

## Bankruptcy/CERCLA(Superfund): Federal Court Addresses Whether Chapter 11 Discharge Nullifies Contribution Action



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10/18/2021

A United States District Court (D. Maryland) (“Court”) addressed in a October 12th Opinion whether a Chapter 11 bankruptcy discharge barred a Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) contribution action against the defendant. See *68 Street Site Work Group, Plaintiff, v. Airgas, Inc., et al.*, 2021 WL 4750180.

The Plaintiffs seeking contribution argued that their claim could not have been discharged because they did not begin incurring response costs until more than a decade after the bankruptcy discharge.

The CERCLA contribution action involved a Baltimore County, Maryland, Superfund site known as the:

68th Street Dump Alternative Site (“68th Street Site”)

The 68th Street Site is described as an aggregation of seven landfills in Baltimore County and the City of Baltimore, Maryland.

The United States Environmental Protection Agency (“EPA”) and the State of Maryland commenced emergency response removal actions at the 68th Street Site in the 1980s. In 2017 EPA entered into a Consent Decree with a group of settling Defendants (i.e., 68th Street Site Work Group [“Work Group”]) regarding additional work to be undertaken at the 68th Street Site.

The Work Group brought a contribution action against an additional 150 Defendants for response costs incurred in connection with activity and payments required by the Consent Decree. One of the Defendants named was Schumacher & Seiler, Inc. (“S&S”).

S&S was alleged to have by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with the transporter for disposal or treatment, of waste containing hazardous substances at the 68th Street Site. The company was described in the Motion for Summary Judgment by the Work Group as engaged in the business of wholesale and service of plumbing, heating, ventilation and air conditioning equipment. Waste streams were allegedly generated which included maintenance waste, metal finishing waste, and building construction waste which are stated to have contained various CERCLA hazardous substances.

S&S filed a Motion for Summary Judgment arguing that:

... “on or about June 26, 1992,” and that an “Order Confirming the Amended Chapter 11 Plant was entered on December 17, 1992.”

The Work Group did not dispute that pursuant to the provisions of the Chapter 11 Plan, § 1141(d) of the United States Bankruptcy Code, along with the discharge and release incorporated into the Confirmation Order, that S&S had been granted:

. . . a discharge . . . and has been released from any obligations that arose before the Effective Date.

As a result, S&S argued that the 1992 bankruptcy (with the Final Decree being issued in May 1996) discharged any CERCLA claims by the Work Group.

The Work Group responded that it did not begin incurring CERCLA response costs until 2006. Consequently, it argued that its contribution claim could not have been discharged by the bankruptcy.

The Court acknowledged that both the Bankruptcy Code and CERCLA have competing objectives, (i.e., providing debtors a fresh start versus casting a broad net of liability for the cleanup of hazardous substances). It further noted that different federal appellate circuits have applied varying approaches to determine whether a bankruptcy discharges a CERCLA claim.

Two of the approaches are described as:

- Right to payment approach (least differential to bankruptcy law)
- Underlying acts approach (most differential to bankruptcy law)

The right to payment approach utilized by the Third Circuit is described as meaning a debtor's CERCLA liability will be discharged only if all four CERCLA elements are in place prior to a bankruptcy. The Work Group argued for the use of this approach because not all four elements of the United States CERCLA claim related to the 68th Street Site existed prior to S&S's bankruptcy. Specifically, emergency removal actions had been performed at the 68th Street Site in the 1980s but S&S had not been identified as a CERCLA potentially responsible party.

The Court instead utilizes the Fourth Circuit underlying acts or conduct approach ("Underlying Acts"). The Underlying Acts approach holds that a "claim" exists so long as the underlying act occurred prior to the debtor's bankruptcy. In other words, the claim can arise even though there is not an immediate right to payment when the predicate acts occurred pre-petition.

Consequently, the Court holds that any CERCLA liability claims against S&S were discharged by its bankruptcy. This is based on the conclusion that its alleged Underlying Acts (hazardous waste pollution from the 1950s to early 1970s) occurred prior to its bankruptcy. The Court holds that the Work Group's claims were therefore discharged.

A copy of the opinion can be downloaded [here](#).