

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA and  
THE STATE OF WISCONSIN,

Plaintiffs,

v.

Case No. 10-C-910

NCR CORPORATION, et al.,

Defendants.

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**DECISION AND ORDER INDICATING APPROVAL OF CONSENT DECREE**

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Plaintiffs the United States and State of Wisconsin lodged three proposed consent decrees with the Court in March 2014. Two of them—settlements with Kimberly-Clark Corporation and NewPage Wisconsin System Inc.—are unopposed. The third settlement, which has been the subject of public comment and opposition, involves payments of some \$54.1 million from six Defendants: Menasha Corp, WTM I Co., U.S. Paper Mills Corp., the City of Appleton, the Neenah-Menasha Sewerage Commission, and the State of Wisconsin.<sup>1</sup> The parties describe the settlement as a “cashout” settlement because the settling Defendants’ principal obligation is to pay the \$54.1 million in order to resolve their CERCLA liability for the Lower Fox River Site.

According to Plaintiffs (herein “the government”), the settlement is the result of substantial negotiations conducted over the course of two years under the supervision of Magistrate Judge

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<sup>1</sup>No one has questioned the settlement with the State of Wisconsin, which under the terms of the decree would pay \$100,000 to settle liability resulting from its disposal of hazardous substances through recycling.

Aaron Goodstein. The government negotiated with the settling Defendants as a group, meaning that the allocation of the settled total among those defendants was not on the table. Several of those Defendants (particularly WTM, Menasha and U.S. Paper) had already made settlement payments of at least \$70 million, and the government factored those payments into its fairness determination. Including the \$54 million to be paid under this consent decree, the total payments would amount to some \$124 million, which the government believes is roughly ten percent of the estimated upper end of total past and future response costs and natural resource damages, a number it pegs at \$1.2 billion.

The government and settling parties believe ten percent is fair because the settling Defendants caused much less of the pollution than parties like NCR, Glatfelter and Georgia-Pacific. The government states that an OUI party like WTM probably overpaid when it settled its liability for OUI on terms similar to Glatfelter. CBC Coating was a small-scale recycler, and the evidence is conflicting as to whether it even recycled broke before NCR stopped using PCBs in its carbonless paper. And other Defendants like U.S. Paper and Menasha made paperboard, which did not require substantial use of NCR's broke. Finally, the City of Appleton and the Neenah-Menasha Sewerage Commission discharged wastewater into the river, but their removal of solids during treatment also removed many of the PCBs that had attached to the solids.

### **Analysis**

A consent decree will be approved if it is reasonable, consistent with CERCLA's goals, and substantively and procedurally fair. *United States v. George A. Whiting Paper Co., et al.*, 644 F.3d 368, 372-73 (7th Cir. 2011). Substantive fairness requires that the terms of the consent decree are based on comparative fault and that liability is apportioned "according to rational estimates of the

harm each party has caused.” *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3d Cir. 2003) (citations omitted). “As long as the measure of comparative fault on which the settlement terms are based is not arbitrary, capricious, and devoid of a rational basis, the district court should uphold it.” *Id.* A consent decree only need be “based on a rational determination of comparative fault, ... whether or not [a district court] would have employed the same method of apportionment.” *Id.*

No party questions the procedural fairness of the settlement. All parties involved were represented by able counsel with extensive experience in this litigation, and the settlement was reached at arms’ length and under the facilitation of the magistrate judge assigned to this action. I therefore proceed to address the substantive fairness of the settlement.

