I. Introduction

Private litigation seeking to require defendants to investigate or remediate contamination, or reimburse past and future cleanup costs is often expensive and lengthy. Such cases present highly technical issues relating to the source, nature, and extent of contamination, how best to address the contamination, and which party or parties should pay for the remediation. When contaminated site litigation occurs at a site already involved in the regulatory process, the potential exists that the plaintiff will obtain a court ruling or remedy that is inconsistent with what would be required or determined by the administrative agency overseeing the process. As discussed below, in these types of cases, defendants may be able to invoke what is known as the “primary jurisdiction doctrine” to stay or dismiss private claims that would undermine an ongoing regulatory process.

II. Primary Jurisdiction Doctrine

The doctrine of primary jurisdiction is designed to preserve a proper working relationship between courts and administrative agencies. Primary jurisdiction is a discretionary doctrine that a court may invoke to stay or dismiss a party’s claims. While there is no “fixed formula” governing application of the doctrine, in general, the factors that courts evaluate include (1) whether the issue is a question within an agency’s particular field of expertise, (2) whether the issue is particularly within the agency’s discretion, (3) whether there is a substantial risk of inconsistent rulings, and (4) whether a prior application to the appropriate agency has been made. See, e.g., U.S. v. W. Pac. R.R. Co., 352 U.S. 59, 62–63 (1956); Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 691 (3d Cir. 2011); Town of New Windsor v. Avery Dennison Corp., No. 10 CV 8611, 2012 WL 67791 at *8 (S.D.N.Y. Mar. 1, 2012).

III. Relevant Environmental Laws

Litigation involving contaminated sites often involves claims under the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (or their state analogs). A brief summary of the pertinent portions of these federal statutes is discussed below.

A. RCRA

RCRA allows private parties to commence a civil action against any person “who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B), available at http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/html/USCODE-2009-title42-chap82.htm. Under this provision, a court may order the removal of all contamination that poses an imminent and substantial endangerment to health or the environment. Although RCRA does not allow a private party to recover costs incurred to investigate and remediate a contaminated site, a private party who prevails in obtaining an abatement order may be awarded its attorney and expert fees. 42 U.S.C. § 6972(e), available at http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/html/USCODE-2009-title42-chap82.htm.

B. CERCLA

Under CERCLA, four categories of parties—collectively referred to as potentially responsible parties (PRPs)—may be held responsible for the costs to investigate and remediate contaminated sites: (1) current owners and operators; (2) former owners and operators at the time of disposal of the hazardous substance; (3) any party who arranged for the

IV. Recent Primary Jurisdiction Cases

A. RCRA

In recent years, primary jurisdiction arguments have been raised against RCRA claims seeking a court order to abate contamination. Intuitively, primary jurisdiction has some appeal for claims seeking a court order to abate contamination if the site is also subject to an administrative order or other regulatory regime to achieve the same objective. As a starting point, courts differ on whether RCRA claims present technical issues best resolved by administrative agencies or whether the existence of the citizen suit provision itself demonstrates Congress’s intent to have courts adjudicate such claims. Compare, e.g., PennEnvironment v. PPG Indus., Inc., No. 12-342, 2013 WL 4045794, at *19 (W.D. Pa. Aug. 8, 2013) with McCormick v. Halliburton Co., No. CIV-11-1272-M, 2012 WL 1119493, at *2 (W.D. Okla. Apr. 3, 2012). Given the judicial division, recent RCRA decisions appear to focus on the degree of the regulatory agency’s involvement. Where the agency is meaningfully involved, the invocation of primary jurisdiction appears more palatable. See, e.g., Stratford Holding LLC v. Foot Locker Retail, Inc., No. CIV-12-0772-HE, 2013 WL 5550461, at *5–6 (W.D. Okla. Oct. 8, 2013); McCormick v. Halliburton Co., No. CIV-11-1272, 2012 WL 1119493, at *3 (W.D. Okla. Apr. 3, 2012). This result is not surprising, as one would expect courts to be hesitant to invoke primary jurisdiction where agency involvement is either lacking or the court is concerned about the progress of the remediation.

B. CERCLA

By contrast, at first glance, primary jurisdiction might appear less applicable in CERCLA cases, where the plaintiff is seeking reimbursement of past response costs and a declaration regarding the defendant’s share of future response costs—as opposed to the RCRA cases discussed, where plaintiffs sought an affirmative order to investigate and remediate the contamination. Two recent cases, however, demonstrate that the primary jurisdiction doctrine may be successfully invoked to defeat cost recovery and contribution claims for cleanup costs.

