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TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Jeff Karp and Edward Mahaffey highlight the difficulties faced by PRPs ensnared in the Superfund liability net to pursue claims to effectively mitigate the harsh results of a government CERCLA cost recovery action. The article explores the D.C. Circuit's decision in Guam v. U.S., in which the Supreme Court granted the Territory's writ of certiorari to determine whether a settlement under a statute other than CERCLA can trigger a CERCLA 113(f)(3)(B) contribution claim, while precluding a cost recovery action under CERCLA Section 107.

Supreme Court to Again Consider the Interplay Between a CERCLA Cost Recovery and Contribution Action

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Liability for clean-up of hazardous substances pursuant to the Comprehensive Response, Compensation and Liability Act of 1980 ("CERCLA," "Act" or "Superfund") can be extremely costly, amounting to hundreds of millions of dollars. Under CERCLA's broad liability net, the United States Environmental Protection Agency ("EPA") can obtain reimbursement of response costs from or require potentially responsible parties ("PRPs")[1] to conduct response actions to address releases or threatened releases of hazardous substances from a facility. See 42 U.S.C.
§ 9607(a); 42 U.S.C.§ 9601(9)(B).

Although CERCLA does not specify the liability standard in government cost recovery cases under Section 107, most courts have accepted the application of strict, joint and several liability for PRPs who cannot prove divisibility of the harm they caused from the total harm. See *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989) ("The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts: damages should be apportioned only if the defendant can demonstrate that the harm is divisible."). In *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009), the U.S. Supreme Court recognized apportionment as a judicially created affirmative defense to joint and several liability under CERCLA. It instructed the lower courts to follow the Restatement (Second) of Torts § 433A in determining whether harm is divisible in any specific case, which occurs when "there is a reasonable basis for determining the contribution of each cause to a single harm." 556 U.S. at 614. The burden of proof, however, is placed on defendants to establish that such a reasonable basis exists. See Restatement (Second) of Torts § 433B(2); *Burlington Northern* at 617 (there must be "facts contained in the record reasonably support[ing] the apportionment of liability."). The practical effect of placing the burden on defendants to prove divisibility is that responsible parties rarely escape joint and several liability, which means that any one PRP may be held responsible for the entire cost of a cleanup. See *Guam v. U.S.*, 950 F.3d 104, 107 (D.C. Cir. 2020).

To mitigate the frequently harsh results of a government action against only one or a few PRPs at a site where the waste of many was disposed of, Congress added Section 113(f)

[1] Potentially responsible parties are determined from the list of covered persons in CERCLA Section 107, the liability section of the Act. See *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1352 (2020). Under Section 107(a), the categories of liable parties are: 1) present owners and operators of a contaminated site; 2) past owners and operators at the time hazardous substances were disposed of at the site; 3) generators of the hazardous substances who arranged for disposal of such substances; and 4) any person who accepts or accepted any hazardous substances for transport to a site it selected. 42 U.S.C. 9607(a)(1)-(4).

to CERCLA in the Superfund Amendments and Reauthorization Act (SARA) of 1986. See 42 U.S.C.§ 9613(f). This provision enables a party liable to the government for response costs to seek contribution from any other person who is liable or potentially liable under Section 9607(a). Contribution is available under either: 1) 42 U.S.C.§ 9613(f)(1) (providing an express right of contribution "during or following any civil action under section 9606. . . or under section 9607(a)"); or 2) 42 U.S.C.§ 9613(f)(3)(B) (providing an express right of contribution "for persons who have resolved their liability to the United States or a state for some or all of a response action in a judicially or administratively approved settlement").

In interpreting CERCLA's contribution provisions, the courts typically give "the word 'contribution' its generally accepted legal meaning." *American Cyanamid v. Capuano*, 381 F.3d 6, 25 (1st Cir. 2004), quoting *United Technologies Corp. v. Browning Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994). Thus, when applied in an environmental case, the term "refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its pro rata share of the aggregate response costs." *Id*.

