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Can a State Environmental Law Resurrect a CERCLA Contribution Claim?

by Heidi S. Minuskin and Deborah A. Kelly

State statutes designed to compel private parties to spend their money to clean up contaminated sites typically mirror the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which enables the U.S. Environmental Protection Agency to force responsible parties to remediate contaminated sites but which also provides parties with a private right of contribution against other responsible parties. Sometimes a state statute of limitations differs from the CERCLA statute of limitations. Recent cases dealing with New Jersey law as it intersects with federal law have started to address this and related issues.

In an effort to have contaminated sites remediated without using public funds, state and federal governments continuously press private parties to spend their money to fund cleanups of contamination. Often, government authorities make demands against only a subset of parties that they deem responsible and afford such parties the right to seek recovery from the non-participating responsible parties. Many states have environmental statutes that provide an avenue to private parties to pursue cost recovery and contribution actions against other responsible parties. These statutes typically mirror CERCLA, 42 U.S.C. §§ 9601 *et seq.*, also known as the "Superfund." This law enables the U.S. Environmental Protection Agency (EPA) to force responsible parties to clean up contamination or to reimburse the EPA for costs that it incurs. CERCLA also provides parties with a private right of contribution against other responsible parties. In states that have regulations containing statutes of limitations that differ from the CERCLA statute of limitations, parties may want to consider whether a state environmental law can be used to recoup certain costs incurred under CERCLA remediation.

Under CERCLA, the statute of limitations for an action for recovery of costs is either three years after completion of a removal action or within six years after initiation of a remedial action. 42 U.S.C. § 9613(2). An action for contribution must be brought within three years after

(A) the date of judgment in any action under this Act for the recovery of such costs or damages, or (B) the date of an administrative order under section 42 USCS § 9622(g) (relating to de minimis settlements) or 42 U.S.C §9622(h) (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

New Jersey has long been in the forefront of environmental regulation and is one of only three states that have a transaction-triggered environmental law. Furthermore, New Jersey enacted the Spill Compensation and Control Act (the Spill Act), the precursor to CERCLA. N.J.S.A. 58:10-23.11f(a)(2)(a). Similar to CERCLA, the Spill Act provides an avenue to a party that cleans up contamination to the right of contribution against other responsible parties—to ensure that those parties that clean up contaminated property have the ability to recover costs. *Id.* Whether a party is able to recover costs depends on details such as timing when to assert a contribution claim.

Against this backdrop, earlier this year, the New Jersey Supreme Court addressed how long a party has to bring such a contribution claim. The court's unanimous decision in *Morristown Associates v. Grant Oil Company*, 220 N.J. 360, 106 A.3d 1176 (N.J. Jan. 26, 2015), held that private claims for contribution made under the Spill Act are not subject to a six-year statute of limitations.



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Therefore, parties in New Jersey who clean up contaminated property have an unlimited amount of time in which to recover the costs incurred for an environmental cleanup.

In *Morristown Associates*, after the discovery of the contamination caused by a leak in an underground storage tank, the plaintiff, the owner of the shopping center, began to remediate the property. The plaintiff later brought claims for contribution against the owner of a dry-cleaning business in the shopping center, as well as oil companies that had provided fuel oil for the underground storage tank. The defendants moved to dismiss the claim on statute of limitations grounds. Ultimately, the New Jersey Supreme Court held that Spill Act claims are not subject to a statute of limitations.

While the *Morristown Associates*' decision paves the way for contribution-seeking plaintiffs to file suit against all parties that may have contributed to a contamination, regardless of how long ago their contribution occurred, some questions remain unanswered. For example, does the decision also allow a plaintiff to resurrect a dismissed CERCLA contribution claim, 42 U.S.C. §§ 9601 *et seq.*, for costs incurred to fulfill an administrative settlement agreement and order on consent with the EPA by couching it as a state claim?

Some plaintiffs' attorneys believe that the answer is yes. The holding in *Morristown Associates* has provided fodder for a debate in a case pending in the New Jersey federal district court, *Sandvik, Inc. and Thermo Fisher Scientific Inc. v. Hampshire Partners Fund VI, L.P. and 18-01 Pollitt Drive LLC*, 2:13-CV-04667 (D. N.J.). In this case the plaintiffs have taken the position, in an opposition to a motion to dismiss a count of their First Amended Complaint, that they are entitled to recover CERCLA costs under the Spill Act. The court previously dismissed the plaintiffs' CERCLA contribution claim based solely on the fact that it was not brought within the applicable CERCLA statute of limitations. 42 U.S.C. § 9613(g)(3)(B).

Both CERCLA and the Spill Act seek to achieve a similar result: to provide contribution to those parties that undertake to remediate contamination. However, the two statutory schemes are different on issues such as causation, scope of liability, and the applicable statute of limitations. If the New Jersey federal district court allows the plaintiffs in *Sandvik* to recover their damages under the Spill Act, would the decision essentially grant plaintiffs that are foreclosed under one statute from bringing a contribution claim because of the statute of limitations a second bite of the apple? Conversely, would the decision promote the ultimate goals of both statutes: to encourage remediation of contamination and to allow parties to recover costs for which they are not responsible?

Whether or not a party can use a state law contribution claim to recover CERCLA response costs after its CERCLA contribution claim is barred by the CERCLA statute of limitations raises interesting issues for responsible parties when the state and the CERCLA statute of limitations differ and a party tries to use the statute with the longer statute of limitations to recover costs incurred to meet state and federal requirements. This scenario implicates a host of issues, including those involving preemption. However, the more practical issue that needs to be examined is whether certain remediation or cleanup costs can be classified as costs related to meeting both state and federal requirements.

The defendants in *Sandvik* suggest that since the plaintiffs were ordered by the EPA to perform a remedial investigation/feasibility study (RI/FS), which is a federal requirement, costs can only be recovered under CERCLA. While on its face, this suggestion seems as if it would provide a simple solution, costs related to a cleanup involving both state and federal requirements are not easy to divide. Typically, remediation is undertaken to satisfy both state and federal requirements. For example, if by performing a RI/FS, a party also would satisfy requirements for remediation at the state level, to which column would those costs be attributed?

Therefore, how do you preserve remediating parties' right to seek costs under either CERCLA or state law? One possibility may be at the beginning of any remediation project, or when entering into an order with either a state or a federal entity to conduct a cleanup, for the parties to ensure that the costs are properly characterized to satisfy state and federal requirements. When a state law's statute of limitations mirrors the CERCLA statute of limitations, this may not become an issue. But in states that have no statutes of limitation or one that differs from the CERCLA statute of limitations, such characterization may allow

parties to use a state law to save an otherwise time-barred contribution claim.



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