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

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BRIEF IN OPPOSITION TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Westinghouse Electric Company LLC ("WEC") brought this action against the United States to recover costs incurred in removing and remediating radiological and hazardous material contamination from its facility in Blairsville, Pennsylvania, caused by the manufacturing of uranium fuel elements for the Navy nuclear submarine program under a contract with the United States. The United States has moved for summary judgment in this matter based on a release of claims under that contract signed by the former owner of the facility. That release is inapplicable to the claims raised in this matter for two reasons. First, the release is limited on its face to claims arising prior to July 31, 1983. WEC's claim for contribution toward the response costs it has incurred at the Blairsville Facility could not, as a matter of law, have arisen before those response costs were first incurred in December of 1993, ten years after the temporal limit of the release. Second, the release is limited on its face to claims arising from or under the contract. The claims in this action are statutory claims arising under the Comprehensive Environmental Response, Compensation, and Liability Act

("CERCLA"), not under the contract between the United States and WEC's predecessor. Accordingly, WEC respectfully requests that the summary judgment motion be denied as it pertains to the release.

The United States also moves for summary judgment as to Count III of the Complaint, which seeks recovery under Section 107 of CERCLA. The United States contends that it is not subject to joint and several liability under Section 107, and is more properly liable for its allocated share of liability under Section 113. Given the positions that the United States is taking in its motion for summary judgment, WEC concedes that its claim against the United States is properly one for contribution.

MATERIAL FACTS

The United States has presented a detailed summary of the history of the United States agencies exercising oversight over the Blairsville Facility, of the contractual documents between Westinghouse Electric Corporation ("Westinghouse") and the United States, and of the ownership of the Blairsville Facility. For purposes of this Motion for Summary Judgment, WEC does not dispute the facts as set forth by the United States. Rather, WEC submits that the United States' motion is flawed as a matter of law because the Release upon which the United States bases its motion contains limitations that render it inapplicable to WEC's claims in this action. Accordingly, WEC will not submit a statement of disputed facts. However, because this is the first motion in this action and because the United States did not provide a general description of the factual background of the action, WEC will provide a brief factual overview.

For many years, Westinghouse had significant involvement in the development and manufacture of the equipment and fuel for a fleet of nuclear powered submarines for the United States Navy. This involvement began in the late 1940s, and was initially memorialized by Contract AT-11-1-GEN-14 ("GEN-14" or the "Contract") executed on July 15, 1949 by Westinghouse and the United States, acting through the Atomic Energy Commission.

Some of the work under GEN-14 was performed at Westinghouse's specialty metals plant in Blairsville, Pennsylvania ("Blairsville" or the "Blairsville Facility"). The Blairsville Facility was constructed in 1955, and began manufacturing Navy fuel elements under GEN-14 in March 1956. Westinghouse continued manufacturing Navy fuel elements at Blairsville through late 1960 or early 1961, at which time the Navy fuel element manufacturing operations were transferred to another Westinghouse facility. Since 1961, there have been no nuclear materials possessed, used, or stored at the Blairsville facility.

In 1993, Westinghouse conducted a survey of certain areas of the floor around the Gage Lab at the Blairsville Facility. During this survey, Westinghouse employees discovered a metal plate on the floor with radiation approximately twice that of allowable limits. Removal of the plate revealed an abandoned sump that had been filled with concrete. Gamma spectrometry measurements indicated that radioactive material of the type used for Navy fuel was present. As a result, WEC conducted further radiological investigations of the Blairsville Facility. Those additional investigations revealed that various areas of the plant and surrounding land were contaminated with uranium of the type used in the Navy fuel elements.

Because the sump posed a potential threat to employees in the area, Westinghouse had the sump from the Gage Lab excavated and the nuclear material removed on December 28 and 29, 1993. Investigation activities have been ongoing at the Blairsville Facility since that time. While cost estimates at Blairsville are not yet complete, investigation, removal, and remediation costs related to the Contract are expected to be in the millions of dollars.

ARGUMENT

I. The United States is Not Entitled to Summary Judgment Because the Release is Limited on its Face to Claims Arising Prior to July 31, 1983 and Arising Out of the Contract.

