

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**APPLETON PAPERS, INC. and
NCR CORPORATION,**

Plaintiffs,

v.

**GEORGE A. WHITING PAPER
COMPANY, et al.,**

Defendants.

MOTION HEARING

Case No. 08-C-16

HONORABLE WILLIAM C. GRIESBACH, presiding
Deputy Clerk: Mary
Proceeding Held: November 10, 2009

Tape: 111009
Hearing Began: 9:06 a.m.
Hearing Ended: 11:24 a.m.

Appearances:

Plaintiffs: See attached seating chart

Defendants: See attached seating chart

9:06 a.m. The case is called.

9:06 a.m. The Court addresses pending motions [548] motion for leave to file eighth amended complaint and [556] motion to modify the Court's September 23, 2008 case management scheduling order.

9:07 a.m. Atty. Roach addresses [548] motion to amend complaint. Cites Burlington Northern case.

9:08 a.m. The Court inquires as to declaratory relief and liability.

9:10 a.m. Atty. Roach replies.

9:10 a.m. Atty. Westerfield states U.S. was added to complaint in separate action.

9:11 a.m. The Court inquires as to background action and amount of liability.

9:12 a.m. Atty. Roach replies, they have not conceded liability, but have complied with the order voluntarily.

9:13 a.m. Atty Westerfield addresses liability of possible fines.

9:14 a.m. Atty. Roach resumes argument.

9:29 a.m. Atty. Hermes addresses [556] motion to modify case management scheduling order.

9:30 a.m. The Court inquires as to what effect amending complaint would have on scheduling order.

9:31 a.m. Atty. Hermes replies.

9:39 a.m. Atty. Mandelbaum puts forth response to motions.

9:44 a.m. The Court inquires as to declaratory relief.

9:44 a.m. Atty. Mandelbaum responds and requests case scheduling order not be modified.

10:16 a.m. Atty. Stone responds to motions. He puts forth four questions of the Court and makes

statements on 1)declaratory judgment question 2)sufficient cause question 3)difference between

contribution under Sec. 113 and traditional common law 4) did Burlington Northern change the law?

Attorney Stone presents document to the Court. Court entitles document - Demonstrative Exhibit 1 and directs it be docketed.

10:43 a.m. The Court recesses.

10:53 a.m. The Court resumes on the record. The Court questions Atty. Stone.

10:54 p.m. Atty. Stone responds.

10:58 a.m. Atty. Roach puts forth reply on [548] motion for leave to file.

11:04 a.m. Atty. Hermes puts forth reply on [556] motion to modify case management scheduling order.

11:09 a.m. The Court expects to issue a decision next week. The Court reschedules Final Pretrial from December 17 to December 21, 2009 at 1:30 p.m. in Milwaukee in Judge Adelman's courtroom. The parties are directed to contact Chief Deputy Clerk Michael Williams for general information regarding the pretrial and court trial in Milwaukee. Counsel tables will be set up and, probably, the rail and some benches removed. There will be a podium set up for questioning witness and the trial will run Mondays through Thursdays.

11:14 a.m. Atty. Roach inquires as to 1) opening statements 2) fact witnesses.

11:15 a.m. The Court confirms, witnesses will be called once and not recalled. Court does not think it will need opening statements.

11:16 a.m. Atty. Scott Hansen addresses secure live streaming Q&A over the internet for clients and attorneys to tap into. Atty. Hanson requests the court consider this in regard to its no-camera and broadcasting policy. This is not a voice or video transmission, just a written transmission.

11:17 a.m. Atty. Roach states no objections.

11:18 a.m. The Court will contact court reporter, but is inclined to grant the streaming Q&A.

11:18 a.m. Atty. Mulligan addresses the Court regarding data bases and electrical power constraints in the courtroom.

11:20 a.m. The Court directs Atty. Mulligan to Jeff Runge who is head of IT. The Court is willing to lift the local rule or policy that would prohibit transmission, if it is necessary, and as long it does not interfere with presentation of evidence.

11:20 a.m. Atty. Levin addresses the issue of fact witnesses having immediate access to testimony.

11:21 a.m. The Court states if there is a sequestration order it would prohibit witnesses to having access to testimony.

