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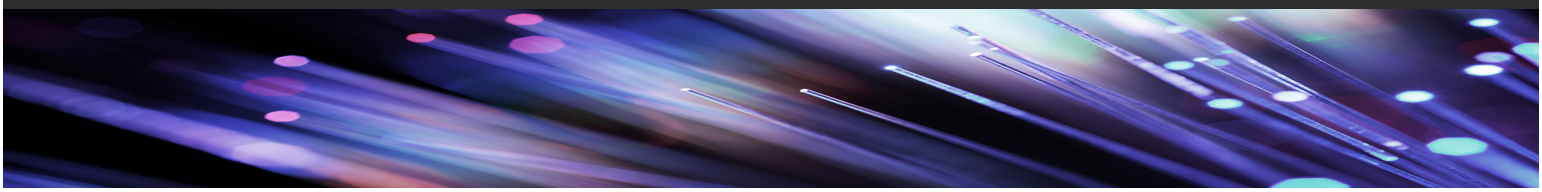
The Superfund Contribution Mind Pretzel… or One of Them



The interplay among the private cost recovery provision of Section 107(a)(1-4)(B) and the contribution provisions of Section 113(f)— all informed by the statute of limitations of Section 113(g)—have created a very substantial, practical settlement problem. But the problem is a little obscure, a bit of a mind pretzel.

By David G. Mandelbaum | February 11, 2020 | The Legal Intelligencer

From the first days of Superfund litigation, lawyers and courts have complained that Congress did not distinguish itself when drafting the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Sections 9601-75. As the law has developed, court decisions have created additional problems. The interplay among the private cost recovery provision of Section 107(a)(1-4)(B) and the contribution provisions of Section 113(f)— all informed by the statute of limitations of Section 113(g)—have created a very substantial, practical settlement problem. But the problem is a little obscure, a bit of a mind pretzel.

Your client is one of several parties responsible for contamination of land with a hazardous substance. Your client is prepared to do its part to clean it up in a settlement with the government. But in exchange for that settlement, your client wants to be done with litigation and wants no more exposure to claims by the United States, the commonwealth or any other responsible party.

No problem, you think. Section 113(f)(2) provides, in part: "a person who has resolved its liability to the United States or a state in an administrative or judicially approved settlement shall not be liable for matters addressed for contribution regarding matters addressed in the settlement," see 42 U.S.C. Section 9613(f)(2). So, as is familiar, a settlement confers both a covenant not to sue by the government and contribution protection against claims by other jointly and severally liable parties.

The statute authorizes two sorts of contribution actions. First, conventional contribution claims may be brought "during or following any civil action under Section [106 for an injunction] or Section [107 for cost recovery]." In addition, a party that settles may bring a settlement contribution claim under Section 113(f)(3)(B).

Again as is familiar, a party may have incurred costs other than by an approved settlement and before any enforcement action under Section 106 or 107. An example would be a party that incurred costs voluntarily or under a unilateral administrative order. The U.S. Supreme Court decided more than 15 years ago that those parties could not sue for contribution, even if they had incurred more than their fair share of costs, see Cooper Industries v. Aviall Services, 535 U.S. 157 (2004). But, held the court, those parties could bring claims to reallocate their costs under the private cost recovery provision of Section 107(a)(1-4)(B), as in United States v. Atlantic Research, 551 U.S. 128 (2007).

The contribution protection that your client wants bars any other party's claims under Section 113(f)(1) or (3)(B) regarding "matters addressed" in your client's settlement. It does not bar another party's claim under Section 107(a)(1-4)(B). So, you must determine whether any other party might have available a cost-recovery claim under Section 107 in order to know that your client will buy peace with its agreement. If another party can bring that Section 107 claim, you may have to litigate or to settle with that other party, notwithstanding your client's agreement with the government.

One might think that that is a far-fetched possibility. However, we do have experience. The United States issued a unilateral administrative order to Appvion to require it jointly and severally with other ordered parties to implement the remedy for the principal portion of the Lower Fox River and Green Bay Site in Wisconsin. However, Appvion turned out not to be a liable party under CERCLA, but it obtained that summary judgment only after it had incurred what it claimed were tens of millions of costs. The court of appeals held that Appvion could not pursue a claim against other parties for those costs under Section 113(f) because Appvion did not have a common liability with the other parties; it was not liable like they were. Instead, Appvion could pursue a cost-recovery claim under Section 107, see NCR v. George A. Whiting Paper, 768 F.3d 682 (7th Cir. 2014).