While work done for and on behalf of the United States caused the contamination at the Blairsville Facility, the United States now seeks to interpose a release executed in 1983 under GEN-14 (the "Release") as a means of avoiding paying its fair share of CERCLA response costs. That Release has no effect on WEC's statutory claims for contribution to the response costs incurred starting in 1993 because the Release is limited, on its face, to claims arising prior to July 31, 1983, and to claims arising out of the Contract with the United States. Specifically, the Release provides as follows:

RELEASE OF CLAIMS

> In consideration for Modification No. M058 to Contract No. DE-AC11-76PN00014, as previously supplemented and modified between the United States of America (hereinafter called the Government), and Westinghouse Electric Corporation (hereinafter called the Contractor) or its assignees, if any, 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 . . .***

Emphasis added. As the analysis below demonstrates, WEC's claims against the United States did not arise until, at the earliest, ten years after the time period covered by the Release. Additionally, WEC's claims did not arise under the Contract, but instead arose under CERCLA. For each of these reasons, the Release does not affect WEC's claims.

A. Standard for Construing Releases

Federal courts uniformly apply state law when determining whether a release or an indemnification provision of a contract is applicable to CERCLA claims. *Aluminum Company of America v. Beazer East, Inc.*, 124 F.3d 551 (3rd Cir. 1997); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206 (3rd Cir. 1994). Under Pennsylvania law, Courts determine the scope and effect of a release from the ordinary meaning of the language and, when construing a release that is clean and unambiguous, the court need only examine the writing itself to give effect to the parties' understanding. *Seasor v. Covington*, 670 A.2d 157, 159 (Pa.Super. 1996). Moreover, a release is ambiguous, as a matter of law, if it is susceptible of different constructions and capable of being understood in more than one sense. *Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1424 (3d Cir. 1994)(applying Pennsylvania law); *Mead*, at 217 (applying Alabama law).

B. WEC's Claims are Outside the Time Period Covered by the Release.

The language of the Release states that WEC "hereby remises, releases, and discharges, the Government, . . . of and from all claims whatsoever arising from or under the said contract ***from its inception on December 10, 1948 through July 31, 1983.***" (*emphasis added*). This language plainly limits the applicability of the Release to only those claims arising before and through July 31, 1983.

The Release simply is not susceptible to any other interpretation. However, should this Court find that the Release may be interpreted in some other fashion, then the Release is susceptible to two competing interpretations and is ambiguous, and must be construed against the United States.[1] Accordingly, WEC's claims for contribution against the United States are only extinguished by the Release if the claims accrued before July 31, 1983.

It is well settled under Pennsylvania law that before any right of contribution or indemnification arises, the party claiming that right must in fact pay money or damages to a third party. *See generally, Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 122 (3rd Cir. 1992); *Graham Oil Company, v. BP Oil Company,* 885 F.Supp. 716, 727 (WD Pa. 1994). *See Also, Pennsylvania Uniform Contribution Among Tortfeasors Act*, 42 Pa.C.S.A. §§ 8321-27 *et seq.* "The reason for this is obvious: since indemnity shifts the loss, no right accrues until one suffers a loss by paying damages to a third party." *Fleck*, 981 F.2d at 122. Put another way, a party claiming contribution or indemnification cannot initiate a law suit to recover monies allegedly owed in contribution or indemnification prior to actually incurring the monetary loss. This general principle has been applied in the CERCLA context, and it has been held that a Section 113 contribution claim does not arise until response costs have been incurred. *Browning-Ferris, Inc. v. Sun Co., Inc.*, 124 F.3d 1187 (10th Cir. 1997) (finding that cause of action for CERCLA contribution does not arise until party actually pays more than its fair share of clean-up costs). Thus, WEC's claim for contribution did not arise until monies were actually spent remediating the Blairsville Facility.

[1] Moreover, if the Release is ambiguous, then extrinsic evidence may be considered and summary judgment would be inappropriate.

WEC did not begin to incur costs to remediate the Blairsville Facility until December of 1993. Complaint, ¶ 74[2] Therefore, WEC's contribution claim against the United States could not have arisen until ten years after the end of the period covered by the Release. Accordingly, the Release is inapplicable to WEC's claims for contribution against the United States.

The conclusion that WEC's claim for contribution is unaffected by the Release is supported by a line of cases from the Third Circuit Court of Appeals dealing with the effect of bankruptcy discharges on CERCLA contribution claims. Specifically, in *Matter of Reading Company*, 115 F.3d 1111 (3d Cir. 1997), the Court addressed Conrail's claim for contribution under Section 113 of CERCLA from the debtor, Reading, with respect to certain sites that were contaminated prior to the bankruptcy but were being remediated after the bankruptcy. The Third Circuit was asked to determine whether the December 31, 1980 bankruptcy discharge barred Conrail's contribution claim. The Court held that Conrail's claim was not barred by the bankruptcy discharge because its contribution claim did not exist prior to December 31, 1980. *Matter of Reading*, 115 F.3d at 1123.

