

THE ELEMENTS OF THE CASE FOR PRIVATE PARTY COST RECOVERY UNDER CERCLA

Each year we include in the ML&B *Environmental Deskbook* a special report on a subject we think will be of particular interest to our clients. This year we have chosen to focus on selected decisions of the Federal courts addressing private party cost recovery issues under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). To facilitate the reader's identification of pertinent cases, we have grouped them by major questions of interest. In the interests of conserving space, we have not addressed questions common to both private party and government cost recovery actions, presuming a basic knowledge of CERCLA amongst our readers. Thus, for example, we have not discussed the necessary elements of CERCLA liability under section 107(a), beyond those elements uniquely required to establish a private party right to cost recovery.

What Are The Statutory Requirements That Must Be Satisfied?

Section 107(a)(4)(B) of CERCLA "allows private parties to recover necessary costs of response . . . consistent with the national contingency plan," from parties otherwise liable under section 107(a). *Stanton Rd. Associates v. Lohrey Enterprises*, 984 F.2d 1015, 1021 (9th Cir. 1993) (quoting *General Elec. Co. v. Litton Indus. Automation Sys. Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991), reh'g denied, 111 S.Ct. 1697 (1991)). Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [section 107(a)]." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654 (N.D.Ill. 1988), aff'd 861 F.2d 155 (7th Cir. 1988).

How Is Consistency With The National Contingency Plan Determined?

The most recent version of the National Contingency Plan ("NCP") was published by EPA in 1990, at 40 C.F.R. Part 300. Section 300.700 deals with the recovery of the costs of response actions by private parties and within that section, subsections (c)(5) and (c)(6) list other procedural sections of the NCP with which private party response actions should comply to be consistent with the NCP.

WHICH NCP APPLIES

In cases brought following EPA publication of a revised NCP but involving response costs incurred before then, the question has arisen as to which version of the NCP should govern. Courts addressing this question have concluded that the NCP in effect when the response costs were incurred should govern. *Louisiana-Pacific Corp. v. Asarco Inc.*, 6 F.3d 1332, 1341 n.7 (9th Cir. 1993); *U.S. Steel Supply, Inc. v. Alco Standard Corp.*, 36 ERC 1330 (N.D.Ill. 1992); *Tri-County Business Campus Joint Venture v. Clow Corp.*, 792 F. Supp. 984, 990 (E.D.Pa. 1992).

SUBSTANTIAL VS. STRICT COMPLIANCE

Prior to 1990, there was disagreement among the courts as to whether compliance with the NCP had to be strict or substantial. *Compare NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898-99 (9th Cir. 1986) ("[C]onsistency with the [NCP] does not necessitate strict compliance with its provisions.") with *Amland Properties Corp. V. Aluminum Co. of America*, 711 F. Supp. 784, 797 (D.N.J. 1989) (rejecting a substantial compliance standard). However, in the 1990 revisions to the NCP, EPA included language stating that "[a] private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in *substantial compliance* with the applicable re-

quirements in [those sections of the NCP relevant to private party response actions], and results in a CERCLA-quality cleanup.” 40 C.F.R. section 300.700(c)(3)(i) (emphasis added). Recent court decisions have followed EPA’s lead and have held that the standard for compliance with the 1990 NCP is “substantial compliance.” *E.g.*, *Louisiana-Pacific Corp. v. Asarco Inc.*, 6 F.3d 1332, 1341 (9th Cir. 1993); *County Line Inv. Co.*, 933 F.2d 1508, 1514 (10th Cir. 1991); *Tri-County Business Campus Joint Venture v. Clow Corp.*, 792 F. Supp. 984, 991 (E.D.Pa. 1992).

Other recent court decisions have applied the substantial compliance standard to response actions subject to the 1985 NCP. *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1240 (E.D. Pa. 1993) (“[A] number of courts have held that the [1990 NCP’s] substantial compliance standard simply clarifies the 1985 NCP and as a clarification applies to response costs incurred during the reign of the 1985 NCP.”).

THE BURDEN OF PROOF

There is general agreement among the courts that the private party attempting to recover response costs must prove that the costs were incurred consistent with the NCP, although there is some disagreement as to when the proof must be advanced. *See Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 n.2 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 377 (1992) (decision to deal with NCP consistency at the damages stage of the trial well within the District Court’s discretion); *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 825 F. Supp. 1363, 1379 (S.D.Ill. 1993) (“[P]laintiff need not prove that . . . response costs were consistent with the NCP in order to make a prima facie case [but must do so] before damages may be recovered.”). *But see County Line*, 933 F.2d at 1512 (“Proof of response costs incurred ‘consistent with’ the NCP is . . . an element of a prima facie private cost recovery action under CERCLA.”). *Accord Donahey v. Bogle*, 987 F.2d 1250, 1255 (6th Cir. 1993) *cert. denied, sub. nom Donahey v. Livingstone*, 62 U.S.L.W. 3409 (1993).

