

PRP Claims under CERCLA: The Rules Continue to Change

Presented by
Kirk B. Maag



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Overview

What causes
of action are
available?

When are
they available
to PRPs?

Why does it
matter?

Causes of Action

§ 107(a) Cost-Recovery

- “Necessary” response costs incurred that are consistent with the NCP

§ 113(f)(1) Contribution

- Costs incurred during or following a civil action under § 106 or § 107

§ 113(f)(3) Contribution

- Costs incurred in other administrative or judicially approved settlements with EPA or a State

The “Old” Paradigm

- Cost-recovery actions under § 107 are available to the United States, a State, an Indian tribe, and non-PRPs
- Cost-recovery actions under § 107 are not available to PRPs
- PRP recovery is limited to contribution actions under § 113

SCOTUS Shifts the Paradigm

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004)

- PRP cannot seek contribution under § 113(f)(1) from other PRPs without first being sued under § 106 or § 107
- Plain language interpretation of § 113(f)(1)

U.S. v. Atlantic Research Corp., 551 U.S. 128 (2007)

- PRP that has incurred response costs may bring a cost-recovery action against other PRPs under § 107(a)(4)(B)
- Plain language interpretation of § 107(a)(4)(B)

Harmonizing § 107 and § 113

- § 107(a) permits cost-recovery (as distinct from contribution) by a private party that has itself incurred response costs
- Costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113
- Footnote Six: “We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all.”

The Answered Questions

Claims that must
be brought
under § 107

- Claim to recover costs incurred by a PRP in a cleanup undertaken without EPA oversight or involvement

Claims that must
be brought
under § 113

- Claim by PRP against other PRPs to recover amounts paid by PRP to person who conducted a cleanup and sued for cost recovery

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The Unanswered Questions

QUESTION 1: Are there circumstances under which a PRP has the option to pursue either a cost-recovery or contribution action?

- Courts of Appeals: No

QUESTION 2: What type of agreement constitutes “an administrative or judicially approved settlement” under § 113(f)(3)(B)?

- Courts of Appeals: Split

Courts of Appeals' Resolution of Question 1

- A PRP that incurs response costs as the result of a § 106 or § 107 action or an administrative or judicially approved settlement with the United States or a State cannot pursue a cost-recovery action.
- Is this consistent with Atlantic Research?
 - “[T]he plain language of [§ 107(a)(4)(B)] authorizes cost-recovery actions by any private party, including PRPs.” (Emphasis added)
 - “We do not decide whether these compelled costs of response [i.e., costs resulting from consent decree] are recoverable under § 113(f), § 107(a), or both.”

Rationales from Courts of Appeals

- PRP with contribution protection under § 113(f)(2) should not be able to bring a cost-recovery claim against another PRP.
 - But see NCR Corp. v. George A. Whiting Paper Co., 2014 U.S. App. LEXIS 18441 (7th Cir. Sept. 25, 2014):
 - “The defendant in a section 107(a) action can always bring a section 113(f) counterclaim if the plaintiff is a PRP[.]”

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Rationales from Courts of Appeals

- § 107(a) is available for voluntarily incurred costs
 - But see:
 - Bernstein v. Bankert, 733 F.3d 190 (7th Cir. 2013) (“CERCLA does not ask whether a person incurs costs voluntarily or involuntarily”)
 - W.R. Grace & Co. -- Conn. v. Zotos Int’l, Inc., 559 F.3d 85 (2d Cir. 2009) (“section 107(a) does not specify that only parties who ‘voluntarily’ remediate a site have a cause of action”)

Courts of Appeals' Resolution of Question 2

- What type of agreement constitutes “an administrative or judicially approved settlement” under § 113(f)(3)(B)?
 - Must the agreement specifically resolve liability under CERCLA?
 - Did the agreement resolve some or all of the plaintiff's liability?

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Must the agreement resolve CERCLA liability?

Second Circuit

- Settlement must resolve CERCLA liability to trigger § 113(f)(3)(B)
- State can resolve liability without EPA involvement

Third Circuit & District of Montana

- Settlement need not specifically resolve CERCLA liability

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Second Circuit Example

W.R. Grace v. Zotos

- Current owner settles with NYDEC
- Consent order obligated current owner to perform RI/FS and RD/RA
- Orders released claims under state law but did not mention CERCLA
- § 113 claim **rejected**; § 107 claim **allowed**

Niagara Mohawk v. Chevron

- Current owner settles with NYDEC
- Consent order obligated current owner to perform RI/SF and RD/RA
- Orders released claims under both CERCLA and state law
- § 113 claim **allowed**; § 107 claim **rejected**

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Did the agreement resolve some/all of plaintiff's liability?

- Settlement agreements are interpreted as contracts under state-law principles
- Agreement, by its terms, must release a party from some or all liability
- § 113(f)(3)(B) is not triggered until liability release goes into effect

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Examples

Hobart, 758 F.3d 757 (6th Cir. 2014)

- EPA ASAOC was an administrative settlement that went into effect upon execution
- Cited § 113(f)(3)(B), titled “administrative settlement,” and included covenant not to sue

ITT Indus., 506 F.3d 452 (6th Cir. 2009)

- EPA AOC was not an administrative settlement
- Did not specifically resolve liability

Bernstein, 733 F.3d 190 (7th Cir. 2013)

- EPA AOC did not trigger § 113(f)(3)(B) until PRP completed cleanup obligations
- Conditioning covenants not to sue on satisfactory performance does not delay effectiveness

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Oregon Example

DEQ Model Order on Consent (Prospective Purchaser Agreement)

- “DEQ and Respondent intend for this Consent Order to be construed as an **administrative settlement** by which Respondent has **resolved its liability** to the State of Oregon, within the meaning of [§ 113(f)(2)], regarding [certain releases]”

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Statute of Limitations for Cost-Recovery Actions

Removal Action

- Must be commenced within 3 years after completion of the removal action

Remedial Action

- Must be commenced within 6 years after initiation of physical onsite construction

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Removal Action v. Remedial Action

Removal Action

- **Immediate, short-term responses** intended to protect people from immediate threats posed by hazardous waste sites.
- Examples: excavating contaminated soil, erecting a security fence, or stabilizing a berm, dike, or impoundment.

Remedial Action

- **Long-term cleanups** designed to permanently and significantly reduce the risks associated with releases or threats of releases of hazardous substances.
- Example: removal of hazardous material from groundwater using pump and treat technologies.

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Statute of Limitations for Contribution Actions

Must be
commenced
within 3
years after
the date of

- Judgment in CERCLA action
- Administrative order under § 122(g) (de minimis settlements)
- Administrative order under § 122(h) (cost-recovery settlements)
- Entry of judicially approved settlement

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Summary

- PRPs are not limited to contribution actions
- Courts of Appeals interpret § 107 and § 113 as providing mutually exclusive causes of action
- Language used in administrative consent orders may dictate which type of action a PRP must pursue

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Questions

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 **STOEL RIVES** LLP
ATTORNEYS AT LAW