

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 11
Issue 2 2003-2004

Article 7

2004

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Recommended Citation

C. Travis Hargrove, *Settling Environmental Cleanup Cases with Multiple PRP's under CERCLA: If One Party Jumps off the Bridge in Favor of Settlement, You Should Follow. In re. Tutu Water Wells CERCLA Litigation*, 11 Mo. Env'tl. L. & Pol'y Rev. 197 (2004)

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CASENOTE

SETTLING ENVIRONMENTAL CLEANUP CASES WITH MULTIPLE PRP'S UNDER CERCLA: IF ONE PARTY JUMPS OFF THE BRIDGE IN FAVOR OF SETTLEMENT, YOU SHOULD FOLLOW

*In re: Tutu Water Wells CERCLA Litigation*¹

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (herein referred to as "CERCLA") is relatively young law and is still very much being molded into its intended effect. The instant case, *In re: Tutu Water Wells CERCLA Litigation*, involves the judicial approval of a consent decree, thereby relieving the participating parties from future liability regarding the contamination in question. The issue in the case arises from the possible liability to parties that choose not to participate in a consent decree and therefore face liability that might exceed the percentage of fault for which those parties are actually responsible. The Third Circuit held that in such a situation, the parties that choose not to participate in the consent decree may indeed be held liable for more than that party's actual allocation of fault.²

II. FACTS AND HOLDING

The Tutu aquifer,³ located in the Virgin Islands, became contaminated with various poisons from "automobile service stations, an automobile dealer, a shopping plaza, a dry cleaner, and a former textile plant."⁴ Government officials brought suit against several companies and individuals pursuant to both CERCLA and territorial law.⁵ The Third Circuit reviewed different aspects of the case on three occasions.⁶ In 1995, the court dismissed claims against the corporations that had since dissolved by the time that litigation began. In 1997, the court reversed sanctions against defendant Esso.⁷ In 2000, the court denied a petition for writ of mandamus.⁸

The "Settling Parties"⁹ filed a joint motion with the district court to resolve two suits¹⁰ arising out of the Tutu aquifer contamination with a consent decree.¹¹ In support of this motion, the settling parties filed a two-volume index, which contained the consent decree, along with other various Environmental Protection Agency and experts' reports.¹² A damage assessment was performed by Industrial Economics, "one of the two

¹ 326 F.3d 201 (3d Cir. 2003) (hereinafter *Tutu CERCLA Litigation*).

² *Id.* at 210.

³ "An underground layer of porous rock, etc. containing water." *Webster's New World Dictionary* (Victoria Neufeldt ed., 1st ed., Pocket Books 1995).

⁴ *In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 373 (3d Cir. 1997).

⁵ *Tutu CERCLA Litigation*, 326 F.3d at 205.

⁶ *Id.*

⁷ *Id.* Esso is a portion of Esso Standard Oil Company (Puerto Rico), Esso Virgin Islands, Inc., and Esso Standard Oil S.A., Ltd.

⁸ *Id.*

⁹ The settling parties referred to in the petition are Esso Standard Oil and Texaco. *Id.* at 206.

¹⁰ The first suit was brought against all of the contaminators of the Tutu aquifer under CERCLA and territorial statutory and common law. The second suit was brought by two of the defendants, Esso and Texaco, who sought to recover contribution under CERCLA for remediation costs incurred under prior Environmental Protection Agency administrative orders. *Id.* at 205.

¹¹ *Id.*

¹² *Id.*

nationally known firms that performs these assessments.”¹³ The work of Industrial Economics was peer-reviewed by Raymond J. Kopp, who is a senior fellow at Resources for the Future, and Dr. Kevin J. Boyle, a professor of environmental economics.¹⁴

In March of 1999, the parties convened at a settlement conference where the damage assessment information was disseminated to defendants.¹⁵ A spreadsheet was also introduced that allocated percentages of fault to each defendant.¹⁶ These allocations were based on several relevant factors, including the volume and toxicity of each party’s contamination, each party’s financial resources, and the degree of cooperation each party demonstrated.¹⁷