11:22 a.m. The Court refers parties to Michael Williams for logistics and Jeff Runge for technology issues.

11:22 a.m. Atty. Levin asks the Court's intention on order of proof.

11:23 a.m. The Court intended to have plaintiffs first, followed by defendants. The Court directs parties to work out those issues on presentation, if there are difficulties the Court will make a ruling on it.

11:24 a.m. The Court adjourns.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
Appleton Papers, Inc., et al. v. George Whiting Paper Co., et al.
Case No. 08-C-16

7	6	5	4	3	2	1
Scott B. Fleming Whiting Paper Weiss Berzowski Brady LLP	Linda Benfield WPS Kimberly Clark Foley & Lardner	Marc E. Davies PH Glatfelter Greenberg Traurig	David Rabbino Menasha Corp. Hunsucker Goodstein & Nelson	Monique M. Mooney PH Glatfelter Greenberg Traurig	Karl S. Lytz Georgia-Pacific Latham & Watkins	Matthew Richmond U.S. Dept. of Justice

Jury Box - Back Row

14	13	12	11	10	9	8
Scott W. Hansen US Paper Mills Reinhart Boerner Van Deuren	Peter C. Karegeannes WTM 1 Co Quarles & Brady	Nancy Peterson WTM 1 Co Quarles & Brady LLP	Waltraud A. Arts City of Appleton Anderson & Kent	Paul G. Kent City of Appleton Anderson & Kent	Megan Senatori Appleton Papers DeWitt Ross Stevens	Dennis P. Birke Appleton Papers DeWitt Ross Stevens

Jury Box - Front Row

GALLERY

Jerome Maynard Procter & Gamble Dykema Gossert	Richard Murawski U.S. Dept. of Justice	Doug Dixon U.S. Dept. of Justice	Matthew R. Oakes U.S. Dept of Justice	Perry Rosen U.S. Dept of Justice	Brandon Evans Appleton Papers Hermes Law Ltd.	Anthony Steffek Appleton Papers Hermes Law Ltd.	Heidi Metzler Appleton Papers Hermes Law Ltd.
					Steven F. McKinney U.S. Paper Haynsworth Sinkler	Michael Carlton CBC Coating Inc von Briesen Roper	Susan Lovern CBC Coating Inc. von Briesen Roper
					Richard C. Yde City of DePere Stafford Rosenbaum LLP	Ted Warpinski City of Green Bay Friebert Finerty & St. John SC	

Defendant's Table

Daniel Murray Newpage Wisconsin Johnson & Bell Ltd	Joshua M. Levin U.S. Dept. of Justice	Randall M. Stone U.S. Dept. of Justice
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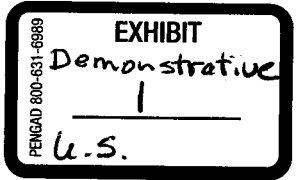
Defendant's Table

Ernest J. Getto Georgia-Pacific Latham & Watkins	William J. Mulligan Neenah-Menasha Davis & Kuelthau	David G. Mandelbaum PH Glatfelter GreenbertTraurig
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Plaintiff's Table

Ronald Ragatz for Appleton Papers DeWitt Ross Stevens	Michael L. Hermes for Appleton Papers Hermes Law Ltd.	Evan B. Westerfield for NCR Corp Sidley Austin LLP	William F. Conlon for NCR Corp Sidley Austin LLP	Kathleen L. Roach for NCR Corp Sidley Austin LLP
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Permits Ex 1



42 U.S.C.A § 9613

United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 103. Comprehensive Environmental Response, Compensation, and Liability

Subchapter I. Hazardous Substances Releases, Liability, Compensation

→ § 9613. Civil proceedings

* * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

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 settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who 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 paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

* * *

Supreme Court of the United States
UNITED STATES, Petitioner,
v.
ATLANTIC RESEARCH CORPORATION.
No. 06-562.

Argued April 23, 2007.
Decided June 11, 2007.

