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CASENOTE

CONTRIBUTION TO INACTION: INTERPRETING CERCLA TO ENCOURAGE, RATHER THAN DISCOURAGE, HAZARDOUS WASTE CLEAN-UP

Dico, Inc. v. Amoco Oil Co.[1]

I. INTRODUCTION

The Comprehensive Environmental Response, Clean-up, and Liability Act (CERCLA) was enacted in 1980 to hold polluters responsible for the hazardous waste they released into the environment and to encourage polluters to voluntarily clean-up contaminated sites. To this end, CERCLA includes provisions authorizing two different types of civil actions against persons liable or potentially liable under CERCLA: the Section 107(a) direct recovery action and the Section 113(f) contribution action.[2] Unfortunately, court interpretations of CERCLA have diminished the utility of the Section 107(a) direct recovery action and negatively impacted the realization of the policy goals embodied in CERCLA. This note focuses on the way in which a change in court interpretation of who may bring a Section 107(a) direct recovery action will further the policy of encouraging voluntary hazardous waste clean-up under CERCLA.

II. FACTS AND HOLDING

Until the 1970s, Di-Chem, the corporate predecessor to Dico, Inc., operated a chemical formulation business in Des Moines, Iowa, on the property involved in this litigation.[3] In 1974, wells near the property were found to be contaminated with trichloroethylene (TCE), prompting the EPA to designate the area around the contaminated wells "The Des Moines TCE Site" and place it on the national priority list.[4] The Des Moines TCE Site ("the Site") included portions of the Dico property.[5]

In 1994, the EPA issued administrative orders that resulted in Dico taking action to remove the contamination from the portion of the site on its property.[6] The defendants (collectively "The Customer Group") took remedial action on a portion of the site as well.[7] At this time, the EPA also participated in contamination removal at the portion of the site on Dico's property and incurred costs as a result.[8] After these contamination removal activities were certified completed in 1996, the Customer Group began negotiations with the EPA over its share of the costs incurred by the EPA in the remediation efforts.[9] The Customer Group was preliminarily assigned responsibility for 39 percent of the EPA's costs, while Dico was assigned 61 percent

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[1] 340 F.3d 525 (8th Cir. 2003) [hereinafter *Dico*].
[2] CERCLA Sections 107 and 113 are codified in 42 U.S.C. §§ 9607 and 9613 (2000) respectively.
[3] *Dico*, 340 F.3d at 527.
[4] *Id.*
[5] *Id.* The site was divided into several "operable units" with Operable Unit-2 and Operable Unit-4 located within Dico's property. *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

by the EPA in a non-binding allocation of responsibility (NBAR).[10] Subsequently, Dico filed this action for direct recovery of remediation costs in 1997.[11]

In April of 1998, both Dico and the Customer Group were notified by the EPA that they were both potentially responsible parties (PRP) under CERCLA and were given notice of the preliminary assignment of liability from the NBAR.[12] Both the plaintiff and the defendants were told that, if they settled with the government, they would be granted immunity from contribution arising out of the contamination remediation activities.[13] Although Dico knew of the benefits of settlement, Dico did not participate in a settlement conference with the government.[14] Before reaching a settlement agreement with the Customer Group, the government again notified Dico of the contribution liability protection provided by settlement in November of 1998.[15] However, Dico continued to refuse to participate in settlement negotiations.[16] On November 29, 1998 the government filed an action in the district court and immediately lodged the consent decree negotiated with the Customer Group.[17] When the consent decree was published in the Federal Register, Dico submitted objections and comments and also intervened in the court action to ask that it be consolidated with a cost recovery action Dico filed against the Customer Group in 1997.[18]

On March 10, 2000 the government moved for the entry of the consent decree with the Customer Group.[19] Dico objected and asked for an evidentiary hearing on the grounds that the government had failed to provide a fair and complete record.[20] Additionally, Dico claimed that it had a vested property right in its contribution action that would be "taken" within the meaning of the Fifth Amendment if the consent decree were entered and contribution were barred.[21] After the district court rejected Dico's request for an evidentiary hearing, it entered the consent decree as the government had requested.[22]

After the entry of the consent decree, the Customer Group moved for summary judgment.[23] The Customer Group argued that summary judgment was appropriate because Dico was barred by CERCLA Section 107(a)(1) from a direct recovery action, because Dico had been found to be a PRP and also that Dico's contribution action was barred by the consent decree between the Customer Group and the government.[24] The district court granted the motion for summary judgment and dismissed both the action for contribution and the direct recovery action.[25] Dico subsequently appealed both dismissals, but later dropped the appeal on the contribution action dismissal.[26]

On appeal, the Eighth Circuit agreed with the finding that Dico was a PRP and was thus barred from asserting a claim for direct recovery of its clean-up costs against other PRPs.[27] This ruling was based upon the