Andres Gal and the Estate of Paul Lazare (hereinafter the “Laga Parties”),¹⁸ former operators of a textile plant, elected not to participate in any settlement discussion that occurred after this initial March 1999 conference.¹⁹ The Settling Parties did continue to participate with good faith and at arm’s length in negotiations between March and September of 1999.²⁰ These negotiations resulted in the Settling Parties agreeing in principle to a consent decree.²¹

On February 14, 2001, the district court heard the Settling Parties’ joint motion to enforce the consent decree.²² During this hearing, the court permitted all of the parties to submit evidence and make arguments.²³ The Settling Parties and the Laga Parties submitted to the district court their proposed findings of fact and conclusions of law.²⁴ On October 15, 2001, the district court approved the consent decree.²⁵

The Laga Parties appealed, arguing that the district court’s approval of the consent decree was not fair, reasonable, or in the public interest.²⁶ The Laga Parties also contended that the district court’s approval of the consent decree without first holding a full evidentiary hearing violated the Parties’ Constitutional right of due process.²⁷

As to the first claim, the Court of Appeals for the Third Circuit held that the Laga Parties failed to meet their “heavy burden” of demonstrating “a meaningful error in judgement by the District Court.”²⁸ As to the second claim on appeal, the Court found no violation of the Laga Parties due process rights because the “Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns.”²⁹

¹³ *Id.*

¹⁴ *Id.* at 205-06.

¹⁵ *Id.* at 206.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The non-settling parties are hereinafter denoted as the “Laga Parties.” “Laga” comes from the first two letters of two of the non-settling parties’ last names, the Estate of Paul Lazare and Andreas Gal. *Id.* at 205, n. 1.

¹⁹ *Id.* at 206.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* “The District Court made 170 findings of fact and 91 conclusions of law” and most were adopted nearly verbatim from the Settling Parties proposed findings of fact and conclusions of law. *Id.* at 209-10.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 209.

²⁸ *Id.* at 208 (internal quotations omitted).

²⁹ *Id.* at 209.

III. LEGAL BACKGROUND

A. CERCLA and Consent Decree's

The Comprehensive Environmental Response, Compensation and Liability Act, more commonly known as "CERCLA" and also known as the federal "Superfund" legislation,³⁰ imposes substantial liability upon responsible parties for the costs of cleaning up sites that have been contaminated by hazardous substances.³¹ In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA).³² Several of the enacted provisions of SARA were intended to persuade potentially responsible parties (PRPs) to enter into settlements with the government that would remove their liability from the contaminated site.³³ These provisions protect settling parties against contribution claims from non-settling PRPs.³⁴ When a party settles, it assumes responsibility to clean up the contaminated site and/or make cash payments.³⁵ The logic behind these provisions is that settling parties would be less likely to settle if they receive no or limited protection against contribution liability from non-settling parties.³⁶ Thus the provisions allow PRPs to "buy peace" against claims of other PRPs.³⁷

Section 107(a) of CERCLA lists four types of entities that can be responsible to the government for the cost of cleaning up a contaminated site.³⁸ Case law has determined that PRPs are jointly and severally liable for

³⁰ Pub. L. No. 96-510, 94 Stat. 2767 (codified as 42 U.S.C. §§ 9601-75).

³¹ John M. Hyson, *CERCLA Settlements, Contribution Protection and Fairness to Non-Settling Responsible Parties*, 10 Vill. Envtl. L.J. 277, 277 (1999).

³² Pub. L. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. 9601-75 (2000)).

³³ Hyson, *supra* n. 31, at 277.

³⁴ *Id.*

³⁵ *Id.* at 278.

³⁶ *Id.* at 277-78. See generally Lewis A. Hornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. Rev. 427 (1994) (providing a thorough and sophisticated discussion of the inducements to settlement under a liability scheme involving joint and several liability, such as CERCLA).

³⁷ Hyson, *supra* n. 31, at 278.