In so holding, the Third Circuit relied on its decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3rd Cir. 1985). There, a group of employees sued Reading after its reorganization for asbestos-related claims under the Federal Employer's Liability Act. Reading attempted to invoke it's bankruptcy discharge to bar the employees' suit. In ruling against Reading, the Court determined that an identifiable compensable injury was a basic element of a tort claim and that no cause of action in tort arose until that element was satisfied. The employees who sued did not manifest injuries until after the consummation date, although the actual injury occurred before

[2]Because this fact is not contested, WEC has not prepared and submitted an affidavit supporting it. WEC can certainly do so if the Court deems it necessary.

the bankruptcy. The Court held that the employees' cause of action did not arise until after the consummation date because their injuries did not manifest until that time, and, therefore, their claims were not barred by the discharge. *Schweitzer*, at 941-42.

The Third Circuit applied this rationale in *Matter of Reading* to determine that Conrail's claim did not arise until after the bankruptcy discharge. Specifically, the Court held that Conrail's contribution claim did not even exist at law until the Superfund Amendments and Reauthorization Act of 1986 ("SARA") was passed in 1986.[3] Thus, Conrail could not have sought contribution from Reading prior to 1986, well after the bankruptcy discharge in 1980. Therefore, Conrail's contribution claim could not possibly have arisen until after the consummation and the discharge was inapplicable. *Matter of Reading*, at 1121-23.

Matter of Reading and *Schweitzer* are highly instructive in the instant matter. Both cases stand for the proposition that a cause of action for contribution does not arise until all the elements of a claim are satisfied. *Matter of Reading* is more significant in that it unequivocally establishes that a claim for contribution under Section 113 of CERCLA could not, as a matter of law, have arisen prior to the enactment of SARA in 1986. *Matter of Reading*, at 1121-23.

In this case, the United States acknowledges that the Release was executed on September 19, 1983, more than three years before the enactment of SARA, and thus more than three years before CERCLA contribution claims even existed. Therefore, as a matter of law as established by the Third

[3] It is crucial to note that Section 113 was not a part of CERCLA as originally enacted in 1980. Rather, Section 113, and the claim for contribution set forth therein, was added to CERCLA by SARA. Therefore, no claim for contribution by one PRP against another was available under CERCLA until 1986. *Matter of Reading*, at 1121-23.

Circuit, WEC's claims for contribution from the United States had not arisen by July 31, 1983, and thus are not affected by the Release.[4]

In advancing its motion, the United States does not substantively address the time limitation contained in the plain language of the Release. The United States does not even attempt to analyze when WEC's claim for contribution arose, despite the fact that the Release plainly states that it applies only to a claim "arising . . . from its inception on December 10, 1948 through July 31, 1983." In its only reference to the issue, the United States merely states in a conclusory fashion without any legal support that the contamination occurred during the period of time covered by the Release. (Memorandum in Support of United States' Motion for Summary Judgment at 26-27.) That fact does not imply that a contribution claim had arisen at the time that the underlying contamination occurred. Indeed, in *Matter of Reading*, the contamination had occurred prior to the date in question, yet the Third Circuit still held that the contribution claim had not yet arisen. *Matter of Reading*, at 115-16, 1123. Accordingly, WEC respectfully submits that its claims in this action did not arise within the time period covered by the release, and that the United States' motion should be denied on this basis.

[4] WEC has focused on the law as it applies to its claim under Section 113 of CERCLA based on the United States' motion for summary judgment as to WEC's claim under Section 107 of CERCLA. The analysis of the effects of the Release is unchanged when applied to Section 107. One of the elements of a cost recovery action under Section 107 is the incurrence of response costs. *Matter of Reading*, 115 F.3d at 1118. That element was not satisfied until at least December of 1993. Therefore, WEC's claim for recovery of response costs under Section 107 did not arise until at least 1993, and is unaffected by the Release.

C. The Release Only Applies to Claims Arising "from or under" the Contract.

In addition to being outside the temporal limits of the Release, WEC's claims are also outside the substantive scope of the Release. The Release specifically states that WEC "hereby remises, releases, and discharges, the Government, . . . of and from all claims whatsoever ***arising from or under the said contract . . . .***" (*emphasis added*). The only reasonable interpretation of this language is that, for a claim to be released, it must be one arising out of the contract.

As a general matter, courts have uniformly held that for a release to affect CERCLA liabilities, it must either specifically reference CERCLA or CERCLA type liabilities, or be so broad and all encompassing that it is clearly intended to include all liabilities of any nature. *See, e.g., Beazer East, Inc.*, 34 F.3d at 211.[5] The Release executed by Westinghouse does not meet that test, because it is limited on its face to claims arising under the Contract.

