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Lesson of Ninth Circuit CERCLA Decision: Prepare to Prove Recoverable Costs

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On June 13, 2016, the Ninth Circuit held that a party which has settled its liability pursuant to a CERCLA section 107[1] cost recovery claim may recover any response costs not covered by the settlement under CERCLA section 107. This decision confirms that a CERCLA responsible party is not necessarily limited to a claim for CERCLA contribution under section 113 merely because it has been sued under CERCLA section 107.

Introduction

Over several years, various courts have interpreted the interplay of CERCLA's two liability provisions: CERCLA's response cost remedy under section 107, and its contribution provision in section 113. The Ninth Circuit's most recent foray into this issue in *Whittaker Corporation v. United States*[2], concluded that responsible parties may recover under either provision, depending on the nature of the damages they seek. While this interpretation does not represent a significant shift in the law, it may result in increased scrutiny by courts of the costs sought by CERCLA claimants. Accordingly, this case presents a reminder that CERCLA responsible parties should undertake careful accounting and documentation of their remedial activities and the associated costs, and should endeavor to utilize CERCLA language in describing those activities whenever possible.

Response Costs Versus Contribution

CERCLA Section 107 provides a claim for any person to recover "necessary costs of response" from four categories of CERCLA responsible party: (1) current owners and operators of a CERCLA facility, (2) owners and operators at the time of disposal of a hazardous substance at a CERCLA facility, (3) transporters of hazardous substances, and (4) persons who arrange for the treatment or disposal of

[1] This Alert references CERCLA's internal numbering scheme, pursuant to which 42 U.S.C. § 9606 is known as section 106, 42 U.S.C. § 9607 is known as section 107, and 42 U.S.C.§ 9613 is known as section 113.
[2] *Whittaker Corp. v. United States*, No. 14-55382 (9th Cir. June 13, 2016).

hazardous substances. Liability under section 107 is joint and several and may be subject to a six year statute of limitations.[3]

In contrast, section 113(f) contains a statutory right to contribution under two circumstances. Section 113(f)(1) provides that "any person" can seek contribution from "any other person who is liable or potentially liable" under section 107, "during or following any civil action" under section 106 or 107.[4] In addition, contribution is available under section 113(f)(3)(B) to a "person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement … from any person who is not a party to the settlement."[5] Liability for contribution under section 113 is several, and is subject to a three year statute of limitations.

Given the differences in available remedies and potentially applicable statutes of limitations, there are obvious incentives for parties to endeavor to recover under section 107. However, the U.S. Supreme Court has ruled that "cost recovery" under section 107, and "contribution" under section 113, are distinct remedies.[6] Thus, they are not interchangeable at the desire of the plaintiff. The Ninth Circuit explained the distinction as follows: "A party uses contribution to get reimbursed for being made to pay more than its fair share to someone else, and uses cost recovery to get reimbursed for its own voluntary cleanup."[7] Despite this rule, every court to address the question prior to *Whittaker* determined that a party who *may* bring a contribution action—i.e., if it meets the statutory trigger for a 113 claim because it has been named in a 106 or 107 action—*must* bring a contribution action, even when a response cost claim would be more favorable.[8] But none of these decisions addressed how this rule applies when the two actions address different costs. In *Whittaker*, the issue was whether a party who settles a 107 claim for certain offsite costs is limited to a 113 claim to recover different onsite costs arising from the same contamination. The Ninth Circuit, following the Supreme Court, determined it was not so limited. Rather the nature of the claim is to be decided based on the nature of the remedies sought.

The *Whittaker* Decision

Whittaker, a long-time defense contractor for the United States, owned and operated a munitions manufacturing facility in Santa Clarita, California ("Bermite Site"). Whittaker began investigating the release of hazardous substances at the site in the early 1980s, and was then sued by the Castaic Lake Water Agency and other water providers for cost recovery under CERCLA section 107 resulting from contamination of nearby water supplies. Summary judgment was entered in favor of the Castaic Lake plaintiffs. Both sides appealed, and Whittaker and its insurers then settled with the Castaic Lake plaintiffs in 2007. Under the settlement, Whittaker and its insurers agreed to reimburse the Castaic Lake plaintiffs for costs they had incurred to remove contamination from their wells and to purchase replacement water. Whittaker was not ordered to clean up the Bermite Site by the EPA, nor was site cleanup part of the settlement agreement. Rather, Whittaker was named in cleanup orders by the California Department of

[3] The applicable statute of limitations depends on the type of costs sought. Claims to recover costs for a removal action must be sought within three years after completion of the removal action, but costs for a remedial action are generally subject to a six year statute of limitations following the initiation of physical on-site construction of the remedial action. 42 U.S.C. § 113(g).