### **1. Consideration of Recent Rulings**

I first note that the Seventh Circuit’s recent decisions (Sept. 25, 2014) significantly changed the landscape of this action, and these decisions post-dated the settlement and lodging of the consent decree. No party has suggested that these decisions should be considered in evaluating the fairness of the settlements previously reached, however.<sup>2</sup> This is not surprising. A consent decree and settlement is a formal process undertaken by the government and PRPs that involves arms’ length negotiation of terms followed by publication, receipt of public comments, and lodging of the decree

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<sup>2</sup>In reversing this court, the Seventh Circuit strongly suggested that the harm in OU4 would be divisible, which would destroy joint and several liability. *United States v. P.H. Glatfelter Co., et al.*, 768 F.3d 662, 678 (7th Cir. 2014). If that proves true, then the exposure of the settling defendants could be greater than previously expected, and greater than what is reflected in the settlement. Notably, however, neither NCR nor Glatfelter argue that the settlement would be unfair as a result of the fact that there is an increased likelihood that the harm in OU4 will not be joint and several. And of course the government seeks approval of the settlement, and it is the government that stands in the shoes of any party that might be injured due to an underpayment by the settling defendants.

in the district court. Developments in the litigation *subsequent* to the settlement the parties reached should not be material to evaluating the fairness of the settlement at the time the parties settled, or else that lengthy process—here, more than two years—would constantly be subject to re-dos as the case developed. “By its nature, a consent decree eliminates many possible outcomes that would have been better for one side or the other.” *United States v. George A. Whiting Paper Co., et al.*, 644 F.3d 368, 374 (7th Cir. 2011). Implicit in the public comment period is the idea that the comments will reflect public opinion about the settlement at the time it was reached, and these comments then factor into the district court’s subsequent review of fairness. Events that occur after the negotiations and public comment period are immaterial to that process. Looking to post-settlement events to evaluate the fairness of a consent decree would create a moving target, because settlements will always look rosier or more onerous for one side or the other as the case develops. Moreover, it would place too great an emphasis on the timing of litigation developments, which are often subject to happenstance. The whole point of settlement, which CERCLA encourages, is to affix liability at a given point in time and thereby create certainty in order to *avoid* the impact of subsequent (and necessarily uncertain) developments in the factual or legal footing of the case. See 42 U.S.C. § 9622(a) (“[W]henver practicable and in the public interest ... the President shall act to facilitate agreements ... to expedite effective remedial actions and minimize litigation.”) The policy of encouraging settlements would be undermined if the parties’ agreements were always subject to *ex post facto* analysis based on events that occurred between the agreement and the district court’s consideration of the fairness of the settlement.

Here, the parties to the settlement recognized the value of settlement and explicitly foreclosed reference to future events as part of the bargain they struck. The consent decree provides

that “each Party is agreeing to compromise and settle based on acknowledged uncertainties concerning the future outcome of pending appeals . . . By settling in this manner each Party is agreeing to avoid potential litigation advantages or disadvantages vis-a-vis the other Parties that might otherwise result from the resolution of any of those appeals.” (ECF No. 924-1 at 8.) Thus, relying on appellate rulings subsequent to the parties’ agreement to determine fairness would actually undermine the agreement itself, to the benefit of none of the parties. As noted above, no party argues that subsequent developments render the settlement unfair, and so I will proceed to address the fairness and suitability of the settlement as of the time the agreement was reached.<sup>3</sup>

## **2. NCR’s Argument**

The principal opposition to the settlement comes from NCR, which argues that the settlement does not reflect a rational estimate of the harm the settling parties caused. Citing Georgia-Pacific’s expert, NCR argues that these parties’ contribution to the harm in OU4 was much higher. But of course Georgia-Pacific is downstream in OU4 and thus had every incentive to maximize estimates of the contributions of all of the other upstream polluters. Consideration of a settlement is not the forum for resolving the proper allocation of responsibility for the pollution, a question that is fraught with complexity. Instead, it would be more reasonable to consider the whole panoply of expert opinions, which assessed figures in the neighborhood of fifteen percent to the settling Defendants.

