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Worse Can Be Better For Nonjudicial CERCLA Allocation

By **William Ford** (August 6, 2021, 4:54 PM EDT)

William Ford

Some commentators believe the U.S. Supreme Court's May 24 decision in Guam v. U.S. may revive cost recovery claims under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law — that were previously thought to be barred by the three-year statute of limitations governing Section 113 contribution claims.

Given such potential revived claims, it may be time to look again at the decision between engaging in CERCLA litigation as opposed to participating in nonjudicial CERCLA allocation.

Is the age-old adage that allocation is always better than litigation still true, particularly for overly complicated allocations at so-called megasites? Can we make an allocation better, by making the allocation process worse?

In designing computer software, there is a school of thought that holds that the quality and success of software does not necessarily increase with functionality. The theory goes that there is a point where a program with less functionality is preferable. A "worse" program — i.e., one with fewer functions — may be "better" or more successful than a complex program.

As discussed herein, overly complex nonjudicial CERCLA allocations with too many inputs run the risk of being less successful Superfund settlement tools, compared to simpler allocation methodologies. In summary, a worse CERCLA allocation process may be a better CERCLA settlement tool.

As good advocates for our clients in CERCLA multiparty disputes, we are all inclined to think, "If I can just get all my individual issues taken care of, my client will get an advantage." However, if every party in a multiparty dispute is allowed to pursue their individual interests without time or process limitations, the cumulative transaction costs and length of the nonjudicial CERCLA allocation threaten the success of the allocation.

Using the tragedy of the commons as an analogy, the cumulative effects of individual decisions can result in degradation of the allocation process. A successful CERCLA allocation requires that a balance be struck between marginal private benefits and costs as against marginal CERCLA benefits and costs.

It also seems obvious, but generally unstated, that for certain potentially responsible parties, or PRPs, at certain sites, never coming to an allocation appears to be a goal. In fact, for PRPs of a certain

presumptively allocable share (primarily large share allocation parties), and sites of a certain total dollar size (primarily more expensive sites), it may seem to make sense to never come to an agreement in allocation.

If the individual PRP believes its transaction costs of allocation are less than the return on investment for that PRP's expected allocated share, its incentive may be to never end the allocation process. This is leaving aside potential strategic delay based on natural attenuation of contaminants, and giving practitioners the benefit of the doubt that they are not purposefully dragging things out.

As originally passed, CERCLA was not meant to be fair to individual PRPs. While you rarely hear discussion of the issue in recent opinions, courts and commentators regularly decried the lack of fairness in CERCLA's liability scheme in the early days of Superfund litigation.

CERCLA was meant to facilitate cleanups and assign costs to entities who were in some way associated with, or responsible for, the contamination at issue, rather than letting those costs fall on taxpayers. Over time — through case law developments, statutory amendments, U.S. Environmental Protection Agency policies and allocation processes — CERCLA has crept closer to being "fair," and toward allocating costs equitably.

However, without external pressures, too much process and too much fairness diminish the benefits of participating in allocation — and the societal benefits of CERCLA.

Nonjudicial allocation, handled in large part by a very small number of skilled Superfund allocators, has long been the preferred alternative to litigating CERCLA liability and allocation. The common wisdom has always been that allocation is cheaper and quicker than litigation. In addition, courts are loathe to get involved in highly technical multiparty suits if they can direct parties to a nonjudicial procedure.

However, it may be time to reconsider the common wisdom for some sites. The time, cost and complexity of nonjudicial CERCLA allocation at some sites may rival or exceed a well-managed multiparty litigation. The nature of a nonjudicial allocation can, without time limits and appropriate scope, lead to an excess of process, which equates to time and money.

Unlike a judge, an allocator works for the PRPs. And while the allocators may want to, and certainly can, give you a Cadillac process and allocation, they can also give you the Hyundai version.

Every CERCLA allocator worth their fee has presumptively handled a multimillion dollar allocation based on small snippets of information — such as mere months of waste records for sites that were open for decades. Allocators have rightly bragged they can do an allocation on the back of a napkin. Sometimes, the back of a napkin may be what is best.

Expensive sites with overly complex allocations have a tendency to bog down without external pressures. Those pressures typically come from regulatory enforcement or litigation. But other pressures can come from motivated PRPs who have or will be incurring costs perceived to be in excess of their proportionate share.

Successful nonjudicial allocations generally do not conclude until external deadlines are imposed. Without those external pressures, delay will become an intentional goal, or an unintended consequence.

All of this leads back to the software design principle that sometimes applies in CERCLA allocations: "Worse is better." Using this computer programming philosophy, a system should be designed with the following characteristics in descending order of importance: Simplicity, correctness, consistency and completeness.

Simplicity is the most important consideration in design. When balancing goals for a design, it is slightly better to be simple than correct — and so forth down the list of goals. Computer programs designed with this "worse is better" philosophy have been argued to be more successful and more accepted by users.

In the CERCLA allocation context, PRPs at large multiparty sites too often insist on completeness first in the design of a CERCLA allocation process. Such an emphasis on completeness can come at the expense of simplicity — and ultimately at the expense of satisfactory resolution and site cleanup.

There is very little published information on how long or how expensive a CERCLA allocation may be. A few years ago, one article optimistically estimated that for "complex properties with limited documentation (e.g., a former municipal landfill involving 50 to 100 parties), a cost allocation may take as long as 12 to 18 months."

In actuality, experience has shown that allocations at megasites may, without appropriate limiting parameters, take more than a decade — and at some sites, may last closer to 20. It is worth debating whether a decade or more of a nonjudicial CERCLA allocation is more efficient than well-managed litigation.

In order to avoid too much allocation process, clients and counsel who are frequently involved in CERCLA allocation should seek up front to design the allocation process with simplicity in mind and guard rails in place. In the long run, clients may be better served with a simpler and "worse" allocation process.

William F. Ford is a partner at Lathrop GPM LLP.