* * *

In *Cooper Industries*, we held that a private party could seek contribution from other liable parties only after having been sued under § 106 or § 107(a). 543 U.S., at 161, 125 S.Ct. 577. This narrower interpretation of § 113(f) caused several Courts of Appeals to reconsider whether PRPs have rights under § 107(a)(4)(B), an issue we declined to address in *Cooper Industries*. *Id.*, at 168, 125 S.Ct. 577. After revisiting the issue, some courts have permitted § 107(a) actions by PRPs. See *Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc.*, 423 F.3d 90 (C.A.2 2005); *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824 (C.A.7 2007). However, at least one court continues to hold that § 113(f) provides the exclusive cause of action available to PRPs. *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515 (C.A.3 2006). Today, we resolve this issue.

**2335 B

In this case, respondent Atlantic Research leased property at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. At the site, Atlantic Research retrofitted rocket motors for petitioner United States. Using a high-pressure water spray, Atlantic Research removed pieces of propellant from the motors. It then burned the propellant pieces. Some of the resultant wastewater and burned fuel contaminated soil and groundwater at the site.

Atlantic Research cleaned the site at its own expense and then sought to recover some of its costs by suing the United States under both § 107(a) and § 113(f). After our decision in *Cooper Industries* foreclosed relief under § 113(f), Atlantic Research amended its complaint to seek relief under § 107(a) and federal common law. The United States moved to dismiss, arguing that § 107(a) does not allow PRPs (such as *134 Atlantic Research) to recover costs. The District Court granted the motion to dismiss, relying on a case decided prior to our decision in *Cooper Industries*, *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (C.A.8 2003).

The Court of Appeals for the Eighth Circuit reversed. Recognizing that *Cooper Industries* undermined the reasoning of its prior precedent, 459 F.3d, at 830, n. 4, the Court of Appeals joined the Second and Seventh Circuits in holding that § 113(f) does not provide “the exclusive route by which [PRPs] may recover cleanup costs.” *Id.*, at 834 (citing *Consolidated Edison Co., supra*). The court reasoned that § 107(a)(4)(B) authorized suit by any person other than the persons permitted to sue under § 107(a)(4)(A). 459 F.3d, at 835. Accordingly, it held that § 107(a)(4)(B) provides a cause of action to Atlantic Research. To prevent perceived conflict between § 107(a)(4)(B) and § 113(f)(1), the Court of Appeals reasoned that PRPs that “have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality.” *Id.*, at 836-837. We granted certiorari, 549 U.S. 1177, 127 S.Ct. 1144, 166 L.Ed.2d 910 (2007), and now affirm.

* * *

72. Pursuant to Section 107(a)(4)(B) and 107(a)(4)(C) of CERCLA, 42 U.S.C. §§ 9607(a)(4)(B) and 9607(a)(4)(C), any person who is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), shall be liable for necessary response costs incurred by any other person consistent with the National Contingency Plan.

73. Under the U.S. Supreme Court's decision in *Burlington Northern and Santa Fe Ry. Co. v. United States*, ___ U.S. ___, 129 S. Ct. 1870 (2009), there is a reasonable basis for apportioning the harms and costs associated with the Lower Fox River Contamination among Plaintiffs, on the one hand, and Defendants, on the other, based on: (a) type of PCB mixtures ("Aroclors") discharged; (b) volume of PCBs discharged; (c) location of the discharge of PCBs; (d) source of PCBs now residing in particular areas; (e) contribution of various parties' discharges to the cost of remediating particular areas; or (f) other methods of apportioning liability.

74. API and NCR are not liable for those harms or costs associated with the Lower Fox River Contamination that are properly apportioned to the Defendants. Further, API and NCR have paid costs to address harms associated with the Lower Fox River Contamination for which API and NCR are not liable. Section 107 is the appropriate method for API and NCR to recover costs to address harms for which they are not liable.

75. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), makes liable, among others: (i) the current owner and operator of a facility; (ii) the owner or operator, at the time of disposal of hazardous substances, of a facility at which such hazardous substances were disposed of; and (iii) any person who, by contract, agreement or otherwise, arranged for disposal or treatment of hazardous substances at any facility containing such hazardous substances.

