Is One Dollar Enough Under CERCLA?

By David G. Mandelbaum | February 9, 2024 | The Legal Intelligencer

Many Superfund practitioners have spent years litigating cases in which a private plaintiff seeks to establish that defendants are liable for costs of responding to a Superfund problem and that they ought to bear some specific equitable share of the total responsibility. Often, the plaintiff has brought the case even though the plaintiff has not paid a very significant portion of the total costs, has not committed to pay a significant portion of the costs, and has not been adjudicated responsible for anything. Why does that private plaintiff get to trigger allocation litigation?

I teach a law school course on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. Section 9601-75. Even after more than four decades, I still bear the scars of the hide-the-ball way in which I was taught in law school. For that reason, in addition to assigned readings I prepare notes for each class that I distribute to the students. I have just finished completing the 2024 update for this semester, 205 pages of text collecting most of the appellate authorities under CERCLA that are all listed on a table of cases that has grown to 34 pages itself.

That exercise shows up how some of the most basic questions about CERCLA litigation remain unresolved and, more significantly, how large numbers of litigators and courts do not even recognize them as questions. This column addresses one of them.

To begin at the beginning, CERCLA was adopted for the purpose of empowering the government "to promote the timely cleanup of hazardous waste sites … ." See *Burlington North & Santa Fe Railway v. United States*, 556 U.S. 599, 602 (2009)(internal quotation marks omitted). However, that first purpose of cleaning up sites quickly is paired with the "polluter pay principle" under which "those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. 848, 96th Cong., 2d Sess., at 13 (1980). See, e.g., *Atlantic Richfield v. Christian*, 140 S. Ct. 1335, 1342

(2020); *GP Vincent II v. Estate of Beard*, 68 F.4th 508, 518 (9th Cir. 2023); *PPG Industries v. United States*, 957 F.3d 395, 399 (3d Cir. 2020); *Trinity Industries v. Greenlease Holding*, 903 F.3d 333, 361 (3d Cir. 2018).

The liability scheme should be implemented to further both purposes. It should facilitate, or at least not interfere, with government efforts to assemble sufficient resources to address a site and in the fullness of time assure that the incidence of the costs of that response fall on the parties responsible. But the liability scheme is, as Justice Clarence Thomas has described it, a "reticulated statutory matrix of environmental duties and liabilities." See *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021). The "complex statutory scheme," 141 S. Ct. at 1611, lacks "concinnity." See *Revitalizing Auto Communities Environmental Response Trust v. National Grid USA*, 10 F.4th 87, 92 (2d Cir. 2021)(meaning that the parts do not fit together).

At each site, the government faces the task of finding the resources to implement the response. The United States pursues an "enforcement first" strategy to accomplish that goal; the government seeks to have private parties do the work rather than to have government contractors do the work and then to pursue cost recovery. That "enforcement first" approach requires a mix of threats and inducements that is sometimes delicate and sometimes well-executed. Moreover, it repeats within a site. First, someone has to do the remedial investigation and feasibility study. Then, someone has to do the remedial design. Then someone has to do the remedial action. And there may be more than one operable unit, so each of those stages may be further subdivided.

Sometimes the government will want to pursue one party. Sometimes it will want to pursue a small group for the whole. Other times, it will want to pursue different groups for different parts of the whole. Parties with small shares may present an opportunity for early settlement at a large premium to ease the burden on the parties with large shares, or the parties with small shares may present an opportunity to leave parties who take on the whole action with contribution claims. All of this has the goal of obtaining a commitment for all of the required work.

In most cases at least one party will see an advantage to resolving some aspect of the allocation among private parties earlier than the government may wish to get to that point. That party may wish to establish that it is not liable, or that some other party is liable. It may wish to establish that its liability is low or that some other party's liability is high. Perhaps that will advance the government's interest, but perhaps it will not, but it is not likely that the process of litigating liability and allocation will align temporally with the government's plan to recruit one or more settlements (or assertions of intentions to comply with unilateral administrative orders) that add up to a complete response action.

One may reasonably question why a private plaintiff or plaintiffs may pursue other private parties ahead of the government's schedule. But they can, and do.

The primary claim among parties that bear a common liability to the underlying plaintiff—the United States—is a claim for contribution. CERCLA provides two sorts of claim for contribution. First, Section 113(f)(3)(B) allows a party that has "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" to sue. But note that need not be a resolution of the entirety of that party's liability, so that it may sue after agreeing to perform the RI/FS, for example, and there is no provision in Section 113(f)(3)(B) stating expressly that that suit may not address responsibility for costs other than the settled action.

Second, Section 113(f)(1) allows a claim for contribution "during or after" an enforcement claim under Section 106(a) or Section 107(a). Again, nothing in Section 113(f)(1) expressly limits that claim to the claims brought in the underlying lawsuit.

In addition, for those costs as to which contribution is not available, the Supreme Court has made cost recovery available under Section 107(a)(1-4)(B) to responsible parties, even parties who have contribution claims available for other costs. The courts are clear that a party must incur at least some costs in order to bring a cost recovery claim, but if it has incurred costs at least some courts would say that that party must either have a contribution claim for those costs or a cost recovery claim for them. If a private party brings a cost recovery claim, the defendant will generally have available a contribution counterclaim at that point; that counterclaim will be asserted "during or after" the Section 107 cost recovery claim. Therefore, the private cost recovery claim simply triggers the same contribution action as a contribution claim would, except it is more procedurally complicated.

In an ordinary contribution dispute among jointly liable parties, no one recovers from anyone else unless the person recovering has overpaid to satisfy the underlying plaintiff. That is, Party A cannot receive contribution from Party B unless Party A has paid more to satisfy the underlying plaintiff than Party A's fair share.

In CERCLA actions, courts have only infrequently disposed of contribution, much less private cost recovery claims, on an early motion asserting that the contribution or cost recovery plaintiff has not yet paid its fair share of the appropriate whole. The whole cannot be the costs incurred by the private plaintiff, because each party pays 100% of the costs that it incurs, but the government is free to segment the site so that a party's total contribution to all tasks and all operable units equals that party's fair share of the whole. Therefore, early in a matter—at the time of the RI/FS, for example—it is likely that no party has paid its fair share. Perhaps a party that committed to overpay in a consent decree could be permitted to sue, or maybe even a party that had expressed its intention to comply with a unilateral administrative order.

Should courts require a private plaintiff to plead and to prove that it has overpaid in some sense? Should a court require that private plaintiff to demonstrate that its private case will not disrupt the satisfaction of the government's underlying claim? We do not really have much law on this topic, and perhaps we should.

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