³⁸ *Id.* at 279. See 42 U.S.C. § 9607(a), which states:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release; and

the costs of cleanup associated with the contamination.³⁹ The government may therefore attempt to recoup its cost of cleanup from any PRP or group of PRPs that it desires.⁴⁰ When Congress passed SARA in 1986, it “ratified the judicial decisions that had held that such a target PRP . . . had a right to assert a contribution claim against other PRPs.”⁴¹ When resolving such a contribution claim, the court will allocate cleanup cost “based on the equitable factors that it deems appropriate.”⁴² Detailed settlement provisions,⁴³ which were created at the same time as SARA, provided that “upon approval of a settlement, a settlor shall not be liable for claims for contribution regarding matters addressed in the settlement.”⁴⁴ Congress also stated that the amount of the settlement reduced the potential liability of any non-settling PRPs by the amount of the settlement.⁴⁵ The government reasoned that these provisions would encourage PRPs to settle because of the possibility that any one PRP could face liability for the whole cleanup cost (due to joint and several liability) and because of the cost of litigation in defending against contribution claims from settling parties.⁴⁶ So, if a PRP does not settle, it runs the risk of being liable for the total cost of the cleanup less the amount of any settlement.⁴⁷ “Thus, the settlement and contribution protection provisions of CERCLA provide the government with a mechanism for rewarding settlors (with covenants not to sue and contribution protection) and punishing non-settlors (with the threat of disproportionate liability).”⁴⁸

Since the adoption of SARA, courts have had to determine the scope of the contribution protection.⁴⁹ There is nothing in the statutory language of “matters addressed in the settlement” dealing with the fairness of the underlying settlement regarding contribution protection.⁵⁰ Thus, if a settling PRP is asserting contribution protection against a non-settling PRP, the court should presume that the court that approved the settlement determined it to be substantively fair.⁵¹

(D) the costs of any health assessment or health effects study carried out under Section 9604(i) of this title. *Id.*

³⁹ Hyson, *supra* n. 31, at 280.

⁴⁰ *Id.* After cleaning up a contaminated site, the United States may bring an action in federal court to recover the response costs it has incurred against one or more parties who are liable under Section 107(a). *Id.* See also *U.S. v. Ottati & Goss*, 900 F.2d 429, 433 (1st Cir. 1990) (describing the government’s enforcement options under CERCLA).

⁴¹ Hyson, *supra* n. 31, at 280-81. See e.g. *U.S. v. Conservation Chem. Co.*, 619 F. Supp. 162, 222-30 (W.D. Mo. 1985); *U.S. v. Chem-Dyne*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (both rejecting defendant’s argument that Congress did not intend joint and several liability in CERCLA actions). Congress ratified these judicial decisions by creating an express right of contribution in Section 113(f)(1) of CERCLA, which states:

Any person may seek contribution from any other person who is liable or potentially liable under Section 9607(a) of this title, during or following any civil action under Section 9606 of this title or under Section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under Section 9606 of this title or Section 9607 of this title.

Hyson, *supra* n. 31, at 281, n. 20. See also 42 U.S.C. § 9613(f)(1).

⁴² Hyson, *supra* n. 31, at 281.

⁴³ See CERCLA § 122, 42 U.S.C. § 9622.

⁴⁴ Hyson, *supra* n. 31, at 281 (internal quotations omitted).

⁴⁵ *Id.* at 282. See CERCLA § 122(h)(4), 42 U.S.C. § 9622(h)(4).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 286.

⁵⁰ *Id.* at 289 (quoting CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2)).

⁵¹ *Id.* See CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B).

B. Legislative History

The first contribution protection provision was included in House Bill 2817.⁵² The originally proposed bill contained the following provision:

When a party has resolved its liability to the United States or a State in a judicially approved good-faith settlement, such person shall not be liable for claims for contribution or indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other parties unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the settlement.⁵³

As originally proposed, this bill “limited contribution protection to a party that has resolved its liability in a judicially approved settlement.”⁵⁴ The actually enacted provision, CERCLA section 113(f)(2), replaces the word “party” with “person.”⁵⁵ The House Bill also limited the protection to settlements that were achieved in good faith.⁵⁶ However, the House Judiciary Committee deleted this requirement because it reasoned that “judicial examination and approval of the settlement itself is adequate to protect against improper or ‘bad faith’ settlements.”⁵⁷ In its finality, this provision provided protection to judicially approved settlements and one of two types of administrative settlements (de minimis or cost recovery settlements).⁵⁸ To assure that the judicially approved settlement was not a violation of due process, the reviewing court was required to find that the settlement was fair, reasonable, and consistent with the public interest of CERCLA before approving the settlement.⁵⁹ As to the administrative settlements, the provision would deny protection “where the party seeking contribution could show that the settlement ‘was achieved through fraud, misrepresentation, or other misconduct by one of the parties to the settlement, or mutual mistake of fact.’”⁶⁰