More specifically, guidance on the interpretation of the specific language in the Release is found in the Third Circuit's decision in *John Wyeth & Brother Ltd v. Cigna Int'l Corp.*, 119 F.3d 1070 (3d Cir. 1997). In *John Wyeth*, the Court interpreted a forum selection clause requiring that "any dispute arising under or out of or in relation to this Agreement" be litigated in England. The Court held that plaintiffs' product liability claims were properly litigated in England because of the broad language of the clause relative to claims "arising in relation to the agreement." However, the Third Circuit expressly distinguished the language at issue from a clause which simply reads "arising

[5] The cases addressing the requirements for a CERCLA release generally have involved a release that was executed prior to the enactment of CERCLA. Thus, the courts developed law to determine the parties' intent as to a liability that did not yet exist. Although the courts have not yet developed the standard for post-CERCLA releases, WEC submits that greater specificity should be required, not less specificity as the United States suggests. Obviously, parties could not be expected to refer to CERCLA before its enactment, so courts must predict the parties' intentions as to an unanticipated CERCLA claim. In a post-CERCLA release, however, nothing prevents parties from specifying CERCLA claims if they so choose, so the parties should be held to a higher level of specificity.

under or out of" the agreement (*i.e.*, not containing the "in relation to" language). The Court indicated that, were the language of the forum selection clause limited in that fashion, the product liability claims would *not* have been subject to the forum selection provisions because they did not arise under or out of the contract, but merely related to it. *John Wyeth*, at 1074.[6]

Here, the language of the Release is nearly identical to the more limited language distinguished by the Third Circuit. In fact, the language here is almost exactly that which the *John Wyeth* court found would not affect non-contractual causes of action. Therefore, only claims which grow directly out of the Contract (*e.g.*, claims for breach of the Contract) are extinguished by the Release. WEC's CERCLA claims are not in any way based upon the terms of the Contract. Rather, WEC's claims are based upon statutorily created liabilities under CERCLA and SARA. The claims exist independent of, and liability may be imposed irrespective of, the existence and nature of any contractual relationship between the parties.

This conclusion is consistent with the recent decision of the Pennsylvania Superior Court in *Morgan Trailer Mfg. Co. v. Hydraroll, Ltd.*, 759 A.2d 926 (Pa. Super. 2000). In *Morgan Trailer*, the Superior Court was asked to interpret a forum selection clause in a contract between the parties. The court held that the clause would not apply to plaintiff's non-contract, tort claims. *Morgan Trailer*, at 931-32. The Court looked to federal law for guidance (including analyzing the *John Wyeth* decision discussed *supra*) and reasoned that the plaintiff's tort claims were not connected to the contract. *Id.* In so holding, the Court expressly rejected the argument that the tort claims only

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[6] It should further be noted that generally forum selection clauses are considered presumptively valid and should be enforced unless the provision is unreasonable. *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.* 709 F.2d 190, 202 (3rd Cir 1983); *Maleski v. DP Realty Trust*, 653 A.2d 54, 64 (Pa. Commw. 1995). This policy contrasts the narrow reading of releases discussed above. Accordingly, the fact that the Third Circuit would have found WEC's claims not covered by a forum selection clause covering claims arising under the contract means the CERCLA claims certainly are not covered by the Release limited to claims arising under the Contract.

arose because of the existence of a contractual relationship between the parties. Specifically, the Court stated that "[w]hile Morgan certainly had a contract with appellees, that does not mean that all future relations with appellees are somehow connected to that contract." *Id.*, at 932.

Here, while it is certainly true that WEC had a contract with the United States, WEC's contribution claims are not contract claims. Rather, WEC's claims are statutory in nature and are based upon rights and liabilities connected to CERCLA and SARA only. Indeed, the procedural history of this matter guarantees that this action is limited to WEC's non-contractual claims. This action was originally part of a Complaint filed before the United States Court of Federal Claims. At the United States' insistence, that court bifurcated the claims, retained jurisdiction over the contractual claims, and sent the non-contractual claims to this Court. In fact, contractual claims against the United States must be brought in the Untied States Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Almost by definition, therefore, the claims in this action did not arise under the Contract. Thus, WEC's CERCLA claims do not arise under the Contract, and the Release does not bar WEC's claims.

As with the time limitation, the United States glosses over the language in the Release that limits it to claims "arising from or under the said contract." Rather than providing a rigorous legal analysis of whether the claim arises under the Contract, the United States merely states that the contamination occurred in the performance of work under the Contract. That conclusory statement does not address the legal issue of whether the claim arises under the Contract. Accordingly, WEC

respectfully submits that its claims in this matter are outside the scope of the Release, and the United States' Motion for Summary Judgment should be denied as it pertains to the Release.[7]

II. Based Upon The Positions Taken by The United States in This Motion, WEC Concedes That The United States Is Liable Only for its Allocated Share of Liability.

