



Supreme Court Clarifies CERCLA Provisions for Recouping Cleanup Costs

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On May 24, 2021, the Supreme Court issued an opinion in *Guam v. United States* that could expand the ability to recover cleanup costs under the [Comprehensive Environmental Response, Compensation, and Liability Act](#) (CERCLA). CERCLA, the “Superfund” statute, provides two avenues for lawsuits to recoup costs for the cleanup of contaminated sites. The *Guam* decision clarified the relationship between these separate CERCLA provisions.

This Sidebar explains CERCLA’s framework for parties to recoup cleanup costs, discusses the *Guam* decision, and considers the implications of the decision. As discussed below, the Court’s ruling allows the Territory of Guam to proceed with its cost-recovery claim against the United States for costs associated with cleaning up the Ordot Dump. More broadly, the ruling could expand parties’ ability to recover cleanup costs, particularly from federal agencies that bear some responsibility for contaminating a given site. It could also alter the scope and timing of settlement negotiations to resolve liability under CERCLA and other environmental statutes.

Background on CERCLA

Congress enacted CERCLA to [clean up](#) the release of [hazardous substances](#), pollutants, or contaminants across the United States and to hold the parties connected to those sites responsible for cleanup costs. CERCLA [provides](#) that “potentially responsible parties” (PRPs) may be compelled to perform or pay for the cleanup of contaminated sites. The statute includes [two provisions](#) that allow parties that incur cleanup costs to recoup all or part of their costs from PRPs: cost-recovery actions [under Section 107\(a\)\(4\)\(B\)](#), and contribution actions under [Section 113\(f\)](#). A federal agency may face liability under either provision if its connection to a site renders it a PRP.

First, [Section 107\(a\)\(4\)\(B\)](#) of CERCLA allows any person to sue a PRP to recover “any other necessary costs of response” that that person has incurred. These lawsuits are known as “cost-recovery” actions. Cost-recovery actions under Section 107(a) are subject to [a six-year statute of limitations](#), which begins upon the initiation of the remedial action (typically a long-term, permanent remedy for the contaminated site).

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Second, [Section 113\(f\)](#) allows a PRP that has been required to pay response costs to someone else to assert a contribution claim against other PRPs in court to compel those PRPs to bear an equitable share of those costs. As relevant to this case, [Section 113\(f\)\(3\)\(B\)](#) provides:

A person that 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 may seek contribution from any person who is not party to a settlement referred to in [[Section 113\(f\)\(2\)](#)].

Contribution actions under [Section 113\(f\)](#) are subject to a [three-year statute of limitations](#), which begins on “the date of judgment in any action under [[CERCLA](#)] for recovery of [[response](#)] costs” or the “entry of a judicially approved settlement with respect to such costs.”

A party that *may* bring a [Section 113\(f\)](#) contribution action [must proceed](#) under [Section 113\(f\)](#), and is barred from proceeding with a cost-recovery action under [Section 107\(a\)](#). Because a claim might be timely under [Section 107\(a\)](#) but not under [Section 113\(f\)](#), parties in litigation over a site have sometimes disputed the [characterization of prior settlements](#) to address contamination at that site in order to advance arguments about whether a party’s claims are timely and thus may go forward.

The *Guam* Litigation

Guam v. United States concerns the cleanup of a site known as the Ordot Dump, which, until its closure in 2011, was the only public landfill on the island of Guam. From 1898 until 1950, the U.S. Navy had [jurisdiction](#) over Guam, and deposited waste at the Ordot Dump, which lacked basic environmental safeguards. After Guam was organized as a United States territory in 1950, the newly formed civilian government [accepted waste](#) and stored it in open, unlined ravines at the Ordot Dump, and the Navy [continued to deposit waste](#) at the dump as well. Over time, contaminants from the Ordot Dump [leached into a nearby river](#) and its tributaries, which ultimately flow into the Pacific Ocean.

The U.S. Environmental Protection Agency (EPA) [sued Guam](#) in 2002, alleging that the discharge of untreated leachate from the Ordot Dump violated the Clean Water Act. Guam and EPA resolved that litigation in 2004 by entering into a consent decree that required Guam to pay a civil penalty and close and cover the dump. The consent decree [provided](#) that Guam’s compliance with its terms would constitute “full settlement and satisfaction” of the claims the United States alleged in the complaint. It also reserved the United States’ ability to raise future claims other than those alleged in the complaint.

In 2017, Guam [sued the United States](#) under [CERCLA](#), alleging that the Navy was responsible for the contamination at the Ordot Dump. Guam asserted both a [CERCLA Section 107\(a\)](#) cost-recovery claim seeking “removal and remediation costs” related to the landfill, and, in the alternative, a contribution action pursuant to [Section 113\(f\)](#).