In 1985, House Bill 3852 (HR 3852, codified as House Bill 2005 (HR2005)) was presented as a compromised version of HR 2817 and contained the following provision:

‘A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.’ This paragraph does not apply to a settlement which was achieved

⁵² H.R. 2817, 99th Cong. (1985). H.R. 2005 was passed in lieu of H.R. 2817 and S. 51 after amending H.R. 2005 to contain much of the text of H.R. 2817. H.R. Conf. Rep. 99-253(I), 1986 U.S.C.C.A.N. 2835, 2835.

⁵³ Arnold & Porter Legislative History: Superfund Amendments and Reauthorization Act of 1986, H.R. 2817, at 450 (1986).

⁵⁴ Hyson, *supra* n. 31, at 295 (internal quotations omitted).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 296 (quoting H.R. Rep. 99-253, pt. 3, at 19 (Oct. 31, 1985) (reprinted in 1986 U.S.C.C.A.N. 3038, 3042)).

⁵⁸ *Id.* at 297. A de minimis settlement is an expedited settlement and is allowed when a settlement involves a minor portion of the clean-up cost. 42 U.S.C. § 9622(g)(1). A cost recovery settlement allows certain heads of departments or agencies to settle claims as long as the claims have not been referred to the Department of Justice. 42 U.S.C. § 9622(h).

⁵⁹ Hyson, *supra* n. 31, at 297-98.

⁶⁰ *Id.* at 298 (quoting H.R. Rpt. 99-253, pt. 3, at 32-33).

through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact.⁶¹

The basic affect of this bill was to broaden the provision to provide contribution protection to all administrative settlements, not just de minimis or cost recovery settlements.⁶²

During this same time period, the Senate had passed its own bill, Senate Bill 51 (S. 51).⁶³ To reconcile the differences between the two bills, Congress appointed a conference committee.⁶⁴ The conference committee added a new provision, section 122(m), and deleted the last sentence from three other provisions.⁶⁵ The new section was entitled "Applicability of General Principles of Law," and stated:

In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.⁶⁶

These changes were significant because they deleted the portion of the provision that allowed a court to disregard a consent decree settlement that was reached through fraud, misrepresentation, misconduct or mutual mistake of fact.⁶⁷ With the deletion of those last sentences, and the addition of the new section, "it appeared that a PRP asserting a contribution claim against a settling PRP could avoid a contribution protection defense only if, under 'general principles of law,' the settlement might be set aside or modified."⁶⁸ It is acknowledged in Senate Bill 51 that a settling party would still be liable for matters not addressed in the consent decree, such as, for example, if a party settled regarding surface cleanup, but later subsurface cleanup occurred.⁶⁹ The settling party would still be liable to other PRPs for the cost of the subsurface cleanup.⁷⁰

C. Due Process Rights

Another possible issue that a non-settling party may bring up in a contribution claim is a violation of its due process rights by not receiving a "trial type evidentiary hearing before a person may be deprived of

⁶¹ Arnold & Porter Legislative History: Superfund Amendments and Reauthorization Act of 1986, H.R. 3852, at 57 (1986).

⁶² Hyson, *supra* n. 31, at 298.

⁶³ *Id.* at 299.

⁶⁴ *Id.*

⁶⁵ *Id.* at 300. The three provisions that had the last sentence deleted were Sections 113(f)(2), 122(g)(5), and 122(h)(5) of H.R. 2005. *Id.*

⁶⁶ *Id.* See 42 U.S.C. § 9622(m).

⁶⁷ Hyson, *supra* n. 31, at 301.

⁶⁸ *Id.* (See H.R. Rep. No. 99-962, at 80. "Section 122(m) does not specify what the procedure for setting aside or modifying the settlement would be. See H.R. Rep. No. 99-962, at 80, 225. If the settlement involved is a judicially approved settlement, the proceeding would presumably be a motion, under Federal Rule of Civil Procedure 60(b), to set aside or modify the consent decree. See Fed. R. Civ. P. 60(b)(5)(6). See also *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (discussing general applicability of Federal Rule of Civil Procedure 60(b) to issue of setting aside or modifying settlement). 'General principles of law' regarding the setting aside or modification of settlements would govern the motion. H.R. Rep. No. 99-962, at 80, 255." Hyson, *supra* n. 31, at n. 105.)