[10] *Id.*
[11] *Id.* at 528, n. 2.
[12] *Id.* at 527-28.
[13] *Id.* at 528.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 530.

apparent Congressional intent to make contribution the sole remedy between PRPs when one PRP seeks to recover cost in excess of their assessed fault.[28] Because Dico was statutorily limited to an action for contribution against the Customer Group and the consent decree barred an action for contribution, the court affirmed the district court's grant of summary judgment in favor of the Customer Group.[29]

III. LEGAL BACKGROUND

A. Liability Under CERCLA

CERCLA was enacted to provide a framework for cleaning up environmental contamination and apportioning the costs among those deemed responsible for the contamination. In particular, CERCLA established rules for determining who is liable for the costs of clean up of a contaminated site.[30] Under CERCLA, owners or operators of facilities that contain or handle hazardous substances and those that transport or dispose of hazardous substances are liable for the cost of remedying any damage caused by the release of a hazardous substance from their control.[31] Private persons may bring an action under CERCLA to recover costs of clean up from persons that caused contamination of their property.[32]

Defenses to liability under CERCLA are strictly limited to three circumstances.[33] The first is that the release or threatened release is the result of an "act of God."[34] To qualify as an "act of God," the cause of the release must have resulted from a natural disaster of "exceptional, inevitable, and irresistible character" that was unforeseeable and against which due care could not have protected.[35] The second defense is that the release in question was the result of an "act of war."[36] The final defense to liability under CERCLA is the assertion that a third party not connected to the defendant caused the release despite the appropriate care and precautions taken by the defendant.[37]

The government is given authority to enter into arrangements for cleaning up contaminated sites and to finance those efforts.[38] The government is also authorized to take actions to recover the cost of clean up efforts

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[28] *Id.*
[29] *Id.* at 532.
[30] *See* 42 U.S.C. § 9607 (2000).
[31] 42 U.S.C. § 9607(a).
[32] 42 U.S.C. § 9613.
[33] *See* 42 U.S.C. § 9607(b).
[34] 42 U.S.C. § 9607(b)(1).
[35] 42 U.S.C. § 9601(1).
[36] 42 U.S.C. § 9607(b)(2). The term "act of war" is not defined in the definitions section of CERCLA. Presumably the meaning intended is that ordinarily given to the term in international law.
[37] 42 U.S.C. § 9607(b)(3). This section reads as follows in describing this defense:

> [A]n act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions[.]

Id.
[38] *See* 42 U.S.C. § 9622.

it finances through court actions against the parties originally responsible for the contamination or release.[39] If a party thinks it has borne a disproportionate share of the clean up costs as compared to its share of the fault, the party may bring an action for contribution against other PRPs.[40]

B. Differences between Actions under CERCLA Sections 107(a) and 113(f)

CERCLA authorizes two different types of civil actions. The first type is authorized under Section 107(a) and is termed a "cost recovery action."[41] In a Section 107(a) cost recovery action, the plaintiff attempts to shift liability for the costs of clean up to the defendants.[42] Under Section 107(a), liability is joint and several.[43] Liability under Section 107(a) is determined based upon the status of the defendant as an owner, operator, past owner, or past operator of a facility where hazardous waste was found or as a transporter of hazardous waste, and liability can be characterized as strict liability.[44]

Section 113(f) authorizes actions for contribution between persons who are found liable and other PRPs.[45] In a Section 113 contribution action, the court is instructed to allocate costs between liable parties using equitable factors.[46] As a result of this equitable distribution of costs among the defendants, liability in a contribution action is several only, meaning that a defendant may not be found liable for more than its equitable share of the costs.[47]

The first difference between the two sections is the joint and several liability under Section 107(a) and the several liability under Section 113(f) and the impact this difference has on the allocation of so called "orphan shares."[48] An "orphan share" is the share of liability attributable to an insolvent or unidentifiable entity.[49] In a Section 107(a) action with joint and several liability, all costs of clean up are shifted to the defendants, including orphan shares.[50] However, due to the several liability and equitable distribution of costs under Section 113(f) contribution actions, the cost of orphan shares is distributed among all parties, including the plaintiff.[51] This difference in the distribution of orphan shares can play a large role in a party's decision-making process when they are determining what to do about a hazardous waste site.[52]

Finally, the most important difference between action under Sections 107(a) and 113(f) is due to the interpretation the various circuit courts use in determining who may sue under each section.[53] Most circuits have taken the position that a PRP may only bring an action against another PRP as an action for contribution

