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SUPERFUND

COST RECOVERY

The varying views of Superfund attorneys on the boundary between cost recovery and contribution actions are explored in this BNA Special Report. Courts have described this aspect of the Comprehensive Environmental Response, Compensation, and Liability Act as ''vexing,'' and lawyers have differing opinions on where to draw the line.

Finding the Divide Between CERCLA Cost Recovery and Contribution Actions

Courts have variously described the boundaries between Superfund cost recovery and contribution actions under § 107(a) and § 113(f), respectively, as ''hazy,'' ''troublesome'' and ''vexing.''

The U.S. Court of Appeals for the Sixth Circuit recently summed up these two provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, which both involve funding for hazardous waste-related cleanups, as a ''complicated network of cost-shifting provisions, which apply depending on who pays what and why'' (*Hobart Corp. v. Waste Mgt. of Ohio, Inc.*, 758 F.3d 757 (2014)).

CERCLA's borders have been explored ever since its enactment in 1980, and some environmental lawyers tell Bloomberg BNA clearer distinctions divide § 107 and § 113 now, despite an unjustified hope held by some lawyers and clients that both avenues may be pursued at the same time.

Other lawyers say the law is unsettled for numerous reasons, including regulations issued by the U.S. Environmental Protection Agency, and that better defined contours may come only if the U.S. Supreme Court or Congress acts to clarify the boundary between § 107 and § 113.

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ATTORNEY DOUGLAS ARNOLD

Douglas Arnold, an environmental lawyer with Alston & Bird in Atlanta, told Bloomberg BNA Feb. 25 that the scope of CERCLA's cost recovery and contribution provisions is clearer because of recent court decisions barring parties from bringing a Superfund cost recovery action once they qualify to bring a contribution claim, and lawyers have less reason to pursue § 107 cost recovery claims that courts have consistently rejected.

''It's wishful thinking on the part of lawyers and their clients,'' Arnold said. ''The trend here is that courts have case law to back them up in holding that once a

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party has standing to bring a contribution claim, that's the only claim they have.''

That wishfulness, Arnold said, stems from the inherent benefits in § 107(a), such as the longer statute of limitations and its provision for joint and several liability.

Boundary Disputes

The Supreme Court held in *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007), that the availability of the two remedies depends on the procedural posture of the case.

If a party has been the subject of a CERCLA action under § 106 or § 107, or has otherwise resolved its liability with the federal government or a state for its response costs through an administrative settlement or judicial decree, the party's remedy lies in seeking contribution from other potentially responsible parties (PRPs).

A party not subject to an enforcement action or settlement, and who has voluntarily incurred response costs, may proceed under § 107(a).

Arnold said the until-recently uncertain intersection of these CERCLA provisions—and differing interpretations by lower courts grappling with them—fueled much litigation in complex contamination cases, especially when a party incurred voluntary costs before an administrative settlement or decree took effect.

Increasingly, however, the courts' definition of the intersection has become consistent, he said.

''Parties need to understand that the mere fact that a client has voluntarily incurred costs prior to an administrative settlement, or entered into a consent decree, doesn't mean those costs can be pursued under Section 107,'' Arnold said.

Michigan Decision

That conclusion was recently confirmed, Arnold said, in a CERCLA case in the U.S. District Court for the Eastern District of Michigan.

The court found no authority for the proposition that ''a party who has incurred voluntary costs and faces future potential liability for further costs in relation to a single site can 'slice and dice' the costs into separate claims'' (*Ford Motor Co. v. Michigan Consol. Gas Co.*, 2015 BL 33780, E.D. Mich., No. 08-cv-13503, 2/10/15 (30 TXLR 174, 2/19/15)).

The court in that case relied heavily on *Hobart*, in which the Sixth Circuit held that a party that resolves its Superfund liability to the government under the EPA's new model administrative consent order is limited to a contribution action against third parties.

Uncertain Future

But some other attorneys practicing in the area don't agree that the law is clear.

Superfund litigator Robert Sanoff, of Foley Hoag in Boston, said in a Feb. 24 e-mail the law is unsettled because of how courts have applied Supreme Court precedents on the crossed paths of cost recovery and contribution actions.

He cited as an example *Cooper Industries, Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) , where the Supreme Court held that a private party may only pursue contribution under § 113(f)(1) from other PRPs ''during or following'' a civil action under § 106 or § 107.

''Over a decade after the Supreme Court's decision in *Aviall*, the divide between CERCLA Section 107 cost recovery claims and Section 113 contribution claims remains unsettled,'' Sanoff said.

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ATTORNEY ROBERT SANOFF

''PRPs incurring response costs at Superfund sites would almost always prefer to seek reimbursement of those costs as a Section 107 claim given its more favorable statute of limitations and joint and several liability standard,'' he said. ''However, the post-*Aviall* case law offers little clarity as to the precise dividing line between Section 107 and 113 claims.''

Whether the border between § 107 and § 113 will solidify is unclear, Sanoff said.

''In the interim, it may be prudent for PRPs to plead alternatively under both Section 107 and Section 113 when they seek reimbursement of response costs,'' Sanoff said. ''Certainty as to which cause of action applies is unlikely to be reached until either Congress or the Supreme Court addresses this issue—and that may never happen.''

Voluntary vs. Compelled Cleanup

Norman Bernstein, of N.W. Bernstein & Associates in Rye Brook, N.Y., who filed a petition for certiorari in *Hobart* that was denied by the Supreme Court in January 2015(30 TXLR 89, 1/22/15), said the issue can arise in a number of scenarios.

''The Section 107/Section 113 issue basically arises in the context of (a) an EPA administrative order on consent, (b) an EPA unilateral administrative order, (c) a cleanup that has occurred without any formal governmental compulsion—for example where a property owner cleans up its own property—or (d) a federal court consent decree [entered into] after a lawsuit has been started,'' Bernstein said in a Feb. 24 e-mail.

''In all cases, the PRP wants to recover at least some of its money from others who are potentially liable under § 107. The question is when is it able to use § 107 directly and when is it limited to a § 113 contribution action to enforce liability created by § 107,'' he said.

''In my view, and as set forth in *Atlantic Research*, if you are suing to recover your own costs of response it is a § 107 action, and if you are suing to recover an amount you paid to others for their costs of response and you think you paid too much, that is a 113 contribution action,'' Bernstein said.

Government Interests

Some of the uncertainty is the result of the view of ''contribution'' adopted by the EPA and the Department

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of Justice over the years, Alfred Light, director of the Graduate Program in Environmental Sustainability, and a law professor, at St. Thomas University Law School in Miami Gardens, Fla., said in a Feb. 24 e-mail.

''The government—and the parties who settle with it—wants to extinguish a private PRP's contribution claim in the government's settlements with other parties under Section 113(f)(2). They can only do this if the PRP's claim is a claim for contribution under Section 113 rather than a claim under Section 107,'' Light said.

Light said that only claims that allocate liability among parties liable to the government are contribution claims—so long as they are covered in the settlement or decree—while claims unrelated to the government's claim ''might be the subject of a Section 107(a) action if the PRP incurred response costs consistent with the [National Contingency Plan] within the meaning of Section 107(a)(4)(B).''

BY STEVEN M. SELLERS