A number of courts have held that initial investigation costs are an exception to the general requirement that costs must be consistent with the NCP. *E.g.*, *Donahey*, 987 F.2d at 1255; *Marriott*

Corp. v. Simkins Indus. 825 F. Supp. 1575, 1583 (S.D. Fla. 1993); *Carlyle Piermont Corp. v. Federal Paper Board Co.*, 742 F. Supp. 814 (S.D.N.Y. 1990). *But see Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1219 (3rd Cir. 1993) (consistency with NCP required as part of prima facie case for recovery of monitoring and evaluation costs).

EPA APPROVAL OF CLEANUP PLAN

Although in the early days of CERCLA there was some uncertainty in the courts as to whether EPA approval of a response plan was necessary for costs to be consistent with the NCP, the courts now are in agreement that such approval is not necessary. *E.g.*, *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 901 F.2d 1206, 1208-09 (4th Cir. 1990) (“[G]overnmental approval [of a cleanup plan] is not a prerequisite to private recovery for cleanup costs under . . . CERCLA.”); *Marriott Corp. v. Simkins Indus.*, 825 F. Supp. 1575, 1580 (S.D. Fla. 1993) (“[T]he prevailing judicial view [is] that government approval prior to initiation of a private action is not required for consistency with the NCP.”)

What Costs Are Considered “Necessary Costs Of Response?”

Costs incurred on-site, in the course of a cleanup determined to be consistent with the NCP (*e.g.*, payments to a remedial contractor for excavating and disposing of contaminated soil to bring a site into compliance with government cleanup standards), are usually found to be “necessary” under section 107(a)(4)(B). *E.g.*, *General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1421 (8th Cir. 1990), *cert. denied* 499 U.S. 937 (1991), *reh’g denied*, 111 S.Ct. 1697 (1991). However, the courts have disagreed about other types of costs, such as attorney’s fees and litigation expenses, and costs indirectly related to the actual cleanup, such as medical monitoring costs.

ATTORNEY’S FEES AND LITIGATION RELATED EXPENSES

The Supreme Court in 1994 is expected to resolve a split in the Circuit Courts as to whether expenses incurred in litigation to recover response costs from other private parties, including attorney's fees, are themselves recoverable. *Compare, Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993) ("The court can conceive of no surer method to defeat [the purpose of section 107] than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover [their] costs.") and *General Electric Co. v. Litton*, 920 F.2d at 1422 ("CERCLA authorizes . . . the recovery by private parties of attorney fees and expenses.") with *Key Tronic Corp. v. United States*, 984 F.2d 1025, 1027 (9th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3409 (U.S. Dec. 13, 1993) (No. 93-376). ("[A] litigant cannot recover in a private response cost recovery action attorneys' fees from a party that was responsible for the pollution.") and *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847 (10th Cir. 1993) ("[A] private party may not recover attorneys fees arising from the litigation of a private recovery action.") but *cf. Louisiana-Pacific Corp. v. Asarco Inc.*, 6 F.3d 1332, 1342 (9th Cir. 1993) (disallowing attorneys' fees but upholding an award of other litigation costs).

OTHER COSTS

Costs Allowed By The Courts

Artesian Water Co. v. Gov't. of New Castle County, 659 F. Supp. 1269, 1287 (D. Del. 1987), *aff'd* 851 F.2d 643 (3rd Cir. 1988) (costs of monitoring and evaluating impact of release are compensable); *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847 (10th Cir. 1993) (non-litigation related attorneys fees are recoverable if they are necessary response costs); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) ("[S]ecurity measures and site investigation are acceptable response costs within the meaning of CERCLA."); *General Electric Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 959 (W.D.Mo. 1989) *affirmed*, *General Electric v. Litton*, 920 F.2d at 1422 (prejudgment interest properly recoverable as a response cost under section 107(a)(4)(B)); *T & E Industries, Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 707, 709 (D.N.J. 1988) (value of time

spent by corporate executive in response to contamination problem is included within the meaning of response costs under CERCLA).