[39] *Id.*
[40] 42 U.S.C. § 9613(f).
[41] *See* Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 Harv. Envtl. L. Rev. 83, 85 (1997).
[42] M. Noelle Padilla, Student Author, *Cost Recovery or Contribution for "Substantially Innocent PRPs" Under CERCLA?: Morrison Enterprises v. McShares, Inc.*, 80 Denv. U.L. Rev. 687, 688 (2003).
[43] *Id.*
[44] *See* 42 U.S.C. § 9607(a).
[45] 42 U.S.C. § 9613(f).
[46] *Id.*
[47] Padilla, *supra* n. 42, at 694.
[48] *See* Padilla, *supra* n. 42, at 695. Since clean up of environmental contamination can become very expensive, which parties bear the cost of "orphan shares" is an issue of great economic importance. *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See generally id.* at 694.
[53] *See id.* at 695.

under Section 113(f).[54] The lone exception to this uniformity among the various circuits is the Seventh Circuit, which has given parties who are otherwise PRPs the ability to sue under Section 107(a) when the party is an "innocent" PRP.[55]

C. *Effect of Settlement with the Government*

Under CERCLA, the government is given authority to enter into settlement agreements with PRPs to expedite clean up of contamination and minimize litigation over responsibility for clean up costs.[56] CERCLA gives the government broad authority to negotiate settlements with PRPs and other parties with the condition that the settlement agreements must be "in the public interest" and consistent with the National Contingency Plan.[57] In order to effectuate these agreements with the government, they are entered as consent decrees.[58] As an additional incentive to settle, PRPs that enter into consent decrees with the government are given immunity from contribution actions regarding matters covered in the settlement agreement.[59]

D. *The Seventh Circuit and the "Innocent Land Owner" Rule*

In a line of cases exemplified by *NutraSweet Co. v. X-L Engineering Co.*,[60] the Seventh Circuit has adopted an "innocent land owner" exception to the requirement that PRPs can only make claims for contribution in apportioning costs amongst themselves.[61] In *NutraSweet*, the plaintiff's property was adjacent to a site where hazardous chemicals were dumped, and the plaintiff's property became contaminated.[62] Under CERCLA, the plaintiff would be liable as the owner of the contaminated property and thus be a PRP.[63] Because of the owner's PRP status, the owner is ordinarily limited to actions for contribution against other PRPs.[64]

Under the circumstances exemplified in *NutraSweet*, the Seventh Circuit has articulated its "innocent land owner" exception to the requirement that owners seek contribution amongst the other PRPs because they are parties to which CERCLA assigns liability.[65] This exception allows a landowner who had no role in causing the contamination to sue under CERCLA for direct recovery of clean up costs as if they were not a PRP or were

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[54] *Id. See United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 99-100 (1st Cir. 1994); *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Pneumo Abex Corp. v. High Point, Thompsonville, and Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *Centerior Ser. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-350 (6th Cir. 1998); *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530 (8th Cir. 2003); *Pinal Creek Group v. Newmont Min. Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); *U.S. v. Colorado & Eastern R.R., Co.*, 50 F.3d 1530, 1534 (10th Cir. 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir 1996).

[55] The Seventh Circuit's exception to the majority rule that actions between PRPs may only be Section 113(f) contribution actions is discussed *infra* at Part III.D.

[56] 42 U.S.C. § 9622(a).

[57] *Id.*

[58] 42 U.S.C. § 9622(c).

[59] 42 U.S.C. § 9622(g)(5).

[60] 227 F.3d 776 (7th Cir. 2000).

[61] *See Dico*, 340 F.3d at 531. Other courts have ruled that since Congress explicitly provided for contribution between PRPs, contribution is the only remedy available to a PRP who has borne a disproportionate share of clean up costs. *Id.* at 530 (citing other cases).

[62] *NutraSweet*, 227 F.3d at 780.

[63] *See* 42 U.S.C. § 9607(a).

[64] *Dico*, 340 F.3d at 531.

[65] *NutraSweet*, 227 F.3d at 784. *See Rumpke of Ind., Inc. v. Cummins Engine Co., Inc*, 107 F.3d 1235 (7th Cir. 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

covered by one of the three statutory defenses to liability.[66] To qualify for the "innocent land owner" exception, the Seventh Circuit requires that (1) the defendant be otherwise liable under CERCLA,[67] (2) there be a release or threatened release of a hazardous substance, (3) the release caused the plaintiff to incur response costs, and (4) the plaintiff did not pollute the site in any way.[68]

IV. INSTANT DECISION

In the instant case, the plaintiff Dico appealed an entry of summary judgment dismissing its claim for direct recovery of clean-up costs under CERCLA.[69] The district court ruled that because Dico was a PRP, it was thus not entitled to an action for direct recovery.[70] Dico's first argument was that the Section 107 authorization of actions by "private parties" includes actions by PRPs under Section 107, since PRPs are "private parties."[71] Dico also argued for the adoption in the Eighth Circuit of a line of Seventh Circuit precedent that judicially creates an "innocent landowner" exception to liability as a PRP under CERCLA, which would allow Dico to proceed with direct recovery.[72] In response, the Customer Group argued that Dico is a PRP and that Dico does not qualify for one of the statutory defenses that would absolve it of liability and allow the commencement of a direct recovery suit.[73]

