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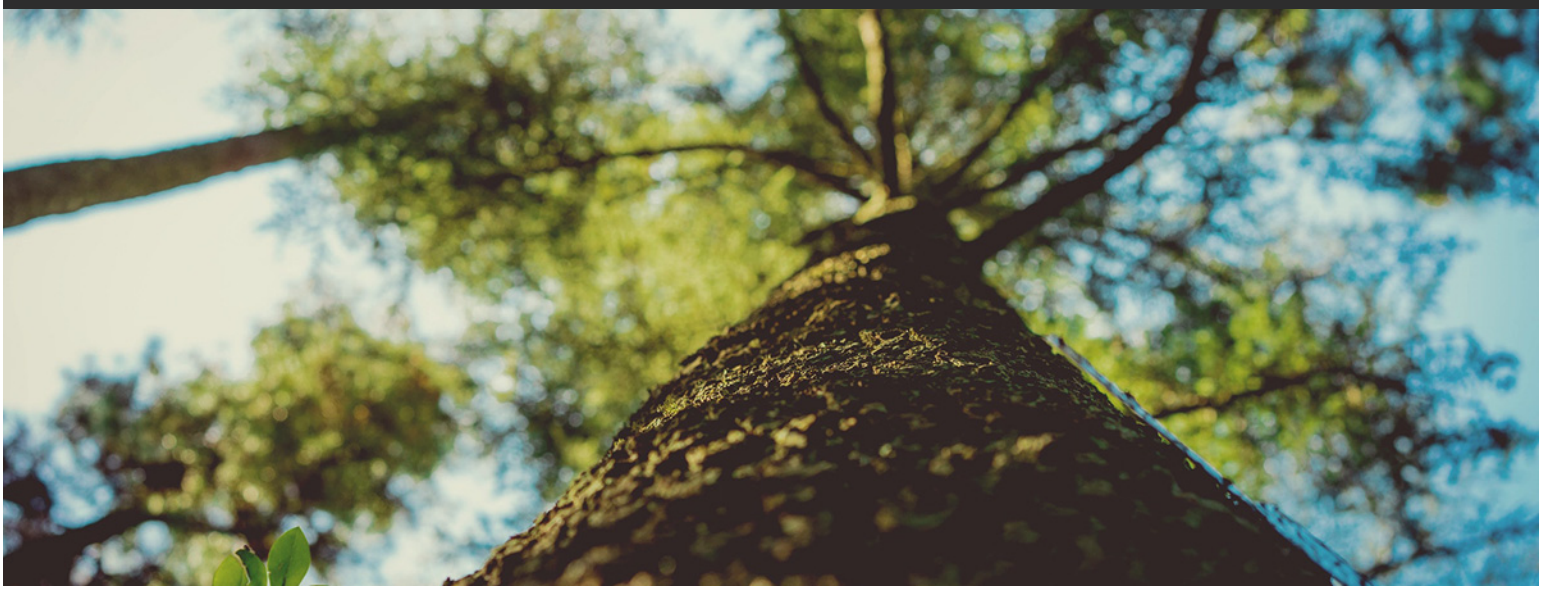
'RACER Trust' and the Concinnity of CERCLA Sections 107 and 113



The decision to apply Section 113 or Section 107 action-by-action or settlement-by-settlement does not improve CERCLA's concinnity.

By David G. Mandelbaum | September 16, 2021 | The Legal Intelligencer

Last month, the U.S. Court of Appeals for the Second Circuit decided *Revitalizing Auto Communities Environmental Response Trust v. National Grid USA*, No. 20-1931-cv (2d Cir. Aug. 18, 2021), another appellate decision amplifying the confusion around private actions to reallocate costs under the federal Superfund statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *Revitalizing Auto Communities Environmental Response Trust (RACER Trust)* affirms the proposition that if a party has a contribution claim available under CERCLA section 113(f), 42 U.S.C. Section 9613(f), then that party *only* has a contribution claim and cannot sue for cost recovery under section 107(a)(1-4)(B), 42 U.S.C. Section 9607(a)(1-4)(B). However, the court of appeals seems to conduct that analysis action-by-action or settlement-by-settlement.

CERCLA "is known neither for its concinnity nor its brevity." See *RACER Trust*, slip op. at 5 (quoting *W.R. Grace & Co.-Connecticut v. Zotos International*, 559 F.3d 85, 88 (2d Cir. 2009)). The Second Circuit may have picked up the rhetorical gauntlet laid down by the U.S. Supreme Court's description of CERCLA's "reticulated statutory matrix of environmental duties and liabilities," *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021), but the decision to apply Section 113 or Section 107 action-by-action or settlement-by-settlement does not improve CERCLA's concinnity. Just learning that word (which means the harmonious arrangement of parts or, alternatively, studied elegance and facility in style of expression) may have to serve as a consolation prize.

Courts and lawyers have managed to craft a confusing, complicated, and sometimes unfair or ineffective structure for reallocating CERCLA costs among responsible parties. Section 113(f)(1) of the statute provides: "in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." That is, the court should do equity in the circumstances. Every procedural hurdle or categorical rule that avoids the equitable allocation results in an allocation of costs potentially other than what that equitable allocation would dictate. One might say that each time a procedural rule determines the outcome, the resulting allocation is less fair than the allocation that would result if a court determined the factors that made for fairness.