While that appeal was under consideration, five of the parties ordered to clean up settled with the United States and the state for a cash out total of $54.5 million. They obtained a covenant not to sue and contribution protection in a consent decree entered by the district court in United States v. NCR, No. 2:10-cv-910-WCG (E.D. Wis.). However, on remand, Appvion reasserted its Section 107 claim, those settling defendants could not obtain a dismissal, and they ultimately had to pay additional millions of dollars in order to extricate themselves from expensive litigation.

The risk posed by this sort of experience presents a significant disincentive to settlement. Unless the United States or courts can take steps to assure settling defendants that nonsettling parties will not have a second bite, there are some cases that just will not settle.

In your client's case, your client will only be exposed to a Section 107 claim if the work or payments are being divided among parties. Otherwise, only your client would have incurred costs, and therefore only your client would have a claim to reallocate them. Exposure of another party to a unilateral administrative order presents the easiest situation to imagine in which the nonsettling other party may acquire a Section 107 claim against your client that it does not now have and that you cannot now evaluate.

That risk dramatically increases if parties that may have, or may have had, a contribution claim for some costs are also exposed to a unilateral administrative order. Thus, a party may have entered into an early consent order to perform a remedial investigation and feasibility study or to fund a removal action. That

party may also be exposed to a unilateral administrative order (UAO) for the portion of the remedy that your client is not performing. Indeed, if your client is settling to perform some of the remedy, but not all of it, the nonsettling responsible parties are directly exposed to a UAO if they do not settle.

Some courts have held that if a party has any contribution claim, it only has a contribution claim for any costs it incurs. See, e.g., Hobart v. Waste Management of Ohio, 758 F.3d 757 (6th Cir. 2014). There is good reason for the "if any contribution, then all contribution" rule. It solves the contribution protection problem, of course. But, it also acknowledges that in a contribution action, the contribution plaintiff can only sue to reallocate those costs that the contribution plaintiff has incurred (or maybe has committed to incur) in excess of the contribution plaintiff's fair share of the total. So, one would typically net overpayments and underpayments on different parts of the overall liability to determine the plaintiff's entitlement to recovery. That accounting is much more complicated if each separate set of tasks is allocated in a separate action, some under Section 113 and some under Section 107. That is like dividing up the bar bill, then dividing up the dinner check, then dividing up the parking charge, all in different proceedings.

The contrary view begins with the statute of limitations of Section 113(g)(3), which begins the three-year contribution limitations period with each separate judgment or order. That causes some courts to reason that the question whether a party may sue under Section 113(f)(1), 113(f)(3)(B) or 107 should be made action-by-action or settlement-by-settlement. See, e.g., Bernstein v. Bankert, 733 F.3d 190 (7th Cir. 2013), cert. denied, 134 S. Ct. 1024 (2014); Occidental Chemical v. 21st Century Fox America, No. 2:18-cv-11273-MCA-JAD (D.N.J. July 31, 2019).

The U.S. Court of Appeals for the Third Circuit has adopted the ambiguous rule that if one has contribution protection, one only has a contribution action, as in Cranbury Brick Yard v. United States, 943 F.3d 701 (3d Cir. 2019) and in Agere Systems v. Advanced Environmental Tech, 602 F.3d 204 (3d Cir. 2010). Whether that means that one only has a contribution action for the costs as to which one has contribution protection or that one only has a contribution action for all costs is unclear.

Until that is cleared up, some cases are hard to settle. No one wants to have the experience of the Fox River Cash Out defendants. The district court approving a settlement could issue an order barring Section 107 claims against the settling parties. However, the United States generally declines to include such a provision in a consent decree, and therefore resists conditioning a settlement on such an order.

This should not be so hard. All this complexity and ambiguity serves no policy purpose I can discern. But Congress is unlikely to fix the statute. It is up to us to be careful.

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