[4] 42 U.S.C. § 113(f)(1).

[5] 42 U.S.C. § 113(f)(3)(B).

[6] *See Cooper Indus., Inc. v. Aviall Servs., Inc.,* 543 U.S. 157, 163 (2004).

[7] *Whittaker* at p. 11 (citing *Aviall* at 139, n. 6.)

[8] *Id.*

Toxic Substances Control (DTSC) and directed to undertake onsite remediation, which it did. These activities pre-dated the Castaic Lake action and settlement by many years.

In 2013, Whittaker sued the United States for the United States' share of Whittaker's onsite response costs under CERCLA section 107. The United States moved to dismiss, arguing that because Whittaker had been sued in the Castaic Lake action, Whittaker could only bring a CERCLA contribution action under section 113, not a cost recovery action under CERCLA section 107, and the three-year statute of limitations had already expired. The Central District of California agreed with the United States and dismissed the complaint. The Ninth Circuit reversed, holding that "Whittaker was not required to bring its claims in this case in a 113(f) contribution action after its liability was resolved in *Castaic Lake*."[9] It reasoned that "[b]ecause Whittaker seeks to recover expenses that are separate from those for which Whittaker's liability is established or pending, Whittaker was not required to bring this suit as a claim for contribution. Whittaker therefore is not barred on this basis from bringing a cost recovery action against the United States."[10] The *Whittaker* opinion reinforced the Supreme Court's conclusion that the "remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances'."[11]

Consequences of *Whittaker* for CERCLA Recovery by Responsible Parties

While the factual circumstances giving rise to the *Whittaker* holding are somewhat unusual, and thus the decision is not apt to directly affect a large number of claimants, it may influence the scrutiny by courts and defendants to the costs sought by responsible party-claimants. Because the type of damages sought will generally determine the nature of a responsible party's potential claim against another responsible party, CERCLA responsible parties should anticipate this issue and work to prepare useful documentation and accounting of their damages from the outset of their removal or remedial activities. In particular, activities to address contamination which is believed to be the result of joint liability should be identified and segregated. Likewise, the costs associated with those activities should be identified and segregated.

Although the idea of documenting and separating costs seems simple, it may prove more difficult in practice. Because it is not uncommon for remediation activities to address more than a single injury on any complex site, and contractors typically bill on a monthly basis for all work performed regardless of the source, it may be difficult to delineate work and attribute specific costs to specific activities. But it is worth the effort to do so. By carefully documenting, describing and identifying the work done and the costs for that work from the outset, responsible parties will best preserve their recovery options in the future. In the instances where costs already have been incurred, sorting through the documents to segregate past costs will be a useful endeavor. Similarly, instructing contractors to carefully segregate future costs will be useful for both sides and may help facilitate early resolutions and party agreements on claimed response costs.

Moreover, because *Whittaker* provides no direction regarding the level of detail required to differentiate the various response costs and related activities, a party should not feel bound to strict interpretations and categorizations of costs. Rather, the responsible party should focus on thoughtfully developing the evidence of its activities and the associated costs in a manner that the parties and court can understand. Expert testimony and support may be useful in this regard to explain and bolster the categorization of a consultant, as well as to justify the amount of costs incurred. Additionally, responsible parties should consider requesting that their consultants utilize the naming conventions of CERCLA in proposing and describing work, especially to an oversight agency, to avoid any confusion between often disparate state

[9] *Whittaker* at p. 20.

[10] *Whittaker* at p. 24.

[11] *United States v. Atlantic Research Corp*., 127 S. Ct. 2331, 2338 (2007) (citation omitted).

and federal nomenclature. It is not uncommon for state agencies overseeing cleanup to use different terminology than CERCLA, even if the activities may qualify as recoverable costs under CERCLA. To best preserve recovery options, consultants should utilize both the terminology used to satisfy a state agency and CERCLA, as appropriate. This will help minimize challenges to costs claimed under CERCLA.

Conclusion

The *Whittaker* decision does not present a sea change for CERCLA claims, but instead offers a reminder that documentation and segregation of costs sought in a CERCLA action are critical to ensure recovery and to preserve recovery options.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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