The court in an action under Section 107 does *not* allocate equitably. Each liable party typically bears joint and several liability to the Section 107 plaintiff for all recoverable costs that the plaintiff has incurred. A court may depart from joint and several liability if the harm may be apportioned. As the Seventh Circuit reminded us the other week in *Von Duprin v. Major Holdings*, No. 20-1711 (7th Cir. Sept. 3, 2021), apportionment is determined by causation only, and is not an equitable allocation.

Of course, a defendant in a Section 107 action may counterclaim for contribution under Section 113, and thereby trigger an equitable allocation. But in many cases a contribution defendant does not wish to litigate the equitable allocation. That defendant may have expected to be free from litigation entirely by reason of either of two defenses to a contribution claim that do not bar a cost recovery claim. First, a defendant may have resolved its liability to the United States or a state for the costs sought by the plaintiff. Ordinarily, that sort of settlement provides the settling party contribution protection under CERCLA Section 113(f)(2). But language in *United States v. Atlantic Research*, 551 U.S. 128 (2007), suggests that the protection from contribution claims does not work against a section 107 cost recovery claim. There are at least some instances of parties that settled by consent decree with the United States continuing to have to defend private cases under Section 107.

Further, a contribution plaintiff must plead and prove that it has paid more than its own equitable share of the whole before it can recover. A lawsuit for contribution before the plaintiff has at least committed to pay more than its own share may be premature. But apparently a private plaintiff may recover its first dollar from a liable defendant under Section 107, subject to the Section 113 counterclaim.

And that Section 113 counterclaim faces the problem that many courts will take equitable account of insurance recoveries or other indemnification payments to the contribution counterclaim plaintiff. Thus, a Section 107 plaintiff may recover fully from the defendant, but the defendant may not be able to trigger an equitable allocation because its insurance takes its exposure below its fair share.

Treating different costs differently under Section 107 and Section 113, even when incurred by the same party just adds to the complexity. This issue arises because one can only pursue contribution under Section 113(f)(1) of CERCLA "during or following" an underlying enforcement action under Section 106 or Section 107. One may also pursue contribution after resolving one's liability to the United States or a state in whole or in part under Section 113(f)(3)(B). *Cooper Industries v. Aviall Services,* 543 U.S. 157, 163 (2004), saw those two claims as distinct. The court's more recent characterization of Section 113(f)(1) as the "anchor provision" of the contribution section in *Guam*, 141 S. Ct. at 1612, raises the possibility that settling party contribution is only available "during or following" a civil action under Section 106 or 107.

The rule adopted by all courts of appeals and reiterated by the Second Circuit in *RACER Trust* is that if a party has available to it a contribution claim, it has *only* the contribution claim and cannot pursue a cost recovery claim under Section 107. So far so good. Any private party claim to adjust the incidence of CERCLA costs will be allocated equitably under Section 113(f) and only when the lawsuit is brought by a party that has paid or committed more than its share.

But, *RACER Trust* also applies that rule separately to costs incurred by the same party in separate parts of the cleanup. The trust incurred costs under a 2011 settlement agreement. The state and the Environmental Protection Agency (EPA) then asked the trust to expand the areal extent of the work. If the 2011 settlement resolved liability under CERCLA, then it served as a predicate for a contribution claim, although that claim would be barred by the limitations period of section 113(g)(3) of CERCLA. However, if the settlement did not address the liability for the additional work, then the trust might have been able to recover those costs under Section 107.

Stepping back from the idiosyncratic facts of *RACER Trust*, a rule that whether one has a contribution claim available is decided action-by-action makes litigation of the case hopelessly complicated. No equitable allocation of costs can ignore who paid what, and the components of the total cost ought not be in different postures. Parties can have made interim contributions to a cleanup either by paying a percentage of the cost of all the tasks or by undertaking all the costs of a subset of tasks. In the common analogy, the parties having paid the bar bill somehow the court should take the payments toward the bar bill into equitable account when deciding how to allocate the dinner check.

There is nothing in the statute that says that a party with a contribution claim only has that contribution claim as to certain costs. Section 113(f)(1) would allow a contribution action "during or following" an enforcement action, and does not limit the costs at issue to the costs demanded in the underlying enforcement case. Section 113(f)(3)(B) similarly authorizes a contribution action after a settlement, but does not limit the costs that the district court can consider.

A rule that allows a party to pursue some costs under Section 107 even though it also has a contribution claim also creates a perverse incentive if large portions of the total costs at issue are still the subject of unresolved government enforcement. If one is going to end up being a plaintiff in a Section 107 or 113 action, Section 107 is procedurally advantageous—it carries joint and several liability, need not respect the defendant's contribution protection, and usually has a longer and later limitations period. Standing alone, costs incurred under a unilateral administrative order may be recovered under Section 107 because there is no underlying civil action under Section 106 or 107 to support a contribution claim. That creates a disincentive for responsible parties to enter into consent decrees with the government.

When a party has a contribution right as to *any* costs, then, the courts might have held that it must pursue *all* costs through a contribution claim. The statutory text would allow it and much of the litigation over which actions fall in which category would fall away. All costs would be allocated equitably. Would overall concinnity be improved?

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