UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.

100 F.3d 792 (10th Cir. 1996) · No. Nos. 95-3385 & 95-3396 · Decided November 13, 1996

SUMMARY

The Tenth Circuit reviewed claims arising from the cleanup of an industrial site contaminated by lead and other hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), along with a state-law breach-of-contract claim. The court affirmed most of the district court’s rulings, including the allocation of cleanup responsibility and refusal to grant a contractual offset. It reversed and remanded the refusal to award prejudgment interest on the CERCLA contribution award, holding that interest may be awarded in Section 113(f) contribution actions in the same manner as in Section 107 actions.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	W. Bruce Brorby; Paul J. Kelly, Jr.; David M. Ebel
JURISDICTION	Federal
DECIDED	November 13, 1996
DOCKET	Nos. 95-3385 & 95-3396
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal and cross-appeal from a bench-trial judgment imposing CERCLA contribution liability and breach-of-contract liability, while denying prejudgment interest.
STANDARD OF REVIEW	De novo for statutory and contract-interpretation issues; abuse of discretion for allocation of CERCLA response costs and prejudgment-interest determinations; clearly erroneous for the factual finding concerning breach of contract and the claimed offset.
PRECEDENTIAL VALUE	published and precedential federal appellate opinion
PARTIES	Mosher Steel of Kansas, Inc., Trinity Industries, Inc. v. Bancamerica Commercial Corporation, Asarco, Inc.

TOPICS

cercla · statutory interpretation · remedies · breach of contract · appellate procedure

PRACTICE AREAS

environmental law | contracts | remedies | appellate procedure

QUESTIONS PRESENTED

1. Whether EPA section 106 orders made the response actions consistent with the National Contingency Plan without requiring compliance with the plan's public-comment requirements.
2. Whether the district court had to determine whether the cleanup was a removal action or a remedial action.
3. Whether Trinity preserved and could assert a claim that Bancamerica's 1988 and 1989 response costs were independently unrecoverable.
4. Whether Trinity established entitlement to an offset against its unpaid-tax liability.
5. Whether prejudgment interest is available in a CERCLA section 113(f) contribution action and whether Bancamerica and ASARCO satisfied the statutory demand requirement.
6. Whether the district court abused its discretion by considering only toxicity and volume in allocating lead-contamination response costs.
7. Whether Trinity breached the lease by improperly operating or maintaining underground storage tanks.

HOLDINGS

1. Response actions performed in compliance with EPA orders issued under CERCLA section 106 are deemed consistent with the National Contingency Plan under 40 C.F.R. § 300.700(c)(3)(ii); the orders' general applicable-law provisions did not independently require compliance with the plan's public-comment requirements.
2. The district court was not required to determine whether the response action was a removal action or a remedial action before deciding consistency with the National Contingency Plan.
3. The court would not consider Trinity's argument concerning the independent recoverability of Bancamerica's 1988 and 1989 costs because Trinity did not adequately raise that distinct argument in the district court.
4. Trinity was not entitled to an offset because it failed to establish that Bancamerica owed the alleged debt for the cranes.
5. Prejudgment interest must be awarded in CERCLA section 113(f) contribution actions in the same manner as in section 107 actions.
6. Bancamerica and ASARCO made sufficient written demands for specified amounts, satisfying section 107(a)'s demand requirement.
7. The district court did not abuse its discretion by considering only the approximate volume and toxicity of Trinity's lead contamination in allocating five percent of the lead-related response costs to Trinity.
8. The district court did not clearly err in finding no breach of the lease because Bancamerica failed to establish that Trinity improperly operated or maintained the tanks or that the contamination occurred during Trinity's tenancy.

KEY QUOTATIONS

> *"We hold prejudgment interest should be granted in Section(s) 113(f) actions in the same fashion as it is granted in Section(s) 107 actions."* (¶ 26)

> *"Indeed, we have stated "a court may consider several factors, a few factors, or only one determining factor, ... depending on the totality of the circumstances presented to the court.""* (¶ 47)

FACTUAL BACKGROUND

ASARCO operated a lead smelter at the industrial site from 1899 to 1902, and other operators later used lead-based paints and solvents there. Bancamerica acquired the site in 1984 and leased it to Trinity, which operated there until 1987 and also used lead-based paints and solvents. The site contained lead contamination, leaking barrels, and leaking underground gasoline-storage tanks. After EPA issued administrative and unilateral CERCLA section 106 orders, Bancamerica and ASARCO completed the cleanup without Trinity's assistance and sought contribution.

PROCEDURAL HISTORY

Bancamerica and ASARCO sued Trinity under CERCLA for contribution toward environmental cleanup costs and Bancamerica asserted a state-law breach-of-contract claim. The District of Kansas held Trinity partially responsible for contamination, awarded $555,293.55 in cleanup costs and $70,178.07 for unpaid taxes, denied prejudgment interest, and rejected an offset and an additional underground-storage-tank claim. The parties appealed and cross-appealed.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

Remand for determination and award of the appropriate prejudgment interest on the response costs, accruing from the later of each plaintiff's written demand or the relevant expenditure date, while affirming the remainder of the district court's judgment.

CASES CITED

- Bancamerica Commercial Corp. v. Trinity Industries, 900 F. Supp. 1427 (D. Kan. 1995)
- Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144, 150-51 (1991)
- Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 991 (E.D. Pa. 1992)
- Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 475 (E.D. Mich. 1993)
- Channel Master Satellite Systems, Inc. v. JFD Electronics Corp., 748 F. Supp. 373, 384 (E.D.N.C. 1990)
- Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 720-22 (10th Cir. 1993)
- Singleton v. Wulff, 428 U.S. 106, 120 (1976)
- County Line Investment Co. v. Tinney, 933 F.2d 1508, 1515-17 (10th Cir. 1991)

- United States v. Colorado & Eastern Railroad Co., 50 F.3d 1530, 1534-36, 1538 (10th Cir. 1995)
- Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 934-36 (8th Cir. 1995)
- Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994)
- Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc., 925 F. Supp. 624, 629-31 (E.D. Mo. 1996)
- Avnet, Inc. v. Allied Signal, Inc., 825 F. Supp. 1132, 1137 (D.R.I. 1992)
- United States v. Diaz, 989 F.2d 391, 392 (10th Cir. 1993)
- Driver Music Co. v. Commercial Union Insurance Cos., 94 F.3d 1428, 1433 (10th Cir. 1996)
- Browning-Ferris Industries v. Ter Maat, No. 92 C 20259, 1996 WL 67216, at *4-*5 (N.D. Ill. Feb. 16, 1996)
- Boeing Co. v. Cascade Corp., 920 F. Supp. 1121, 1132, 1140 (D. Or. 1996)
- Hatco Corp. v. W.R. Grace & Co.-Conn., 836 F. Supp. 1049, 1090 (D.N.J. 1993)
- United States v. Hardage, 750 F. Supp. 1460, 1495-96 (W.D. Okla. 1990), aff'd, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 510 U.S. 913 (1993)
- United States v. Northernaire Plating Co., 685 F. Supp. 1410, 1421 (W.D. Mich. 1988), aff'd, 889 F.2d 1497 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990)
- FMC Corp. v. Aero Industries, Inc., 998 F.2d 842, 846-47 (10th Cir. 1993)
- United States v. R.W. Meyer, Inc., 932 F.2d 568, 573 (6th Cir. 1991)
- Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992)
- Production Credit Association v. Alamo Ranch Co., 989 F.2d 413, 419 (10th Cir. 1993)
- Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d 1286, 1289 (10th Cir. 1988)