In Asarco v. NL Industries, Asarco asserted a CERCLA contribution claim against several defendants for their alleged share of response costs and natural resource damages (NRDs) with respect to the so-called Tri-States sites in southwest Missouri, southeast Kansas, and northeast Oklahoma. No. 11-00138, 2013 U.S. Dist. LEXIS 43013, at *3–6 (W.D. Mo. Mar. 18, 2013). In evaluating the defendants’ primary jurisdiction argument, the court explained that the Environmental Protection Agency (EPA) had not yet completed its investigation of the sites and determined a final remedy. Therefore, “the amount of total liabilities, a prerequisite to a contribution right,” was not known. Given that Congress intended EPA to determine the nature and scope of to remediate contamination under CERCLA, the court held that adjudicating Asarco’s CERCLA contribution claim would “waste the parties and this Court’s resources,” and “could lead to inconsistent judgments.” As a result, the court invoked the primary jurisdiction doctrine to stay Asarco’s contribution claim until, among other things, EPA completed its investigation, determined a final remedy, and calculated NRDs.

Another court employed similar reasoning in Magic Petroleum Corp. v. Exxon Mobil, a New Jersey state case where the plaintiff sought contribution under the Spill Compensation and Control Act (Spill Act), New Jersey’s analog to CERCLA. No. A-1218-
Although the court acknowledged that the plaintiff had a statutory right to contribution under the Spill Act, it dismissed the contribution claim under the primary jurisdiction doctrine because “[p]rior to adjudicating the possible liability of the parties, the scope and nature of that liability must be determined” and “only the [N.J. Department of Environmental Protection] can define the contaminants, determine the extent of the discharge, identify the authorized forms of investigative testing, and the permissive methodology of cleanup.” Simply put, the court held that “until the DEP agrees the investigation properly identifies the scope of the cleanup and approves the methodology for proper remediation, the court cannot properly determine contribution,” without exposing the defendant to inconsistent rulings and possibly interfering with the agency’s regulatory process.

V. Takeaways

Investigating and remediating a contaminated site often is a complex process that takes years or decades to complete. Where parties have agreed to undertake that process with agency oversight, the prospect of having the regulatory regime upset by private litigation is, to say the least, troubling. In light of EPA’s well-publicized decision to drastically cut enforcement over the next four years, there may be an increase in private litigation involving contaminated sites.

Importantly, companies defending RCRA and CERCLA claims involving contaminated sites may be able to invoke primary jurisdiction to stay or dismiss the plaintiff’s claims. If successful, concurrent costs to defend the litigation and complete the regulatory process would be avoided. While primary jurisdiction is a discretionary doctrine and will inherently depend on the unique facts at issue, recent case law suggests that the chances of successfully invoking the doctrine are increased if any of the following factors are present: (1) the agency is actively involved in the investigation or remediation of the site; (2) a final remedy has not been selected for the site; or (3) the nature and extent of contamination is not fully delineated.

To avoid exposure to private litigation, companies should consider what strategic steps, if any, can be taken at their site to lay the groundwork for potential application of the primary jurisdiction doctrine, including documenting (1) that the company has been working closely with the regulatory agency; (2) that the company has complied with agency requests and direction; (3) that the company and agency have agreed on a conceptual framework and remedial approach to address site impacts (e.g., source removal followed by monitored natural attenuation); and (4) that the litigation may result in delays and potentially an inconsistent remedy or irreconcilable liability determinations at the site. While establishing any specific set of facts does not guarantee that a court will agree to invoke primary jurisdiction, the chances of success likely increase if the court finds that the regulatory process is moving forward with a schedule and purpose.

Gary P. Gengel is a partner in the Environment, Land & Resources Department at Latham & Watkins LLP, where his practice focuses on remediation and NRD matters, and transactions. He can be reached by e-mail at gary.gengel@lw.com or by telephone at (212) 906-4690.

Kegan A. Brown is an associate in the Environment, Land & Resources and Litigation Departments at Latham & Watkins LLP, where his practice focuses on environmental and products liability litigation, and environmental regulatory and transactional matters. He can be reached by e-mail at kegan.brown@lw.com or by telephone at (212) 906-1224.

Robert J. Denicola is an associate at Latham & Watkins LLP, where his practice focuses on litigation matters. He can be reached by e-mail at robert.denicola@lw.com or by telephone at (212) 906-4608.