Establishing liability in a contribution case involves proving the same elements as for cost recovery under Section 107(a). See *U.S. v. Davis*, 31 F. Supp. 2d 45, 59 (D.R.I. 1998), aff'd 261 F.3d 1 (1st Cir. 2001). However, unlike a cost recovery action by the government under CERCLA Section 107, a claim for relief under CERCLA 113(f) involves several, not joint and several, liability for the defendant(s). See *U.S. v. Davis*, 31 F. Supp. 2d at 62, aff'd 261 F.3d 1 (1st Cir. 2001); see also *U.S. v. Consolidation Coal Co*., 184 F. Supp. 2d 723, 743 (S.D. Ohio 2002). CERCLA Section 113(f)(1) provides that a court "may allocate the response costs among liable parties using such equitable factors as the Court determines are appropriate." See 42 U.S.C.§ 9613(f)(1). Thus, contribution claims between or among PRPs are based on the principle of equitable allocation, and each party is responsible only for its equitable share of the response costs. See *American Cyanamid* at 14; see also *U.S. v. Davis*, 31 F. Supp. 2d at 63 ("[S]ince contribution liability is several, the party seeking contribution has the burden of proving both that a defendant shares in the common liability and what their share is"). In this respect, contribution liability under 9613(f) differs from liability imposed in a government cost recovery action under 9607 where only one or a few defendants may be found jointly and severally liable for the entirety of the cleanup costs. See *Guam v. U.S*., 950 F.3d 104, 107 (D.C. Cir. 2020); see also *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 2000).

Undoubtedly, many Superfund practitioners have experienced their clients being unfairly left with a huge financial exposure in a CERCLA matter due to the deck being so heavily stacked in EPA's favor. This situation has occurred despite the inclusion of the contribution provisions in the Act, often due to remaining uncertainties regarding the interplay between those provisions and the cost recovery provisions under CERCLA

Section 107. Typically, the issue has arisen in the context of whether the criteria for pursuing a contribution claim have been triggered, or, alternatively, whether a party who has entered into a settlement with EPA may recover its response costs incurred from non-settling PRPs pursuant to Section 107(a)(4)(B).

In 2007, the U.S. Supreme Court ruled that a cost recovery action under Section 107 and a contribution claim under Section 113(f) are separate causes of action, but in some situations "neither remedy swallows the other." *U.S. v. Atlantic Research Corp*., 551 U.S. 128, 139 n.6 (2007). The Court further clarified that "the remedies available in section 107(a) and section 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances.'" *Id.* at 140 (citation omitted).

The Court stated that a party settling with the government may pursue a contribution claim under Section 113(f)(3)(B), which "is contingent upon an inequitable distribution of common liability among liable parties." *Id*. at 139. Concomitantly, a cost recovery action under Section 107 "permits recovery of cleanup costs but does not create a right to contribution" . . . because "[a] private person may recover under 107(a) without establishment of liability to a third party." *Id*. Thus, the Court concluded that if the party had incurred response costs to remediate a site, an action to recover those costs under CERCLA Section 107 also would appear to be available. *Id*.

The resolution of the permissible line between pursuing a claim under Section 107 and Section 113 often is quite contentious because of differing statute of limitations and court decisions subsequent to *Atlantic Research* holding that the two causes of action are mutually exclusive of each other. For a remedial action under Section 107, the statute of limitations is six years. See Section 113(g)(2)(B). The statute of limitations for a contribution claim under Section 113 is only three years. See Section 113(g)(3). Thus, the particular facts of a case can "make-or-break" the availability of a claim for relief.

The harsh result that can occur are seen in *Guam v. U.S.,* 950 F.3d 104, 118 (D.C. Cir. 2020), cert. granted January 8, 2021. In that case, the United States Navy discarded hazardous substances at a landfill it created on the Island of Guam ("Guam" or "Territory") in the 1940s and used through the 1970s, without employing any environmental safeguards. Initially, EPA addressed the facility under CERCLA. It included the site on its National Priorities List, comprised of the most egregiously contaminated facilities, and conducted a Remedial Investigation/Feasibility Study at the landfill pursuant to the National Contingency Plan, the regulations promulgated by EPA to implement the Act. However, the agency declined to select an active remedy for the property under CERCLA. Instead, the government switched gears, suing Guam for violations of its permit under the Clean Water Act (CWA) in 2002. The parties settled the EPA's claims in 2004 by entering into a consent decree that

required Guam to pay civil penalties, and properly close and cleanup the landfill.

