CERCLA Statutes of Limitations Confusion in Administrative Settlements

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When a private party pursues a claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against another private party, it does so by bringing a cost recovery claim, under section 107, or a contribution claim, under section 113. There has been substantial litigation over the years regarding how those two claims intersect.

Whether a party has a section 107 or 113 claim becomes critical when there is the possibility that a claim is time-barred. A section 113 contribution claim is subject to a three-year statute of limitations, whereas a section 107 cost recovery claim is subject to a six-year statute of limitations. Recently, courts have generally agreed that a party with a section 113 claim may not also seek cost recovery under section 107. However, that general rule of thumb rarely provides a simple answer for parties and for courts, and recent case law has examined that confusion in the context of settlements.

A section 107 claim is available when a plaintiff has voluntarily incurred costs cleaning up a site and seeks to recover cleanup costs from another potentially responsible party (PRP). A section 113 claim is available when (1) the government has either compelled the plaintiff to clean up a site or brought a cost recovery claim against the plaintiff, or 2) the government has entered into a settlement agreement with the plaintiff. Generally, once a section 113 claim is triggered, a section 107 claim is foreclosed.

An administrative settlement triggers the running of the three-year statute of limitations under section 113, so long as that settlement resolves the PRP's liability to the United States for at least some of the costs at the site. However, there has been a relative flurry of cases recently interpreting what constitutes an administrative settlement under section 113(f)(3)(B). In *Bernstein v. Bankert, 733 F.3d 190 (7th Cir. 2012)*, the U.S. Court of Appeals for the Seventh Circuit explained that simply entering into an administrative settlement is not enough to trigger resolution of liability and triggering a section 113 claim; rather, only when the government's covenant not to sue is definitively triggered is liability resolved and a section 113 claim becomes ripe. In Bernstein, conditions were placed on the covenant not to sue and thus no section 113 claim had been triggered. Bernstein and other cases have made clear that there must be a clear admission of liability and an unconditional covenant not to sue in order for a section 113 claim to be triggered.

The question then becomes whether the plaintiff in fact entered into an administrative settlement under section 113(f)(3)(B). Bernstein and other cases have shed some light on this, and the U.S. Court of Appeals for the Sixth Circuit has considered this question in multiple cases recently. In *Hobart Corp. v. Waste Management of Ohio, 758 F.3d 757 (6th Cir. 2014)*, the Sixth

Circuit became the first Court of Appeals to consider the EPA's most recent model CERCLA administrative consent order. The court found that the model AOC-amended in 2005 to address case law addressing this area of confusion-did in fact constitute a 113(f)(3)(B) settlement and trigger a 113 claim.

More recently, in November 2015, the Sixth Circuit again considered whether a CERCLA AOC constituted an administrative settlement, in Florida Power v. Firstenergy, No. 14-4126 (6th Cir. Nov. 5, 2015). Following Bernstein and other cases, the Sixth Circuit found that the AOCs at issue did resolve liability because resolution of liability was conditioned on the plaintiff's performance and did not take immediate effect. Rather, the AOCs explicitly state that resolution of liability takes placed upon the performance of the RI/FS that was the subject of the AOC.

These cases lay out the framework for obtaining certainty when entering into administrative settlements and for avoiding running into statutes of limitations confusion that may result in a time-barred claim. First, make clear the parties' intent for the AOC to resolve some of the party's liability. This should be done by (1) explicitly stating in the document that it is in fact an "administrative settlement" under section 113(f)(3)(B), (2) explicitly stating in the document that the agreement resolves at least a portion of the party's liability, (3) titling the document "Administrative Settlement Agreement and Order on Consent" in order to match the language from section 113(f)(3)(B), and (4) including a covenant not to sue.

Those four things should provide more certainty that a settlement is a section 113(f)(3)(B) settlement, but does not necessarily resolve the statute of limitations issue. The case law has faced the issue of when liability is resolved, because only when liability is resolved will a section 113 claim be triggered. In order to trigger a section 113 claim upon entering into the settlement agreement, the agreement must say that liability is resolved upon such date. Further, conditioning the covenant not to sue may prevent a finding of resolution of liability. If EPA insists on a broad reservation of rights and other conditions, there may be confusion as to whether a section 113 claim is triggered, creating statute of limitations problems.

Of note is the fact that paying money pursuant to the agreement is not necessarily enough to resolve any of a party's liability. As the Sixth Circuit found, despite the plaintiff having paid the EPA's past response costs pursuant to the agreement, the agreement conditions resolution of liability on satisfaction of all of the agreement's requirements and so no section 113 claim was triggered. Therefore, if the EPA insists on conditioning resolution of liability, it must be made clear in the agreement when and how resolution of liability is triggered in order to protect against a time-barred claim.

Going forward, the inconsistency in interpretation of administrative settlements will hopefully be helped by EPA's revision to its model AOC. The language was modified to provide explicit language regarding resolution of liability, and the court in Hobart found it to constitute a resolution of liability sufficient to trigger a section 113 claim. The model AOC provides no guarantees (and does nothing for prior AOCs), but its explicit language will hopefully provide

practitioners with a measure of comfort when entering into administrative settlements. But given that administrative settlements have consistently caused confusion among the courts, it is important both to be deliberate in crafting settlement agreements and diligent in tracking statute of limitations.