Environment, Land Use & Natural Resources ADVISORY ■

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CERCLA Litigation Update: Cleanup Costs Cannot Be “Sliced and Diced”

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Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) litigation centered for many years on whether a party that has incurred cleanup costs can assert a cost recovery claim, a contribution claim or both. That battle is largely over. If a party has standing to bring a contribution claim under Section 113(f) of CERCLA, then the party cannot also bring a cost recovery claim under Section 107(a). NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 691–93 (7th Cir. 2014); Hobart v. Waste Mgmt. of Ohio, 758 F.3d 757, 767 (6th Cir. 2014); Solutia v. McWane, Inc., 672 F.3d 1230, 1237 (11th Cir. 2012); Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 602–4 (8th Cir. 2011); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 127–28 (2d Cir. 2010).

The fight has therefore now shifted to whether cleanup costs incurred “voluntarily” fall outside the scope of a contribution claim. If so, the argument goes, those cleanup costs would be recoverable in a cost recovery claim.

Cost Recovery Versus Contribution: Why It Matters

There are three key differences between Section 107 and Section 113 actions. First, Section 107 potentially permits a party to seek joint and several liability against one or more defendants for all of its cleanup costs. In contrast, Section 113 provides only for contribution, meaning that a party can only recover cleanup costs beyond what it should have paid—i.e., its “fair” share. Second, a party generally has up to six years to bring a Section 107 claim, while Section 113 claims are subject to a three-year statute of limitations. Third, Section 113 actions are subject to a settlement bar. In other words, parties that settle their CERCLA liability with the government are protected by statute from future contribution actions by others. So, as the Sixth Circuit aptly summed up, “[g]iven the choice, a rational [potentially responsible party] would prefer to file an action under § 107 . . . in every case.” Hobart, 758 F.3d at 767.

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Where Do “Voluntary” Cleanup Costs Fall?

Section 113 provides a right of contribution to a party that has incurred cleanup costs after either being sued under Section 106 or 107 by the government or a private party or settling its CERCLA liability with the government. The statute is silent, however, on whether cleanup costs “voluntarily” incurred before suit or settlement are nonetheless recoverable under Section 107. A growing number of courts have said no.

The United States District Court for the Eastern District of Michigan is the most recent court to address this issue. In *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-cv-13503 (E.D. Mich. Feb. 10, 2015), Michigan Consolidated Gas Co. (MichCon) was sued under Section 107 by Ford and others for cleanup costs at a Superfund site in Dearborn, Michigan. MichCon in turn filed a cost recovery claim against the United States, arguing that prior government action had exacerbated the site contamination.

The government moved to dismiss, arguing that because MichCon was subject to Ford’s Section 107 action at the time of the suit, it could only bring a Section 113 contribution claim. In response, MichCon countered that the costs it sought were incurred voluntarily and not the “result” of Ford’s Section 107 action; therefore, it had standing to bring a Section 107 claim.

The court disagreed. MichCon, the court found, was subject to a Section 107 claim at the time of its third-party complaint. Accordingly, MichCon was limited to a contribution claim for all of its claimed costs, voluntarily incurred or otherwise.

As support, the *Ford* court noted other recent CERCLA opinions addressing this issue. Just last year, for instance, the Seventh Circuit rejected the claimant’s argument that cleanup costs it had “voluntarily” incurred under a Unilateral Administrative Order (UAO) before the government filed suit to enforce the UAO were potentially recoverable under Section 107. “Such slicing and dicing of costs incurred under the same administrative order,” the court held, “[made] little sense when a party’s liability for all of those costs will ultimately be determined in the enforcement action.” *NCR*, 768 F.3d at 692. Similarly, a district court in California declined to parse a litigant’s “voluntary” and “compelled” costs because it could seek Section 113 contribution for all costs that it incurred related to the underlying site. *Whittaker Corp. v. United States*, No. 13-1741, 2014 WL 631113 (C.D. Cal., Feb. 10, 2014).

The Ford decision seems to highlight an emerging trend: courts will not entertain arguments that certain cleanup costs were incurred “voluntarily” as a means to “repackage” a Section 113 claim into a Section 107 claim. Instead, if a party has standing to bring a contribution claim at the time of filing suit, then the party may only pursue reimbursement of its costs—regardless of when or how incurred—in a Section 113 action.
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