⁶⁹ *Id.* at 303.

⁷⁰ *Id.* at 303-04.

property.”⁷¹ In *Matthews v. Eldridge*,⁷² the Supreme Court held that due process requires that a party be given an opportunity to be “heard ‘at a meaningful time and in a meaningful manner.’”⁷³ The Court then set forth the standard that is currently used to determine if a hearing is meaningful.⁷⁴ The standard consisted of three factors that must be considered: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and third, “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁷⁵ Additionally, a court with such an issue before it must realize that “providing a full evidentiary hearing will undercut the congressional desire to encourage settlements by affording settl[ing] parties protection against the burden of litigating contribution claims by other PRPs.”⁷⁶

D. Matter Addressed

In 1997, the EPA issued a memorandum in an attempt to clarify another issue that had arisen in regards to contribution claims, namely the matters addressed in the settlements.⁷⁷ This memorandum concluded that the issue of what matters were addressed could easily be resolved by “defining [the] matters addressed in every settlement.”⁷⁸ The memorandum also agreed with the majority opinion in *Akzo*,⁷⁹ “that the scope of contribution protection afforded by the statutory provision is dependent in large measure on the expectation of the parties to the settlement, and that these expectations are most clearly expressed in a separate and explicit ‘matters addressed’ section.”⁸⁰

All three CERCLA contribution protection provisions contain the same text, stating that “a person who has resolved its liability to the United States . . . shall not be liable for claims for contribution regarding matters addressed in the settlement.”⁸¹ Two questions arise: when is a non-settling party’s claim a contribution claim, and how is it determined if a non-settling party’s claim is a matter that was addressed in the settlement?⁸²

As previously stated, CERCLA protects settling parties against claims of contribution from non-settling parties.⁸³ Non-settling parties attempted to circumvent this by classifying their claims against settling parties as something other than contribution claims.⁸⁴ This issue is one that has troubled the courts a great deal,⁸⁵

⁷¹ *Id.* at 342.

⁷² 424 U.S. 319 (1975).

⁷³ *Matthews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁷⁴ Hyson, *supra* n. 31, at 343.

⁷⁵ *Matthews*, 424 U.S. at 334-35.

⁷⁶ Hyson, *supra* n. 31, at 343.

⁷⁷ *Id.* at 350.

⁷⁸ *Id.*

⁷⁹ *Akzo Coatings, Inc., v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994).

⁸⁰ Hyson, *supra* n. 31, at 351. *See Akzo*, 30 F.3d at 767.

⁸¹ Hyson, *supra* n. 31, at 291 (alteration in original) (quoting CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4); 42 U.S.C. §§ 9613 (f)(2), 9622(g)(5), 9622(h)(4)). Hyson notes that the statutory language employed in each of the first sections of the three provisions is identical, except that Sections 113(f)(2) and 122(h)(4) extend contribution protection to a “person” who has entered into a settlement, but Section 122(g)(5) extends contribution protection to a “party” that has entered into a settlement. Hyson, *supra* n. 31, at 291 n. 52.

⁸² *Id.* at 291.

⁸³ *Id.*

⁸⁴ *Id.* In *Akzo*, the non-settling parties brought a claim under Section 107(a) of CERCLA for directly incurred response costs—not a claim for contribution. *Id.* *See also Akzo*, 30 F.3d at 764.

⁸⁵ *Id.* at 291.

however, the current trend is that, “a claim by one PRP against another PRP is necessarily for contribution.”⁸⁶ This was also the result reached in *Akzo*,⁸⁷ as the court rejected the plaintiff’s contention that the award prayed for was direct cost recovery instead of a contribution claim.⁸⁸

However, the contribution protection provisions of CERCLA do not protect settling parties against all contribution claims, only those that do not arise out of matters addressed in a settlement.⁸⁹ The issue that faces the courts is that the statute does not specify how a court should determine what matters were addressed in a consent decree settlement.⁹⁰ Until recently, consent decrees generally did not contain express contribution protection provision, and this absence left courts in the dark as to what sections of the consent decree to evaluate in an effort to determine the “matters addressed.”⁹¹ However, as aforementioned, this issue has been addressed by requiring settlements to have a “matters addressed” section to clarify the ambiguities.

