

COURT TAKES NOVEL APPROACH ON COST RECOVERY UNDER CERCLA

by

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The U.S. Court of Appeals for the Seventh Circuit recently allowed a cost recovery suit under CERCLA § 107(a) to proceed despite the fact that in 2002 the plaintiffs entered into an Administrative Order on Consent with the U.S. Environmental Protection Agency (EPA) requiring cleanup of a Superfund site. Most circuits have held that plaintiffs in similar circumstances have resolved their CERCLA liability in an “administrative or judicially approved settlement,” and as a result are limited to contribution under CERCLA § 113(f). The *Bernstein, et al. v. Bankert, et al.* decision may be of value to similarly situated PRPs in other federal circuits as well.

CERCLA 107 and 113. Private parties that have incurred response costs associated with contaminated sites have two potential rights of action under CERCLA: “cost recovery” under § 107(a) and “contribution” under § 113(f).

However, following the U.S. Supreme Court decisions in *Aviall* (2004) and *Atlantic Research* (2007), most circuits have not permitted PRPs to pursue cost recovery when a contribution claim is available. Most circuits have further held that PRPs that enter into judicially or administratively approved settlements, such as an administrative order on consent or consent decree, are limited to contribution under § 113(f).

Bernstein. In *Bernstein*, the plaintiffs asserted a cost recovery claim under § 107(a) for expenses they incurred during a Superfund removal action. The district court ruled that the plaintiffs, having entered into an Administrative Order on Consent with EPA in 2002 regarding the removal work (AOC), could not pursue a claim of cost recovery because their CERCLA liability to the government with respect to the removal work was resolved. As a result, the plaintiffs were limited to contribution under § 113(f); a claim they could not maintain because the three-year statute of limitations for contribution began running in 2002, six years before the plaintiffs filed suit in 2008.

On appeal, the Seventh Circuit agreed with the other circuits that have held a PRP is limited to CERCLA contribution when it is available. However, the court took the novel approach that CERCLA contribution is a party’s sole claim upon resolution of liability through an administrative settlement, but that does not occur until a PRP has satisfactorily discharged its obligations under the administrative agreement and EPA has certified completion of the same. Until that time, the PRP may pursue cost-recovery under § 107(a) (assuming the PRP has not been subjected to civil action under CERCLA § 106 or § 107).

With respect to the plaintiffs in *Bernstein*, the Seventh Circuit determined the work required of them under the 2002 AOC was ongoing at the time they filed suit. The court also found that EPA had not issued a notice of approval certifying completion of the work thereunder that triggered the conditional covenants not to sue provided to the plaintiffs under the AOC. As neither had yet occurred, the court concluded plaintiffs did not satisfy the

conditions for a contribution claim under § 113(f) and their cause of action was instead one for cost recovery under § 107(a).

The immediate impact following *Bernstein*, at least in the Seventh Circuit, is that a signatory to an administrative settlement with the government is not automatically prohibited from seeking cost recovery against other PRPs under § 107(a). Additionally, while the *Bernstein* holding is not controlling in other circuits, it will provide PRPs in those circuits with potentially useful arguments to assert regarding the scope and availability of cost recovery under § 107(a).

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