CERCLA/Superfund Cost Recovery Action: U.S. District Court Addresses Contribution Question

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The United States District Court ("Court") for the Western Division of the Southern District of Ohio in an August 20th opinion addressed an issue raised in the context of a federal Superfund/Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") private party cost-recovery action. See *Hobart Corp., et al. v. The Dayton Power and Light Co., et al.,* No. 3:13-cv-115, 2018 WL 3978094 (S.D. Ohio Aug. 20, 2018).

The question involved the circumstances in which a party can bring a CERCLA contribution action.

CERCLA provides two remedies for private parties seeking to recover costs incurred in cleaning up releases of hazardous substances.

First, under § 107, a private party who has voluntarily incurred cleanup costs may recover "necessary costs of response" if those costs are "consistent with the National Contingency Plan. Section 113 provides "any person may seek contribution from any other person who is liable or potentially liable under § 107(a), during or following any civil action under § 9606 or under § 107(a). § 113 also states that 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 contribution regarding matters addressed in the settlement. That person may then seek contribution from any person who is not a party to the settlement.

The remedies under § 107 and § 113 are mutually exclusive.

The Sixth Circuit Court of Appeals ("Sixth Circuit") had previously addressed whether a private party who incurs costs involuntarily may recover under either or both cited CERCLA sections. The Sixth Circuit held that parties who incur costs "only because they were obligated to do so" must proceed under § 113(f) if they meet one of the "statutory triggers."

The U.S. District Court in this preceding noted that the United States Environmental Protection Agency ("EPA") had in 2013 ordered Valley Asphalt Corporation ("Defendant") to test for vapor intrusion and, if necessary, to install a vapor abatement mitigation system on its own property. Vapor intrusion is the process by which volatile chemicals migrate to indoor air above a contaminated site.

Hobart Corporation ("Plaintiff") filed a CERCLA contribution action against Defendant in connection with a different EPA CERCLA Order. Defendant filed a counterclaim seeking contribution for costs incurred with the 2013 Order. This counterclaim was filed under both § 107(a) and § 113(f).

Plaintiff moved to dismiss the counterclaim. It asserted that Defendant triggered one or more of the "statutory triggers," limiting it to a counterclaim under § 113(f) only.

One of these "triggers" involves a private party seeking contribution after resolving its liability with the United States in an administrative or judicially approved settlement. The Court disqualified this trigger. It stated that the 2013 EPA Order explicitly provided that it did not constitute "a satisfaction of or release from any claim or cause of action" the United States may have against Defendant. The Order did not constitute an "administrative or judicially approved settlement."

The second "statutory trigger" applies when a private party is eligible to bring a contribution claim during or following any civil action under § 106 or § 107 of ERISA. Defendant was deemed eligible to bring a contribution claim because it was sued under § 107(a). Therefore, Defendant was entitled to bring a § 113(f) action.

Because Defendant was eligible to bring a § 113(f) counterclaim, it was barred from bringing a cost recovery claim under § 107(a).

A copy of the opinion can be found here.