IV. INSTANT DECISION

The United States Court of Appeals for the Third Circuit reviewed the district court’s approval of a consent decree under the amended CERCLA.⁹² The consent decree had essentially resolved more than a decade of litigation involving the Tutu Water Wells aquifer in the United State Virgin Islands.⁹³ The Third Circuit evaluated two issues on appeal that were brought into question by the Laga Parties.⁹⁴ The parties alleged that the consent decree was arbitrary and unreasonable in its damage assessments and that the district court erred in not conducting a full evidentiary hearing prior to its holding.⁹⁵

As to the first issue, the Laga Parties “attempted to undercut the evidence submitted by the Settling Parties.”⁹⁶ They reasoned that the record did not contain enough information for the district court to make a rational determination of comparative fault and settlement value.⁹⁷ More specifically, they questioned the damage assessment prepared by Industrial Economics reasoning that the “estimation of non-use damages was inconclusive.”⁹⁸ The Laga Parties also contended that “the determination process did not provide them with an opportunity to contest the assessment.”⁹⁹

The Third Circuit held that the Laga Parties did not meet “their heavy burden to demonstrate a meaningful error in judgement by the District Court.”¹⁰⁰ The court stated that the Laga Parties elected to offer no expert witnesses or reports or any factual or documentary support for their arguments before the district

⁸⁶ *Id.* at 292 (quoting *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1987)).

⁸⁷ *Id.* See *Azko*, 30 F.3d at 764-65.

⁸⁸ Hyson, *supra* n. 31, at 292.

⁸⁹ *Id.* at 293.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Tutu CERCLA Litigation*, 326 F.3d at 205.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 208.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* “The Laga Parties also contended [that] the [d]istrict [c]ourt should have disapproved the settlement because of a pending motion, offered by some of the Settling Parties and joined by the Laga Parties, alleging a conflict of interest by the trustee’s counsel, John K. Dema. But the [d]istrict [c]ourt’s decision not to disapprove the settlement on these grounds was sound[] [because] [t]he Settling Parties all consented to Dema’s participation in the negotiations and the settlement was independently reviewed.” *Id.* at 208, n. 4.

¹⁰⁰ *Id.* at 208 (internal quotations omitted).

court.¹⁰¹ Furthermore, while the Laga Parties attempted to offer evidence regarding deposition testimony on appeal, they failed to raise it before the district court.¹⁰² As to the issue of the assessment report by Industrial Economics, the court found that Industrial Economics was one of only two companies that prepare such assessments, that two independent experts reviewed and approved the final report, and that the parties conducted the settlement at arm's length and adopted the assessment's findings.¹⁰³ Furthermore, the Laga Parties obtained the assessment report at the same time as the Settling Parties and therefore had the same opportunity to contest the fault that was allocated to them.¹⁰⁴ The court also stated that "[t]he Laga Parties were not obligated to participate in the settlement negotiations."¹⁰⁵ The Third Circuit quoted its holdings in *Occidental Chemical*¹⁰⁶ and *SEPTA*¹⁰⁷ stating that, "non-settling defendants may bear disproportionate liability for their acts."¹⁰⁸ As such, the Third Circuit found that just because liability is increased due to the consent decree, it did not render the consent decree unfair.¹⁰⁹ The court also found that the district court's holding was correct in that the "settlement comports with the public interest... [in] provid[ing] prompt resolution of [] environmental claims and accountability."¹¹⁰ Therefore, the Third Circuit held that there was no abuse of discretion by the district court as to the reasonableness of the consent decree.¹¹¹

B. Deprivation of Right to Due Process

The second contention of the Laga Parties was that the failure of the district court to hold a full evidentiary hearing was a violation of their Constitutional due process rights.¹¹² The Third Circuit stated that "[t]he Constitution does not require the [court to conduct a full and formal evidentiary hearing to satisfy due process concerns."¹¹³ Further, it stated that the decision to hold a full evidentiary hearing is at the full discretion of the district court.¹¹⁴ The Third Circuit reasoned that here, the Settling Parties took part in settlement negotiations at arms length that "produced an extensive documentary record to support their joint motion [that] included exhibits, expert reports, and deposition testimony" regarding investigation into the contaminated Tutu site.¹¹⁵ In contrast, the Laga Parties presented no documents, testimony, or analysis, but instead tried to argue that the Settling Parties evidence was "insufficient and replete with errors."¹¹⁶

¹⁰¹ *Id.* at 207-08.