Costs Not Allowed By The Courts

Key Tronic Corp. v. United States, 984 F.2d 1025, 1027-28 (9th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3409 (U.S. Dec. 13, 1993) (No. 93-376) (legal expenses in preparing and negotiating a consent decree with EPA were not necessary response costs under CERCLA section 107(a)(4)(B)); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992) (medical monitoring to detect chronic disease not recoverable where it "smacks of a cause of action for damages resulting from personal injury"); *Central Maine Power, Co. v. F.J. O'Connor Co.*, No. 91-0251-B, 1993 U.S. Dist. LEXIS 17234, at *21 (D. Me. Nov. 8, 1993) (costs of voluntarily reimbursing EPA for oversight expenses not recoverable as necessary response costs); *Louisiana-Pac. Corp. v. Beazer Materials & Services Inc.*, 811 F. Supp. 1421, 1425 (E.D.Cal. 1993) (private party site investigation conducted in parallel to EPA investigation was duplicative and therefore unnecessary); *In re Hemingway Transport, Inc.*, 126 B.R. 650, 663 (D. Mass. 1991) (employee time is not a cost of response under CERCLA); *In re Hanford Nuclear Reservation Litigation*, 780 F. Supp. 1551, 1567 (E.D.Wash. 1991) (private party medical monitoring costs not necessary because medical monitoring underway by Agency for Toxic Substances and Disease Registry); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1474 (D. Colo. 1991) (costs for medical testing to monitor health effects are not recoverable, but costs for medical testing to monitor environmental effects are recoverable); *Artesian Water Co. v. Gov't. of New Castle County*, 659 F. Supp. 1269, 1287 (D. Del. 1987), *aff'd* 851 F.2d 643 (3rd Cir. 1988) (economic losses due to idled property are not response costs under CERCLA).

How Are The Costs Allocated Among The Parties?

CERCLA section 113(f)(1) provides that "[i]n resolving contribution claims, the court may allo-

cate response costs among liable parties using such equitable factors as the court determines are appropriate." In *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571-73 (6th Cir. 1991) the Sixth Circuit comprehensively reviewed the types of factors that courts can consider in allocating response costs between responsible parties. The court's list included: (1) the ability of the parties to distinguish their contributions; (2) the amount of waste involved; (3) the toxicity of the waste involved; (4) the degree of involvement of the parties in generation, treatment, storage, or disposal of the waste; (5) the degree of care exercised by the parties; (6) the degree of cooperation by the parties with government officials; (7) the state of mind of the parties; (8) the parties' economic status; (9) contracts between the parties bearing on the subject; (10) traditional equitable defenses; and, (11) the relative culpability of the parties.

The first six factors on the *Meyer* court's list have come to be called the "Gore factors," after then Congressman Al Gore, who first introduced them during the legislative process that resulted in CERCLA. 126 Cong. Rec. 26,779, 26,781 (1980). Although they were not incorporated into CERCLA, the "Gore factors" have been looked to by a number of courts for guidance in equitably allocating response costs under section 113(f)(1). See *In re Hemingway Transport, Inc.*, 993 F.2d 915, 922 n. 4 (1st Cir. 1993) ("Gore factors' provide a nonexhaustive but valuable roster of equitable apportionment considerations.") (citing and quoting *Environmental Transp. Systems Inc. v. EnSCO, Inc.*, 969 F.2d 503, 508-09 (7th Cir. 1992).

Application of these equitable factors has led to a wide range of varying allocation decisions. *BCW Associates, Ltd. v. Occidental Chemical Corp.*, 1988 WL 102641 at *28 (E.D. Pa. 1988) (former owner, present owner, and present lessee of property each allocated one-third of clean up costs, in part because present owner and lessee obtained "collateral benefits" by entering into contracts which incorporated price concessions reflecting the condition of the property); *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 527 (8th Cir. 1992) (past owner who knew of and was responsible for contamination, and who

fraudulently induced plaintiff to purchase property, properly allocated 100% of cleanup costs by the District Court); *Central Maine Power Co. v. F. J. O'Connor Co.*, No. 91-0251-B (D. Me. Nov. 8, 1993) (holding an arranger for disposal responsible for a higher percentage of response costs than the proportionate share of the waste it contributed, on the grounds that the arranger had been less cooperative with EPA than the other parties and had more financial resources); *Environmental Transp. Systems Inc. v. EnSCO, Inc.*, 969 F.2d 503 (7th Cir. 1992) (transporter that was solely at fault for a highway accident leading to a spill of PCBs found 100% responsible for contribution, freeing generator from any liability); *Danella Southwest v. Southwestern Bell Telephone*, 775 F. Supp. 1227, 1235 (E.D. Mo. 1991) (contractor who transported dioxin-contaminated dirt to disposal site not liable for contribution because he performed the job in a professional and workmanlike manner, was not aware that dirt was contaminated with dioxin and was not at fault in failing to detect presence of dioxin).

What Defenses Are Available?