More importantly, the premise underlying NCR’s objection is flawed. If we need to conclusively establish the parties’ contribution to the harm prior to settlement, then there would be

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<sup>3</sup>None of this is meant to suggest that a different outcome would necessarily follow if the Seventh Circuit’s recent decisions were taken into account.

little point in settling in most cases because calculation of the parties' respective contributions to the harm often requires a trial. It is enough that the government has engaged in a good faith effort to estimate the harm caused, and then it may discount that figure as an incentive to induce settlement. "As long as the measure of comparative fault on which the settlement terms are based is not arbitrary, capricious, and devoid of a rational basis, the district court should uphold it." *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3d Cir. 2003) (quoting *United States v. SEPTA*, 235 F.3d 817, 824 (3d Cir. 2000)). The fact that the settlement does not reflect the exact contribution amounts estimated by one of the experts in this action does not come close to rendering it arbitrary.

Moreover, NCR ignores the fact that equitable factors play a strong role in this action. At the time of settlement, NCR had been deemed 100% responsible, on an equitable basis, for the cleanup costs, due to two key facts: (1) the toxins came from its own product and (2) NCR had an appreciation for the risk that the PCBs could be dangerous. Even after the appeal, there is no indication that these factors will not continue to play an important, or even dispositive, role in the contribution analysis. Additionally, the equitable factors strongly suggest that the statutory contribution bar the settling parties receive as a result of settling should not have a significant impact on the non-settling parties. When equitable factors are considered, it is difficult to envision a scenario in which the entity responsible for the pollution in the first place would be entitled to substantial contribution amounts from entities that merely processed wastewater or paper scraps. For these reasons, I will indicate my intention to approve the proposed consent decree with the six "cashout" defendants.

### **3. Consent Decree with NewPage and Kimberly-Clark**

Neither NewPage Wisconsin System Inc. nor Kimberly-Clark Corporation has been cited as a significant contributor of PCBs to the Lower Fox River. As the government notes, the Wisconsin DNR ascribed more than 99% of the problem to other dischargers, and in the lengthy proceedings in this and the companion action, No. 08-C-16, no experts or other parties have attempted to show that either of these Defendants were major, or even significant, dischargers. During the settlement analysis, the government ascribed only .03% of the discharge to Kimberly-Clark. With large uncertainty factors being applied, and an upper-bound estimate of the total at \$1.5 billion, Kimberly-Clark's settlement amount came to \$1.35 million. For its part, NewPage agreed to a settlement figure of \$1,157,253, which represented a .083% share of the cost of remediating OU2 through OU5. Given NewPage's bankruptcy, however, the expected payout will be closer to \$50,000, which the government recognizes.

The only comments received relating to these settlements came from Glatfelter, which had objected to the allocation of a large portion of the money to a segregated fund under the direction of the Wisconsin DNR. The gist of Glatfelter's comments was that there were no guarantees the DNR would use the money properly, and the amount assigned to Wisconsin was not in line with Wisconsin's own expected costs. (ECF No. 930-1 at 11-13.) In short, it wanted to ensure that the funds the DNR received would reduce any liability Glatfelter has itself. Glatfelter has not repeated these concerns in its brief more recently filed in this Court, and so I conclude that any concerns it may have had have been addressed by the government's response. In any event, my review of the government's explanation convinces me independently that there is no merit to any concerns about a fund under the control of the state DNR. Moreover, the amounts received by the government under the consent decrees are more than fair. If anything, the "fudge factors" inherent in the

calculations ascribe more costs to these two parties than what might be otherwise expected. Only in environmental litigation can the phrase “*de minimis*” be used in the same sentence with seven-figure dollar amounts; the fact that *de minimis* parties are willing to settle for seven-figure amounts is likely based on a simple conclusion that litigating the point would cost more than it would be worth to establish their actual liability.

### **Conclusion**

For the reasons given above, pursuant to Fed. R. App. P. 12.1(a), I hereby indicate my intention to approve the consent decree between the United States, the State of Wisconsin, and the six “cashout” Defendants set forth above. In addition, I hereby approve the consent decrees with Kimberly-Clark and NewPage. The clerk is directed to enter these consent decrees (ECF No. 924-2 and 924-3) on the docket. The motions to file responses [941, 946, 947] are **GRANTED**.

**SO ORDERED** this 12th day of December, 2014.

/s William C. Griesbach  
William C. Griesbach, Chief Judge  
United States District Court