¹⁰² *Id.* at 208.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *U.S. v. Occidental Chem. Corp.*, 200 F.3d 143, 150 n. 8 (3d Cir. 1999).

¹⁰⁷ *U.S. v. SEPTA*, 235 F.3d 817 (3d Cir. 2000) "In most instances, settlement requires compromise. Thus, it makes sense for the government . . . to give a [potentially responsible party] a discount on its maximum potential liability as an incentive to settle. Indeed, the statutory scheme contemplates that those who are slow to settle ought to bear the risk of paying more . . ." *Id.* at 824-25 (quoting *U.S. v. DiBiase*, 45 F.3d 541, 546 (1st Cir. 1995)).

¹⁰⁸ *Tutu CERCLA Litigation*, 326 F.3d at 208.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 209 (quoting in part *Comm'r of the DPNR*, Civ. No. 1998-206, at 44).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (See *BP Amoco Oil*, 277 F.3d at 1017-1018 ("It is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree. . . . Due process does not always require an evidentiary hearing, even where a significant interest is at stake.").

¹¹⁴ *Tutu CERCLA Litigation*, 326 F.3d at 209.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The Laga parties also argued that the district court erred by adopting nearly verbatim the factual findings and conclusions of law developed and proposed by the Settling Parties to the district court.¹¹⁷ The Third Circuit stated that even so, “the proffered findings and conclusions [are] irrelevant as long as those findings and conclusions were fair, reasonable, and consistent with the public interest.”¹¹⁸ The court found no evidence here that the findings and conclusions were not fair, reasonable, or not in the public interest because “the Laga Parties failed to submit deposition testimony, experts reports, or analysis to support their criticisms of the Settling Parties’ evidence, and were afforded ample opportunity to be heard prior to” the approval of the consent decree.¹¹⁹ For the above mentioned reasons, the Third Circuit found that the district court approved a fair and reasonable consent decree that was in the realm of public interest, and as such there was no abuse of discretion.¹²⁰

V. COMMENT

In *In re: Tutu Water Wells CERCLA Litigation*, the Third Circuit held that it was not a violation of the non-settling parties rights of due process for the district court to approve the consent decree without a full evidentiary hearing,¹²¹ and that the approved consent decree was not unfair.¹²² The court first tackled the issue of why it was not unfair for the Laga Parties’ liability to increase as a result of the consent decree being approved by the district court. There are two “layers” on appeal that the appellants face a heavy burden in overcoming.¹²³ The first layer consists of the “deference . . . owe[d] to the EPA’s expertise” during negotiations, and the policy of this law in encouraging settlements.¹²⁴ The second layer is simply the deference that the appellate court owes to the district court’s decision.¹²⁵

The Third Circuit made the correct decision in the instant case in that the Laga Parties’ did not overcome this heavy burden by showing an abuse of discretion by the district court. The Laga Parties’ participated in the settlement negotiations at first, but then consciously elected to stop participating.¹²⁶ There is plenty of case law in existence, such as *Occidental Chemical*¹²⁷ and *SEPTA*,¹²⁸ that makes it clear that non-settling parties may bear a disproportionate amount of liability.¹²⁹ Additionally, the Laga Parties received the same fault assessment report as the Settling Parties, yet they never contested the amount of fault allotted to them.¹³⁰ It would seem that the Laga Parties had all the information they needed to make a judgement on whether they should participate in the settlement or not. They knew the amount of fault that had been allotted to them, and furthermore, they knew—or at least should have known through their attorney—what the possible repercussions would be for not taking part in the settlement decree.

Furthermore, common sense in this case would dictate participation in the consent decree. The fact that the larger, more advanced corporate parties were participating should have been a sign to smaller, less

¹¹⁷ *Id.* at 209-10.

¹¹⁸ *Id.* at 210.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 209.

