

3rd Circ. Affirms CERCLA Cost-Recovery, Contribution Claim Limitations Periods

By **Mark L. Greenfogel** | *Legal Intelligencer*

It is not unusual for judges deciding a case under the Comprehensive Environmental Response, Contribution, and Liability Act, 42 U.S.C. Section 9601 et seq. (CERCLA) to acknowledge CERCLA’s reputation for imprecise drafting and ambiguity. A recent U.S. Court of Appeals for the Third Circuit opinion addressing the contours of a “cost recovery” and a “contribution” action under CERCLA is no exception, as in *Cranbury Brick Yard v. United States*, — F.3d — (3d Cir. 2019). In that case, the court was left to resolve the familiar points of disagreement among CERCLA litigants of when the clock starts running on a CERCLA claim and which limitations period applies.

In *Cranbury*, Cranbury Brick Yard (Cranbury) brought both a cost recovery and contribution claim against the federal government based on its alleged partial responsibility for the contamination at the site of a former weapons factory in Cranbury, New Jersey. A cost-recovery claim under CERCLA Section 9607 permits a person who incurs response costs to recover such costs from those responsible for the site’s pollution. In a cost-recovery action, defendants can be held strictly and jointly and severally liable. A contribution claim under CERCLA Section 9613(f), on the other hand, permits a liable party to sue other polluters to allocate costs equitably.

In accordance with Section 9613(f), “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 claims for contribution regarding matters addressed in the settlement.” Such immunization, however, comes at a price. In exchange for this immunity from contribution claims, the Third Circuit along with a majority of the other courts of appeals, has held that a settling party can bring only a contribution claim, and not a cost recovery claim, against other potentially

responsible parties, as in *Agere Systems v. Advanced Environmental Technology*, 602, F.3d 204, 229 (3d Cir. 2010).

In the 1970s, Cranbury Development bought the New Jersey site. Then, in the early 2000s, the New Jersey Department of Environmental Protection (NJDEP) issued a directive identifying Cranbury Development, the successor to the weapons manufacturer named Maxxam Group, and the U.S. Navy as the parties responsible for the site's contamination. NJDEP directed the parties to commit to perform the remediation, but "the Navy rebuffed NJDEP and refused to take part." In 2005, Cranbury Development and Maxxam entered into a consent order with NJDEP in which the responsible parties agreed to clean up the site. The consent order stated, "It is the intent of NJDEP, Cranbury Development and Maxxam that this administrative consent order constitutes an administrative settlement within the meaning of CERCLA Section 113(f), 42 U.S.C. Section 9613(f)(2) for the purpose of providing protection from contribution actions or claims under CERCLA as a result of releases of hazardous substances at the Site." In 2006, Cranbury purchased the site from Cranbury Development. Prior to purchasing the site, Cranbury sought to assume Cranbury Development's cleanup obligations. The consent order was amended to replace Cranbury Development with Cranbury.

In 2015, Cranbury sued the federal government seeking both cost recovery and contribution under CERCLA. After the federal government's motion to dismiss was denied, it filed a counterclaim for contribution alleging Cranbury's responsibility for part of the site's pollution. The court of appeals affirmed the District of New Jersey's holding that the consent order was a settlement under § 9613(f)(2), and because the settlement immunized Cranbury from the federal government's contribution counterclaim, Cranbury could not bring a cost-recovery action.

The court of appeals rejected Cranbury's counterarguments. According to Cranbury, because it had no CERCLA liability to resolve in the first place, and it voluntarily joined the consent order, it should be entitled to bring a cost recovery claim to recover its response costs. The court distinguished between Cranbury's joining the consent order, which it did so "freely," and its resultant obligation to clean up the site in accordance with the consent order. The court found the "voluntariness" of the cleanup irrelevant to whether a party may bring a cost-recovery action so long as a party is immune from contribution claims.

Once the court determined that Cranbury could not bring its cost-recovery claim, it considered whether the contribution claim was timely. Contribution claims must be brought within three years after the date of judgment in an action for recovery of costs or damages, the date of an administrative order related to de minimis settlements under Section 9622(g), the date of a cost recovery settlement under Section 9622(h), or "entry of a judicially approved settlement with respect to such costs or damages." Noting that "the parties agreed that none of the four contribution-claim triggers occurred because the consent order was not 'judicially approved,'" the court endeavored to fill the statute of limitations gap.

The appellate court considered, "borrowing state statutes of limitations," but rejected doing so to avoid "subjecting the federal government to varying liability state by state" and because CERCLA "provides ready alternatives." The court further rejected the Sixth Circuit's approach of holding that "Section 9613(g)(3)'s list is illustrative, not exhaustive," see *Hobart v. Waste Management of Ohio*, 758 F.3d 757, 774-75 (6th Cir. 2014), observing that the inclusion of only four triggering events, each separated by the word "or," and without any "broad residual language, like 'or other similar settlements'" counseled against that approach.

Instead, the court held, “the thrust of Section 9613(g)(3) is that the limitations period starts to run when a litigant’s contribution claim accrues,” and that a contribution claim “accrues” when “a litigant’s potential CERCLA liability is formally recognized.” In support for its interpretation, the court points to three “textual clues.” First, a litigant may sue for contribution “during or following any cost-recovery action” under Section 9613(f)(1), which the court interprets to mean “after its possible liability is officially recognized in a complaint or judgment.” Second, Section 9613(f)(3)(B) provides a litigant can bring a contribution claim after entering into an administrative or judicially approved settlement with the government, by which the court considers a party to have “affirmed its potential liability.” Third, each of the triggers in Section 9613(g)(3) “formally recognizes a litigant’s actual or potential CERCLA liability.”

Applying this framework, the court found that Cranbury’s contribution claim accrued in 2006 when it entered into the amended Consent order. In doing so, the court rejected Cranbury’s argument that CERCLA Section 9613(g)(2)(B)’s limitations period for cost-recovery action of six years from the date cleanup begins should apply. Cranbury argued that because its amended consent order was not made available for public review and comment, and never entered or approved by a court, it is different in character from the enumerated triggers in Section 9613(g)(3). Br. at 41. Noting that cost-recovery and contribution are “two distinct causes of action authorized by two different statutory provisions,” the Third Circuit found “no textual basis” for applying a cost-recovery limitations period trigger to a contribution action.

Having decided that the limitations period trigger was the date Cranbury entered into the amended consent order, which was nine years prior to the date Cranbury filed its lawsuit, the court declined to decide whether the Section 9613(g)(3) three-year limitations period for contribution claims, or the Federal Tort Claims Act six-year limitations period applies.

This case serves as a reminder to CERCLA practitioners to always be mindful of limitations periods and aware of which factual developments can preclude claims or cause claims to accrue. In addition to holding that nonjudicially approved settlement agreements trigger a limitations period, this case may prove important depending on how the Third Circuit's concept of claim accrual upon formal recognition of a litigant's actual or potential CERCLA liability develops. For example, while the court notes the filing of a complaint is a formal recognition of potential liability, it remains to be seen whether courts will consider other communications or agreements with a state or federal agency a "formal" recognition triggering a contribution claim limitations period.

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