim is not barred by the release.

WEC mistakenly relies on the state law of Pennsylvania in its efforts to escape the terms of the general release of claims.⁵ “It is well settled that contracts to which the government is a party . . . are normally governed by federal law, not by the law of the state where they are made or performed.” Prudential Ins. Co. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986) (citing United States v. County of Allegheny, 322 U.S. 174, 183 (1944) and other cases).

It has long been recognized that releases of claims contained in government contracts “are

⁵ The Federal Defendants made the same mistake in the Memorandum in Support of their Motion for Summary Judgment, pp. 16-17. Although choice of law principles generally require that courts look to the law of a particular state concerning the construction or interpretation of contracts, those principles apply to contracts between private parties, not contracts to which the federal government is a party. WEC’s contribution claims arose “from or under” the contract regardless of whether state or federal rules of contract interpretation are followed. Pennsylvania law does not allow parties to selectively ignore contract terms. E.g., Capek v. Devito, 767 A.2d 1047, 1050 (Pa. 2001) (“In construing a contract, we must . . . give effect to all of the provisions therein”).

not to be shorn of their efficiency by any narrow, technical, and close construction.” United States v. Wm. Cramp & Sons Ship & Engine Bldg. Co., 206 U.S. 118, 128 (1907). “As a general rule, the execution of an unrestricted release, pursuant to a government contract, bars the later assertion of claims against the government with respect to that contract.” Dairyland Power Coop. v. United States, 27 Fed. Cl. 805, 811(1993), aff’d, 16 F.3d 1197 (Fed. Cir. 1994) (citations omitted). A contractor wishing to preserve a right to assert a claim bears the burden to modify the release before signing it. Id. “If parties intend to leave some things open and unsettled, their intent to do so should be made manifest.” Wm. Cramp, 206 U.S. at 128. ““Exceptions to releases of claims are strictly construed against government contractors.”” Dairyland Power, 27 Fed. Cl. at 811 (quoting Gresham, Smith & Partners v. United States, 24 Cl. Ct. 796, 801 (1991)).

WEC argues that the release is not broad enough to release claims for reimbursement of its cleanup costs by focusing exclusively on the words “arising from or under” the contract. This narrow focus violates basic precepts of contract construction. In interpreting the terms of a contract, a court must examine the entire agreement and interpret it as a whole. E.g., Williams v. Metzler, 132 F.3d 937, 947 (3d Cir. 1997). By ignoring this principle, WEC offers a crabbed interpretation of the release. The full breadth of the release is revealed by examining all of its terms, including the use of the language “all claims whatsoever,” Memo. in Support at 18-22, and the fact that WEC’s claims for reimbursement of its cleanup costs are not included in the specifically identified exceptions from the release, id. at 22-26.

Even WEC’s interpretation of “arising from or under” the contract is unsupportably constricted. WEC reads this phrase as including only causes of action for breach of contract. Br.

in Opp'n at 11. This argument gives the words "from" and "under" identical meaning, effectively reading one of those words out of the contract, again violating a cardinal precept of contract construction: "[A] document should be read to give effect to all its provisions and to render them consistent with each other." Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995).

Ignoring altogether the relevant case law concerning release and assumption of liability,⁶ WEC relies on cases interpreting forum selection clauses. These cases do not support WEC's argument. The word "from" is "used as a function word to indicate a starting point in measuring or reckoning or in a statement of limits" or "to indicate the source, cause, agent or basis." Merriam-Webster's Collegiate Dictionary 468 (10th ed. 1998). "From" does not connote the total measure, outer limits, or final results. As used in the GEN-14 release of claims, "arising from . . . the said contract" indicates that the claims released need have only a causal connection to the contract. The Court of Appeals gave the same construction to a forum selection clause that applied to "any dispute arising under or out of or in relation to" the underlying agreement, and held that plaintiff's tort claims "arose in relation to" the agreement. John Wyeth & Brother Ltd. v. Cigna Int'l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997). Under that rationale, WEC's CERCLA contribution claims are causally connected to the GEN-14 contract and are barred by the release of claims.

Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., 759 A.2d 926 (Pa. Super. 2000) concerned a forum selection clause that was narrowly limited to requiring that the "Agreement and each

⁶ E.g., Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1461 (9th Cir. 1986); Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985).

contract made between the parties . . . will in all respects be interpreted in accordance with the laws of England and the parties hereby submit themselves to the exclusive jurisdiction of the English Courts.” Id. at 931. The court held that tort claims did not fall under this clause, and noted that John Wyeth reached a different result “because of the broad language in the forum selection clause.” Id. Because the language of the GEN-14 release of claims is comparable to that at issue in John Wyeth, Morgan Trailer is completely inapplicable to this case.

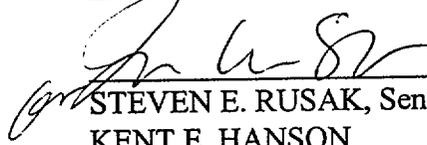
Finally, WEC’s Complaint establishes that its CERCLA contribution claim “arises from or under” the contract. WEC seeks to recover the costs incurred in cleaning up radioactive contamination that allegedly resulted from work performed under GEN-14. WEC now asserts claims under three legal theories, which WEC pleads as alternative grounds for seeking reimbursement of the same cleanup costs. Count I (“Contractual Reimbursement”) and Count II (“Contractual Indemnification”) sound in contract. Count IV, the CERCLA contribution claim, does not sound in contract although it seeks identical relief and is predicated on the same events as Counts I and II. Merely asserting a non-contract theory as an alternative claim for relief does not transform the lawsuit from one “arising from or under” the contract to one that does not.

CONCLUSION

For the foregoing reasons, the Court should grant the United States’ motion for summary judgment and dismiss Counts III and IV of WEC’s Complaint with prejudice.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division



STEVEN E. RUSAK, Senior Attorney
KENT E. HANSON
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
Tel: (202) 514-9275

HARRY LITMAN
United States Attorney
Western District of Pennsylvania

JESSICA LIEBER SMOLAR, PA Bar # 65406
Assistant United States Attorney
Western District of Pennsylvania
633 U.S. Post Office and Court House
Pittsburgh, Pennsylvania 15219
Tel: (412) 644-3500

OF COUNSEL:

JAMES CAREY, Chief Counsel
Pittsburgh Naval Reactors Office
United States Department of Energy
P.O. Box 109
West Mifflin, PA 15122-0109
Tel: (412) 476-7202

CHARLES MULLINS, Senior Attorney
Office of the General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555
Tel: (301) 415-1606

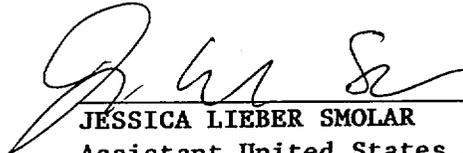
DATE: May 18, 2001

CERTIFICATE OF SERVICE

I, Steven E. Rusak, do hereby certify that the foregoing "Reply Memorandum in Support of United States' Motion for Summary Judgment" was served by placing a true and correct copy in the United States mail, postage prepaid, and addressed to the following:

Steven Baicker-McKee, Esq.
Scott A. Wright, Esq.
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 8th Floor
Pittsburgh, PA 15222

on this 18th day of May, 2001.



JESSICA LIEBER SMOLAR
Assistant United States Attorney