The courts agree that a party subject to a private cost recovery action has available the defenses to liability enumerated in CERCLA section 107(b). E.g., *General Electric Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1418 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991), reh'g denied, 111 S.Ct. 1697 (1991). ("The available defenses are that the release was caused solely by an 'act of God or war' or that the release was caused solely by a third party whose actions were not foreseeable by the defendant, who was exercising due care with respect to the hazardous substance."). But the courts disagree about the availability of other defenses.

The Third Circuit has characterized other sections of CERCLA as "suggest[ing] additional defenses in a broad sense," *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3rd Cir. 1988). Among the sections the court listed were: the three year statute of limitations period [for contri-

bution actions] in section 113(g); the limitation on liability for contribution of a party that has settled with the government in section 113(f)(2); and, section 107(e) enforceability as between the parties (but not against the government) of agreements to indemnify or hold harmless (see discussion of section 107(e)(1) below). *Id.*

There is a question as to whether equitable defenses are available in private party cost recovery actions. The answer often depends on whether the court is treating the action as one under section 107 or section 113. Compare *General Electric v. Litton*, 920 F.2d at 1418 (“CERCLA does not provide for an ‘unclean hands’ defense; the liability imposed by [section 107(a)] is subject only to the defenses [in section 107(b)].”) with *Village of Fox River Grove v. Grayhill, Inc.*, 806 F. Supp. 785, 790 (N.D.Ill. 1992) (“[C]ourts are to resolve contribution claims on a case-by-case basis, taking into account relevant equitable considerations . . . [t]herefore, equitable defenses may be asserted against private plaintiffs.”) (citations omitted).

Further, many courts view the determination of liability and the allocation determination as a two step process. See *Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1274 (E.D.Va. 1992) (“Because of the complexity of CERCLA cases . . . courts have bifurcated the liability and . . . damages phases of CERCLA litigation.”) (quoting *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th Cir. 1989)). Consequently, some of those courts view the relevance of equitable defenses differently at the two stages of the trial. *E.g.*, *Smith Land*, 851 F.2d at 90 (“[U]nder CERCLA the doctrine of caveat emptor is not a defense to liability for contribution, but may only be considered in mitigation of amount due.”); *Thaler v. PRB Metal Prods.*, 815 F. Supp. 99, 102 (E.D.N.Y. 1993) (“[E]quitable principles are not a defense to liability for contribution under CERCLA, but the district court in its exercise of discretion may consider them in the allocation of contribution.”) (quoting *International Clinical Laboratories v. Stevens*, 710 F. Supp. 466, 471 (E.D.N.Y. 1989), and citing three other cases for the proposition).

Can Private Parties Allocate CERCLA Liability Contractually?

Section 107(e)(1) of CERCLA states that:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from . . . any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

One interpretation of this section that has emerged from recent decisions on this issue, is that “private parties can enter into agreements between themselves to apportion responsibility as to each other for costs incurred under CERCLA . . . [but] cannot . . . alter their underlying liability to the government to remediate contamination.” *Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468, 1473 (N.D. Cal. 1993). See also *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993) (“[It is] CERCLA’s ‘essential purpose’ [to make] ‘those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created If section [107(a)] imposes liability on a party then that party cannot escape liability by means of a contract with another party That is, the government or a private party can pursue any responsible party it desires. Two or more parties, however, can allocate ultimate responsibility among themselves by contract.”) (citations omitted). *Accord* *Commander Oil Corp. v. Advance Food Service Equip.*, 991 F.2d 49, 51 (2nd Cir. 1993); *AM Int’l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 994 (6th Cir. 1993); *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 692 (9th Cir. 1992); *Danella Southwest, Inc. v. Southwestern Bell Tel. Co.*, 775 F. Supp. 1227, 1241 (E.D. Mo. 1991), *summarily aff’d*, 978 F.2d 1263 (8th Cir. 1992).

One court has recently taken a different view, holding that the first sentence of section 107(e) “preclude[s] the contractual transfer of liability between parties responsible or potentially responsible for the clean-up of contaminated sites.” *Harley-Davidson, Inc. v. Minstar, Inc.*, No. 90-c-1245, 1993 U.S. Dist. LEXIS 16203, at *6 (E.D. Wis. Nov. 5, 1993) (holding at *19 that the second sentence of section 107(e) “permits the transfer of liability owed by a potentially responsible party to a non-liable or non-potentially responsible party, such as an insurance company.”).

Courts have generally looked to state law as governing the interpretation of indemnity agreements under CERCLA, or as providing the content of federal law. *E.g.*, *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (“We . . . look to Massachusetts law for guidance in interpreting [an] agreement with respect to CERCLA liabilities.”); *AM Int’l v. International Forging Equip. Co.*, 982 F.2d 989, 995 (6th Cir. 1993); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2d Cir. 1993).