The U.S. District Court for the District of Columbia [ruled](#) that Guam could proceed with its cost-recovery action. On [interlocutory review](#), the D.C. Circuit [reversed and remanded](#). The D.C. Circuit held that the 2004 consent decree triggered a contribution claim under [Section 113\(f\)](#) by resolving Guam’s liability to the United States, thus also barring Guam from seeking cost recovery under [Section 107\(a\)](#). Although the 2004 consent decree resolved claims under the Clean Water Act, not [CERCLA](#), the D.C. Circuit [held](#) that [Section 113\(f\)\(3\)\(B\)](#) “does not require a [CERCLA-specific settlement](#)” before a party may pursue a contribution claim (and therefore may not pursue a cost-recovery claim). In so holding, the D.C. Circuit joined the [Third](#), [Seventh](#), and [Ninth Circuits](#), and differed from the [Second Circuit](#). Analyzing the terms of the consent decree, the court [ruled](#) that the settlement required Guam to take action that qualified as a “response action” under [CERCLA](#) and released Guam from liability for the Clean Water Act claim, thus resolving Guam’s liability to the United States. Because the three-year statute of limitations for Guam’s

Section 113(f) contribution claim began with the entry of the 2004 consent decree and thus had already run, the D.C. Circuit held that Guam could not pursue a contribution claim against the United States.

The Supreme Court's Decision

The Supreme Court granted certiorari to review [two questions](#): (1) whether a non-CERCLA settlement can form the basis for a Section 113(f)(3)(B) contribution claim, thereby precluding a Section 107(a) cost-recovery claim; and (2) whether a settlement that includes liability disclaimers and reservations of rights can trigger a Section 113(f)(B) contribution claim. In a [unanimous opinion](#) authored by Justice Thomas, the Court reversed the D.C. Circuit's judgment and remanded for further proceedings. As to the first question, the Court [held](#) that a settlement must resolve a *CERCLA-specific* liability to trigger a Section 113(f)(3)(B) contribution action. Conversely, settlements that resolve liability under other environmental statutes do not trigger contribution rights or foreclose Section 107(a) cost-recovery actions under CERCLA. The Court determined that it only needed to address the first question to decide the case, and thus declined to reach the second question.

The Court held that the text and structure of CERCLA and Section 113(f) tie contribution rights to liability under CERCLA. Reviewing the “interlocking language and structure of the relevant text,” the Court began by [describing the key features](#) of Section 113(f)'s three components. The Court [explained](#) that Section 113(f) “centers on and is entitled ‘contribution.’” It [ruled](#) that a party's entitlement to seek contribution after resolving its liability through a settlement “does not stand alone,” but instead must be read within the specific context of Section 113(f), which outlines the broader workings of CERCLA contribution.

Next, considering the nature of contribution suits, the Court concluded that a party's right to seek contribution after resolving its liability through a settlement must remain “[within the bounds of CERCLA](#).” The Court explained that contribution suits “[do] not exist in a vacuum” but rather are a “tool for apportioning the burdens of a predicate ‘common liability’ among” PRPs. The Court reasoned that CERCLA presented the “most obvious place” to find the threshold liability that is apportioned through contribution suits. The Court also [observed](#) that there is no “general federal right to contribution.” Instead, contribution suits “are virtually always a creature of a specific statutory regime.”

Reading each provision in Section 113(f) sequentially as “integral parts of a whole,” the Court [concluded](#) that all three provisions either explicitly or implicitly presume that CERCLA liability is necessary to trigger contribution rights. In particular, the Court pointed to the statement in Section 113(f)(3)(B) that contribution is available “from any person who is not party to a settlement referred to in” Section 113(f)(2). The Court described Section 113(f)(2) as mirroring Section 113(f)(1)'s anchor provision, which expressly contemplates a predicate CERCLA liability.

The Court determined that Section 113(f)(3)(B)'s use of the term “response action” further ties Section 113(f)(3)(B) to the CERCLA regime. The Court [wrote](#) that “response action” is “a familiar CERCLA phrase that appears dozens of times throughout the Act.” While the Court [agreed](#) with the United States that remedial measures taken under another environmental statute [may resemble the steps](#) taken in a CERCLA “response action,” it concluded that such a functional overlap was not a sufficient basis for interpreting Section 113(f)(3)(B) as providing a contribution claim whenever a party settles an environmental liability that “might have been actionable under CERCLA.” The Court also [considered](#) the requirement that a party have “*resolved* its liability” in order to trigger the availability of a contribution action, specifying that the term “resolve” “conveys finality and certainty.” The Court reasoned that its narrower reading would avoid the “rather odd” result that a party could have “resolved its liability” and yet remain vulnerable to a CERCLA suit.