76. The Lower Fox River Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

178. Papermaking activities conducted by CBC at the CBC Mill resulted in the release of PCBs, either directly or through a municipal wastewater treatment plant, into the Lower Fox River Site. As a result, CBC arranged for the disposal and/or treatment of hazardous substances it owned or possessed at a facility containing such substances within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

179. CBC was a person who at the time of disposal of a hazardous substance owned or operated a facility, the CBC Mill, at which such hazardous substances were disposed of, within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

180. CBC is the current owner and operator of a facility, the CBC Mill, within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

181. PCBs have been released at and from the facilities identified above, within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

182. In connection with these releases of PCBs from the facilities identified above, API and NCR have paid and will continue to pay costs for necessary response actions at the Lower Fox River Site consistent with the National Contingency Plan, within the meaning of Section 101(31) of CERCLA, 42 U.S.C. § 9601(31).

183. API and NCR request that the Court determine (1) that the harms and costs associated with the Lower Fox River Contamination are capable of apportionment; (2) the parties' apportioned shares of such harms and costs; and (3) that Defendants are liable to API and NCR for those recoverable costs paid by each of API and NCR to address harms associated with the Lower Fox River Contamination for which API and NCR are not liable.

184. Pursuant to Section 113(l) of CERCLA, 42 U.S.C. § 9613(l), API and NCR have provided a copy of this Eighth Amended Complaint to the Attorney General of the United States and the Administrator of USEPA.

United States Court of Appeals, Eleventh Circuit.
REDWING CARRIERS, INC., Plaintiff-Counter-defendant-Appellant,
v.
SARALAND APARTMENTS, Roar Company, Defendants-Counter-claimants-Appellees,
Michael Coit, in his capacity as legal representative of the Estate of Robert Coit, Christopher M. Weil, in his
capacity as legal representative of the estate of Robert Coit, Marcrum Management Company, et al.,
Defendants-Appellees,
Robert Coit, Defendant-Counter-claimant.
No. 95-6198.

Sept. 12, 1996.

* * *

E. *Equitable Allocation of Costs under § 113(f)*

Of the Appellees, the district court found only Saraland Limited was a responsible party under § 107(a). The court, however, granted summary judgment to the Partnership and the partners on their counterclaims against Redwing for contribution under § 113(f). This section provides that a court “may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f). The court concluded that between Redwing and Saraland Limited, Redwing should bear all of the costs of cleaning up the Saraland Site. *Redwing Carriers*, 875 F.Supp. at 1569.

Having determined the district court erred in granting summary judgment in favor of Marcrum and Meador, we must reverse the district court's allocation of costs under § 113(f). On remand, Marcrum and Meador could be found responsible parties under § 107(a) thus requiring the court to evaluate whether they should share liability with Redwing and Saraland Limited. In reversing the district court's allocation under § 113(f), we express no opinion on the court's decision to hold Redwing entirely responsible for cleaning up the property. Although the parties debate the equity of this holding, we need not review it at this time.

[36] Our attention is instead drawn to the district court's underlying legal analysis which illustrates how courts and practitioners often misinterpret the nature of liability under § 113(f). The court reasoned that prior to allocating costs based on “such equitable factors as the court determines are appropriate,” it first had to find the harm at the Saraland Site was “divisible.” In finding the *1513 harm at the Site was divisible, the court relied on *United States v. Monsanto Co.*, 858 F.2d 160, 171-72 (4th Cir.1988), cert. denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989), where the Fourth Circuit adopted the rule of § 433A of the Restatement (Second) of Torts for determining when to impose joint and several liability on parties found liable to federal and state governments under § 107(a) of CERCLA. *Redwing Carriers*, 875 F.Supp. at 1568. Through its reliance on *Monsanto* and other cases involving governmental plaintiffs, the district court improperly imported the “divisibility” defense to joint and several liability under § 107(a) into the analysis for equitable allocation under § 113(f).