Upon discovering the landfill cleanup costs could exceed $160 million, Guam sued the Navy in 2017 for cost recovery under CERCLA Section 107(a) and, alternatively, for contribution under CERCLA Section 113(f)(3)(B). The government moved to dismiss Guam's complaint in its entirety. It argued that the contribution claim was triggered by virtue of the parties entering into the consent decree under the CWA and thus resolving Guam's liability for the response action under Section 113(f)(3)(B). Guam's contribution claim, the government asserted, was time-barred by the three-year statute of limitations applicable to contribution actions. The United States also moved to dismiss the cost recovery claim on the basis that the contribution claim, having been triggered, was Guam's exclusive remedy under CERCLA.

The District Court disagreed with the government's position, concluding that the 2004 EPA consent decree did not resolve Guam's liability for the site cleanup, and did not qualify as a settlement within the meaning of CERCLA section 113(f)(3)(B). *Guam v. U.S.*, 341 F. Supp. 3d 74, 84 (D.D.C. 2018). Therefore, the court denied the United States' motion to dismiss, and permitted the Territory to pursue relief for its response costs under CERCLA Section 107 (with its six-year statute of limitations that had not yet expired). *Id*.

On interlocutory appeal, the D.C. Circuit reversed. The court stated that the Supreme Court in *Atlantic Research* "d[id] not decide whether the compelled costs of response are recoverable under 113(f), 107(a), or both." *Guam v. U.S.*, 950 F.3d at 111. But, the D.C. Circuit found that "every federal court of appeals to have considered the question since *Atlantic Research* has said that a party who may bring a contribution action for certain expenses must use the contribution action, even if a cost recovery action would otherwise be available." *Id.*, quoting *Whittaker Corp. v. United States*, 825 F.3d 1002, 1007 n.5 (9th Cir. 2016) (collected cases); see also *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2016) (a PRP that has resolved its liability for some or all of a response action arising from a common liability stemming from a 107 action, may not seek cost recovery under 107). Thus, the court concluded that section 113(f) and section 107 are mutually exclusive. *Guam* at 111.

Further, in reviewing the 2004 CWA Consent Decree, the court determined that the settlement had "resolve[d] Guam's liability for some . . . of a response action within the meaning of CERCLA section 113(f)(3)(B), triggering that section and precluding Guam from seeking cost-recovery under section 107." *Guam* at 116. Having determined that Guam's cause of action for contribution expired in 2007, the D.C. Circuit reversed and remanded with instructions to dismiss Guam's complaint. Id. at 118.

This view is not universally held among the circuits, which are split on whether a non-CERCLA settlement agreement, such as the CWA consent decree in *Guam*, could give

rise to a contribution action under CERCLA Section 113. Id. at 114. The Third, Seventh and Ninth Circuits have held that such non-CERCLA settlement agreements in fact give rise to a contribution claim, while the Second Circuit concluded that non-CERCLA agreements do not. Id. By virtue of its ruling in *Guam* that a CERCLA contribution claim was triggered by a judicially approved settlement under the CWA, the D.C. Circuit's decision further exacerbated that split.

The D.C. Circuit's finding that Guam's contribution claim under CERCLA Section 113 was time-barred and that the Territory had no claim for relief under CERCLA Section 107 because the two provisions were mutually exclusive, left Guam facing substantial financial liability to remediate a landfill that was polluted by the United States Navy. Perhaps, then, it was not surprising that the Supreme Court granted Guam's petition for certiorari, on January 8, 2021. Oral argument is scheduled for April 26, 2021, at which the parties will address whether a settlement under a statute other than CERCLA can serve to trigger a contribution claim under CERCLA Section 113(f)(3)(B), while precluding a cost recovery action under CERCLA Section 107.

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