¹²² *Id.*

¹²³ *Id.* at 207.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 208.

¹²⁷ 200 F.3d 143.

¹²⁸ 235 F.3d 817.

¹²⁹ *Tutu CERCLA Litigation*, 326 F. 3d. at 208.

¹³⁰ *Id.*

experienced parties of what direction they should go. The Settling Parties in the instant case presumably had attorneys that were experienced in this area and well-suited to determine if a trial would be a better road than settlement. From what information is available regarding this case, it is very tough to determine any reason why the Laga Parties elected to not participate in the settlement process.

One possible explanation for why the Laga Parties did not participate in the settlement was their second claim on appeal—that their constitutional due process rights were violated by not receiving a full evidentiary hearing.¹³¹ The Third Circuit handled this claim rather quickly and easily. The court said that “[t]he Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns.”¹³² In the instant case, there was over a decade worth of information regarding the investigation of the contamination.¹³³ The Settling Parties gave “extensive documentary record” including exhibits, expert reports, and deposition testimony collected over a ten year period.¹³⁴ The Laga Parties gave no evidence and “merely contested the Settling Parties’ evidence as insufficient and replete with errors.”¹³⁵ The Laga Parties had many opportunities to be heard prior to the acceptance of the consent decree, but never submitted any direct evidence on why they claimed the Settling Parties evidence was insufficient and error-filled.¹³⁶ The contention that, because the district court adopted the findings of fact and conclusions of law by the Settling Parties nearly verbatim, the Laga Parties were denied due process, was found irrelevant.¹³⁷ “[A]s long as those findings and conclusions were fair, reasonable, and consistent with the public interest,” the fact that they were adopted nearly verbatim is irrelevant.¹³⁸ Accordingly, the Third Circuit found no violation of the Laga Parties due process rights.¹³⁹

An analysis of *Tutu* tends to show that the decision was made in an effort to further clarify the current state and direction of the law. Nothing new or drastic was announced in the decision, but the court used unambiguous language to make it very clear that the public and government interest in cleaning up environmental contamination is high. While in the instant case the Laga Parties ultimately had a weak claim regarding their due process rights, the language the court uses seems to imply that, even if the Laga Parties had provided evidence as to their claim,¹⁴⁰ the fact that the district court had found the consent decree to be reasonable and fair would have still been insurmountable. The court makes it appear that the only plausible way for a consent decree to be deemed unfair, and therefore invalid, would be if the allocation of fault was determined in a manner completely devoid of any rational basis.¹⁴¹

While the facts of the instant case made it quite easy to decide, the court used this opportunity to explain and demonstrate the importance of the policy of CERCLA’s settlement provisions to PRPs. The government and public interest in cleaning up and resolving an environmental contamination is so weighty that the government will allow settling parties to receive vital benefits for their stepping up to the plate. At the same time, the government will place on non-settling parties the greater burden of increased liability with little protection. This effectively forces PRPs to settle rather than go to trial because of the potential risks of being

¹³¹ *Id.* at 209.

¹³² *Id.* See *supra* n. 113.

¹³³ *Tutu CERCLA Litigation*, 326 F.3d at 209.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 210.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ “We will not upset the court’s judgement unless those parties demonstrate the court committed a material error of law or a ‘meaningful error in judgment.’” *Id.* at 207 (quoting *U.S. v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)). See also *supra* n. 113.

¹⁴¹ *Tutu CERCLA Litigation*, 326 F. 3d. at 207.

the odd man out. With the principles clearly announced in the instant case, fewer and fewer PRPs will refuse to jump off of the proverbial bridge when other parties dive right in and settle, which is plainly result CERCLA was intended to produce.

VI. CONCLUSION

The Third Circuit's holding in *In re: Tutu Water Wells CERCLA Litigation* is very clear, logical, and furthers the government's efforts to mend environmental issues quickly and efficiently. The government has provided a "fast track" method for getting environmental issues resolved beneficially to the settling parties and detrimentally to the non-settling parties. The consent decree method allows parties to possibly settle for less than their actual liability may be for stepping up to the plate. Cases of this nature will most likely continue down this stringent path, rewarding the settlers and punishing the non-settlers, in an effort to protect our nation's natural resources.

C. TRAVIS HARGROVE