In the second section of its Motion and Memorandum, the United States seeks summary judgment as to Count III of the Complaint. Count III contains a claim under the cost recovery provisions of Section 107 of CERCLA. The United States argues that WEC is a Potentially Responsible Party ("PRP") under Section 107, and therefore is limited to its claim for contribution under Section 113 (which is contained in Count IV). The United States contends that the only significance of this issue is that Section 107 provides for joint and several liability, whereas Section 113 imposes liability on a defendant for that defendant's fair share of the total liability. (Memorandum in Support of United States' Motion for Summary Judgment at 29).

The relationship between Section 107 and Section 113 has been the subject of extensive discussion by the courts and by commentators. It now appears settled that a party who was actively involved in the activities leading to the release of hazardous substances is restricted to a contribution claim under Section 113 of CERCLA. *In the Matter of Reading Co.*, 115 F.3d 1111, 1118-21 (3d Cir. 1997). Westinghouse owned the Blairsville Facility during the years in which the radioactive materials that are implicated in this action were being handled at the Blairsville Facility. Westinghouse is also the entity that conducted the nuclear operations at Blairsville on behalf of the

[7]Instead of addressing the critical limitations in the Release, the United States devotes considerable space in its Memorandum to arguing that the exceptions in the Release do not apply. WEC does not rely on any of these exceptions, and therefore will not address the United States' discussion of the exceptions.

United States. Accordingly, Westinghouse would plainly be restricted to a contribution claim under Section 113.

WEC did not purchase the Blairsville Facility until March of 1999, long after the conclusion of the nuclear operations. Accordingly, WEC could argue that it may maintain an action under Section 107. *See, e.g., Reading* at 1120 ("some courts have held that a landowner may bring a direct action under § 107(a)(4)(B) to recover its own clean-up costs from a polluter."). However, the United States has taken the position in this Motion for Summary Judgment that WEC is the successor to Westinghouse for purposes of the liabilities relating to the nuclear contamination at the Blairsville Facility. (*See, e.g.*, Memorandum in Support of United States' Motion for Summary Judgment at 1, 4, 28). Ordinarily, the determination of whether WEC is the successor to Westinghouse for purposes of CERCLA liabilities would be an issue of fact and would involve a determination that is certainly not possible based on the limited record submitted by the United States. *See Aluminum Co. of America*, 124 F.3d at 565 (setting forth the fact-based factors for successor liability). However, assuming that the United States will not change its position in subsequent proceedings, and is conceding that WEC stands in the shoes of Westinghouse at the time that WEC acquired Westinghouse's nuclear operations in 1999, WEC concedes that the United States is most properly liable for contribution under Section 113.[8]

[8]One of WEC's primary concerns is that it not be forced to defend varying, inconsistent positions by the United States in this and the related litigation involving contractual claims for reimbursement and indemnity. Specifically, the United States previously suggested in the related litigation that WEC is not the successor to Westinghouse, but rather should be treated as a separate, unrelated corporation that does not succeed to Westinghouse's rights under the contract. If the United States formally takes that position in a motion or other submission, it would be advocating a position directly inconsistent with the positions that the United States asserts herein that WEC is bound by the Westinghouse release and that WEC should be deemed the successor to Westinghouse with respect to the nuclear contamination liabilities at Blairsville. WEC's position on the summary judgment motion is based on the assumption that the United States will not subsequently attempt to take a position inconsistent with its positions herein, and WEC will seek to estop the United States from taking such inconsistent positions. Alternatively, if the United States is not committing to the positions taken herein, then WEC submits that there are issues of fact precluding summary judgment as to successor liability or liability under Section 107, and requests further briefing on this issue should the United States change its positions.

CONCLUSION

WEC submits that the 1983 release is plainly inapplicable to the claims in this action because the claims asserted herein neither arose prior to July 31, 1983, nor arose under the contract between the United States and Westinghouse Electric Corporation. Accordingly, WEC respectfully requests that the United States' Motion for Summary Judgment be denied to the extent that it is based upon the release.

Westinghouse concedes, based on the positions taken by the United States, that the United States is properly liable for contribution under Section 113 of CERCLA. Accordingly, WEC does not oppose a partial summary judgment determining that the United States is not subject to joint and several liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to the United States' Motion for Summary Judgment was served by U.S. Mail, postage prepaid this 7th day of May, 2001 upon the following counsel:

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