CERCLA creates two avenues of recovery for two types of plaintiffs. Parties who are not themselves liable or potentially liable for response costs under § 107(a) of CERCLA can bring a cost recovery action directly under § 107(a) against potentially responsible parties. See *United Technologies Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 99-100 (1st Cir.1994), cert. denied, 513 U.S. 1183, 115 S.Ct. 1176, 130 L.Ed.2d 1128 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir.1994). Although it possible that a private party may qualify as an “innocent” plaintiff enabling it to bring a cost recovery action based on § 107(a) alone, the typical § 107(a) action is brought by a governmental plaintiff that has expended taxpayer dollars in cleaning up a facility. In most of these cases, where the focus is on allowing state and federal governments to recoup their expenses, defendants are held jointly and severally liable. See,

e.g., O'Neil v. Picillo, 883 F.2d 176, 183 (1st Cir.1989), *cert. denied*, 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); *Monsanto*, 858 F.2d at 171-73.

[37] Joint and several liability under § 107(a) is not automatic, however. Recognizing Congress' intent that "traditional and evolving common law principles" should define the scope of liability under CERCLA, courts have looked to the Restatement (Second) of Torts, particularly § 433A, for guidance. *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895 (5th Cir.1993); accord *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir.1992); *Monsanto*, 858 F.2d at 172. This section provides:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts § 433A (1965). Consequently, courts will not hold a defendant jointly and severally liable to a governmental or non-labile private plaintiff where the defendant can demonstrate the harm at a given site is "divisible," *i.e.*, there are distinct harms or a reasonable basis for determining the contribution of each cause to a single harm. *Bell Petroleum*, 3 F.3d at 904; *Alcan Aluminum*, 964 F.2d at 268-69; *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 810 (S.D. Ohio 1983). When a defendant successfully demonstrates the harm at the site is divisible, it will only be held liable for that portion of the cleanup costs attributable to its conduct. *Alcan Aluminum*, 964 F.2d at 269; *Chem-Dyne*, 572 F.Supp. at 810.

[38] While the "divisibility" defense to joint and several liability is frequently invoked in cost recovery actions brought under § 107(a), it is not a defense to a contribution action under § 113(f). In contrast to a § 107(a) action, a contribution claim under § 113(f) is a means of equitably allocating response costs among responsible or potentially responsible parties. See S.Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). Thus, when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f). See *United States v. Colorado & E.R. Co.*, 50 F.3d 1530, 1535-36 (10th Cir.1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir.1989). Whereas joint and several liability is the rule for defendants in actions under § 107(a), courts in contribution cases may "allocate response costs among liable parties." See 42 U.S.C. § 9613(f)(1). This could include allocating some response costs *1514 to the plaintiff. Since there is no joint and several liability among defendants in a contribution action, the divisibility defense has no relevance as a "defense" in these cases. ^{FN32}

^{FN32}. This is not to say the ability of the court, with the assistance of the parties, to distinguish among separate harms caused by different parties at a site is irrelevant in allocating response costs under § 113(f). This is unquestionably an "appropriate" factor for a court to consider in making a fair division of liability.

As we noted at the outset of our discussion, Redwing's CERCLA claims against the Appellees are claims for contribution governed by § 113(f). This is true as well for the Appellees' CERCLA counterclaims. The divisibility defense is therefore not at issue in this case. Once the district court determines who are responsible parties under § 107(a), the next step under § 113(f) is to equitably allocate responsibility among the parties. Divisibility of the harm at the Saraland Site is not a prerequisite to making this allocation.

IV. CONCLUSION

Noting “the essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on those responsible for [the] problems caused by the disposal of chemical poison,” the district court held Redwing responsible for the entire cost of cleaning up the Saraland Site. *Redwing Carriers*, 875 F.Supp. at 1569 (citations and quotation marks omitted). While we agree Redwing must bear its fair share of the cost of remedying a condition it largely created, the district court's holding was premature. We affirm the court's grant of summary judgment in favor of the Hutton partners. And with the exception of Redwing's partnership law claims against Coit and Roar, we affirm summary judgment for the general partners as well. As to Marcrum, we affirm summary judgment on Redwing's claims premised on subsections 107(a)(2) and (a)(3). We reverse, however, on Redwing's operator claim against Marcrum based on subsection 107(a)(1). We likewise find there are genuine issues of material fact precluding summary judgment on Redwing's arranger claim against Meador. If Marcrum and/or Meador are found to be responsible parties under § 107(a) of CERCLA, then the district court must consider their roles and circumstances in allocating costs under § 113(f).

AFFIRMED in part, REVERSED in part, and REMANDED.