What Does It Take to 'Incur' a Cleanup Cost Under CERCLA?

By David G. Mandelbaum | September 19, 2024 | The Legal Intelligencer

The federal Superfund statute allows a private person to recover "necessary costs of response incurred" by that person consistently with the governing regulation, the national contingency plan. A recent appellate decision, to be sure unreported and therefore not binding, raises the interesting question of what a person must do to "incur" a cost. The person in question was a law firm and this is an "environmental law practice" column, so the question may be doubly interesting.

Gallagher & Kennedy v. City of Phoenix, No. 23-15938 (9th Cir. Aug. 30, 2024) (unreported), addressed the law firm's claim under Section 107(a)(1-4)(B) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. Section 9607(a)(1-4)(B), to recover costs the law firm alleged it had incurred as part of an engagement by the Roosevelt Irrigation District. RID was formed in the 1920s by Maricopa County at the behest of a group of landowners controlling tens of thousands of acres for the purpose of assuring irrigation, and also power, in that portion of the county. The RID system includes groundwater supply wells.

Hazardous substances contaminated the RID groundwater wells. The law firm entered into an agreement with RID to manage the cleanup of the groundwater being drawn into the wells. The law firm in turn hired "subcontractors" who would actually do the investigation and cleanup.

The law firm spent its own "time and resources" on the project. In addition, the subcontractors submitted invoices to the law firm which were either paid or pending.

The city was alleged to be responsible for a release of hazardous substances that caused the contamination. The law firm sought to recover the two categories of costs – its own "time and resources" and the subcontractor invoices—from the city. Because the law firm itself was not a responsible party, this was a cost recovery claim under Section 107 of CERCLA, not a contribution claim under Section 113(f).

The wrinkle in this case was that the law firm's agreement with RID and with the subcontractors called for payment to be contingent on the availability of "project funds." Project funds were either recoveries from other responsible parties or proceeds from the sale of cleaned up groundwater. So, one might argue that the person who actually "incurred" the cost for any invoice actually paid was either the other responsible party whose settlement or judgment payment contributed the "project funds" or the owner of the groundwater, presumably RID. The district court decided on a motion for summary judgment that the law firm had not "incurred" the claimed costs. The court of appeals agreed as to the subcontractor invoices, but not as to the firm's own "time and resources."

The court of appeals reasoned that the law firm incurred the cost of expending its own time and resources when it devoted the time or resources to the project. Assuming that work was not for litigation but instead

was for a legitimate cost of response, *Key Tronic v. United States*, 511 U.S. 809 (1994), would make those costs at least potentially recoverable. The court of appeals ruled that the contingent fee arrangement had "no bearing on the question of whether the law firm committed resources to activities that were closely tied to the cleanup."

On the other hand, the law firm's payment of, or contingent commitment to pay, subcontractor invoices was simply a reimbursement of costs incurred by the subcontractor from Project Funds, not firm funds, and therefore was not recoverable. For this, the court of appeals cited *Chubb Custom Insurance v. Space Systems/Loral*, 710 F.3d 946 (9th Cir. 2013), a subrogation case under Section 112.

This resolution raises as many issues as it resolves. Most parties that actually implement cleanups do so as cleanup contractors. They expect to be paid. When paid, they can no longer recover the value of their "time and resources" because to do so would be to recover twice.

On the other hand, most cost recovery plaintiffs that claim to have "incurred" costs of response—including governmental parties under Section 107(a)(1-4)(A)—in fact have not done the work themselves, but have instead paid for it. They hired a cleanup contractor who submitted an invoice and they paid it. By paying the invoice plaintiffs say that they "incurred" the cost. In order to pay the invoice, the plaintiff claiming to incur the cost must have had resources.

Those resources had to come from somewhere. How far up the chain does one look to determine who "incurred" the cost?

One vexing category of cases that this column has addressed previously involves insurance recoveries on account of the cleanup costs. Those courts that have considered the issue have held that costs reimbursed by insurance are not recoverable from other responsible parties under Section 107 and must be taken into account in any equitable allocation of costs in a contribution action under Section 113(f), 42 U.S.C. Section 9613(f). To ignore the insurance recovery would allow a potential double recovery.

To take another common example, when a buyer acquires land or a business known to be contaminated, the buyer often negotiates either an indemnification for cleanup costs from the seller or a reduction in the purchase price. If the buyer spends money to clean up, an issue arises as to whether it "incurred" those cleanup costs. In the case of an indemnification, assuming the seller in fact honors its indemnification obligation courts would typically not permit the buyer to recover its costs from any other responsible party just as if it had recovered from an insurer. They would either say that to do so would be to allow a double-recovery or they would say that the buyer had not incurred those costs; the seller who indemnified had incurred them.

In the case of the price reduction, the result arguably ought to be the same. The buyer would arguably have paid for the cleanup out of the price reduction and, at least to the extent of the price reduction, the seller would have incurred those costs. But the price reduction is unlikely to be labelled explicitly as a price reduction on account of contamination. The buyer and seller would negotiate a price and the buyer would release any claim it might have to recover from the buyer for cleanup costs, but no one would explicitly calculate a "clean" price and deduct an expected cleanup cost. So, is this situation more like the law firm's own time and resources, or its contingent obligation to pay subcontractor invoices?

Similarly, in many cases a group of "work" parties may agree to incur the costs of a cleanup. Each agrees to pay a share of the cleanup contractor invoices as they come due. The work party group may pursue contribution from other responsible parties. Each member of the plaintiff work group is jointly and severally liable to the government for the cleanup (that is, for the actual work), but they may agree among

themselves to defer a final allocation of those costs until after they complete contribution litigation against others. In this common arrangement, no member of the work group has a known amount of costs that it will ultimately pay; it only has an interim share of a common set of costs. Courts generally allow the group to sue as a group and to recover jointly subject to their internal reallocation. But some courts would say that an unincorporated association of work parties cannot be a person under CERCLA that "incurs" costs and the members must sue individually.

The practice lesson here is that 44 years into this program, this statute remains a festival of litigation problems. Creative fee arrangements under that statute have their own litigation risks that lawyers will have to evaluate.

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