Implications of the Court's Decision

The immediate practical effect of the Supreme Court's ruling is that Guam may now proceed with its Section 107(a) cost-recovery claim in the district court because its Clean Water Act settlement did not give rise to a contribution claim under Section 113(f)(3)(B). Notwithstanding the Court's review, the case is still in its early stages, and neither the Court's opinion nor any lower-court decision to date has addressed the merits of Guam's claim. CERCLA provides many [defenses to liability](#) that could limit the United States' obligation to compensate Guam. Furthermore, although CERCLA provides for joint and several liability—meaning that any single PRP may be held liable for all of the response costs associated with a cleanup—a party may file a counterclaim for contribution under Section 113(f) to reduce the extent of its financial obligation in the event it is found liable. In this instance, Section 113(f) may allow the United States to file a counterclaim against Guam for an equitable apportionment of response costs, but the United States has not yet filed any counterclaims in this litigation. Accordingly, it is not possible at this time to determine whether Guam will succeed in establishing that the United States is liable—or, if Guam succeeds, how much of its response costs ([estimated](#) at \$160 million, or nearly [one-fifth](#) of Guam's annual budget) will be recovered from the United States.

The litigation with Guam arises out of the United States' status as both an enforcer of federal environmental laws (through EPA, in this case) and a possible PRP under CERCLA (in light of the Navy's historic involvement in the operation of the Ordot Dump). This posture is hardly unique to this case. Currently, there are 159 [current or proposed federal sites](#) on the Superfund National Priorities List, which identifies high-priority sites for investigation and cleanup. The federal government plays a dual role at many of those sites across the country. During the proceedings before the Supreme Court, commentators—including a group of 24 states, the Commonwealth of the Northern Mariana Islands, and the District of Columbia, which filed an [amicus brief](#) in support of Guam—expressed concern that the United States should not be able to craft settlements of federal enforcement actions under *other* statutes that would allow federal PRPs to evade CERCLA liability. Following the Supreme Court's ruling, if a private party resolves its liability to the United States under a statute other than CERCLA for environmental harm at a particular site, it may still be able to bring a cost-recovery action against the United States under CERCLA in connection with the federal government's involvement at a site.

As the Supreme Court acknowledged, there is sometimes a functional overlap between CERCLA response actions and cleanup activities undertaken to resolve liability under environmental laws. The Court [described its interpretation](#) of Section 113(f)(3)(B) as requiring that a prior settlement expressly resolve CERCLA liability as “the far simpler approach” compared to a case-by-case analysis of whether an earlier settlement was “close enough to CERCLA.” In the future, parties like Guam that are resolving their non-CERCLA liability through settlement may need to consider an additional point: they may either limit the scope of those non-CERCLA settlements, thereby leaving themselves vulnerable to additional litigation, in order to protect their ability to bring a CERCLA cost-recovery claim later; or they may resolve their liability more broadly, including any potential CERCLA liability, but foreclose their ability to bring a future cost-recovery claim and begin the three-year period to bring a contribution claim. It is also possible, as the [United States warned](#) in its brief, that a settling party invoking Section 107(a) could choose when the statute of limitations period begins to run by deciding when to begin on-site construction of a remedial action, which could delay the timely cleanup of and settlements regarding contaminated sites. Such a delay may not be possible, however, if a non-CERCLA settlement requires the settling party to take cleanup action within a specific timeframe.

Considerations for Congress

Congress added Section 113 to CERCLA in the [Superfund Amendments and Reauthorization Act of 1986](#) to clarify that parties that are “liable under CERCLA [can] [seek contribution](#) from other potentially liable parties.” See H.Rept. 99-253, pt. 1, at 79 (1985). Since then, [courts have struggled](#) with the intersection of CERCLA’s cost-recovery and contribution provisions, [acknowledging](#) that “the supposedly sharp distinction” between the mutually exclusive causes of action “does not always play out in practice.” This is the [second Term in a row](#) in which the Supreme Court has attempted to clarify technically detailed questions about the interplay of different provisions in CERCLA.

Notwithstanding the Court’s ruling, if Congress believes the United States’ broader reading of Section 113(f)(3)(B) is the correct one, it could amend CERCLA to specify that a “response action” need not be pursuant to CERCLA in order to trigger Section 113(f) contribution rights. Congress could also amend CERCLA to address the question left unaddressed by the Court, i.e., whether a settlement that disclaims liability or reserves a party’s rights can resolve liability sufficient to trigger Section 113(f)(3)(B).

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