The court of appeals agreed with the district court's decision that Dico fell within the definition of a PRP, and thus must rely upon one of the defenses to liability outlined by CERCLA in order to maintain its action against the Customer Group.[74] However, Dico did not argue that it qualified for one of the statutory defenses to liability, but instead argued for the adoption of a judicial "innocent landowner" exception that originated in the Seventh Circuit.[75] The Eighth Circuit declined to reach the question of adopting the "innocent landowner" rule, because it affirmed the finding that Dico was a PRP, did not qualify for any of the statutory defenses under CERCLA Section 107(b), and thus could not possibly be innocent of any wrongdoing as Dico asserted.[76] However, in the applicability of the Section 107(b) defenses to Dico, the court noted that Section 107(a) imposes liability subject only to the Section 107(b) defenses.[77]

Because the court found that Dico was a PRP, the court of appeals found the district court's grant of summary judgment was appropriate, since PRPs are only permitted claims for contribution from other PRPs, and Dico had failed to allege facts supporting a statutory defense to liability.[78] Accordingly the district court's decision was affirmed.[79]

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[66] *NutraSweet*, 227 F.3d at 784.
[67] This requires that the defendant be otherwise covered by the liability provisions of 42 U.S.C. § 9607(a).
[68] *NutraSweet*, 227 F.3d at 784.
[69] *Dico*, 340 F.3d at 530.
[70] *Id.*
[71] *Id.* at 530-31.
[72] *Id.* at 531.
[73] *Id.*
[74] *Id.* at 530-31. These defenses are limited to damage arising from (1) an act of war; (2) an act of God; or (3) negligence of a third party not in privity of contract with the defendant when the defendant has taken reasonable actions to prevent harm caused by a third parties' foreseeable actions and the defendant has not himself been negligent in handling the hazardous substance. *See* 42 U.S.C. § 9607(b).
[75] *Dico*, 340 F.3d at 531.
[76] *Id.* at 532.
[77] *Id.*
[78] *Id.* at 530-31.
[79] *Id.* at 532.

V. COMMENT

The interpretations of Sections 107(a) and 113(f) adopted by the various circuit courts represent judicial construction of a statute that hinders implementation of the policy underlying the staute. This conclusion is based upon the circuit courts' failure to adopt an interpretation of the CERCLA liability and contribution provisions that fully effectuates the policy underlying CERCLA and that comports with the generally understood legal principle of contribution. In part, this failure of the circuit courts to adjust their interpretation of CERCLA rests on the doctrine of *stare decisis* as the Supreme Court has applied it to statutory construction.[80] However, the Supreme Court has left room in its interpretation of *stare decisis* for changes in interpretation when the interpretation conflicts with other legal doctrines or public policy.[81] CERCLA represents such a law where the circuit courts should alter their interpretations to further the policy of encouraging responsible parties to voluntarily clean up hazardous waste embodied in CERCLA.

The position of the substantial majority of circuits that PRPs are limited to contribution actions under Section 113(f) with respect to other PRPs flies in the face of both the wording of Section 107(a) and the common law principle of contribution. First, Section 107(a) makes a PRP liable to "any other person" who has incurred clean up costs in response to hazardous substances.[82] The plain meaning of this language indicates that the set of persons liable is to be determined without regard to plaintiff's own status. If Congress had intended PRPs not to be able to sue for direct recovery under Section 107(a), why was such broad language used in defining who is liable?

The assertion by many courts that claims between PRPs are inherently claims for contribution only takes into account part of what is necessary for a contribution claim to exist under the traditional understanding of that concept. While it is true that contribution actions are between parties that have been found liable to a third party, the necessary elements that the circuit courts are overlooking for an action to truly be one for contribution are that (1) there must be a previous finding of liability, and (2) the plaintiff in the contribution action must have fully satisfied the underlying judgment.[83] Consideration of these important elements of a contribution action is what would allow courts to determine when a person that qualifies as a PRP may bring an action for direct recovery under Section 107(a), as opposed to a contribution action under Section 113(f).

If the circuit courts allowed PRPs to bring actions under Section 107(a), the public policy embodied in CERCLA would be advanced. This would occur because a PRP that voluntarily cleaned up a site could, in addition to recovering the equitable shares of the costs from the other solvent PRPs, shift responsibility for orphan shares to the PRPs that did not clean the site because of Section 107(a)'s imposition of joint and several liability. This would be a substantial departure from the present situation where there is very little actual incentive for a PRP to voluntarily incur response costs that cannot be shifted to other PRPs due to the requirement that all actions between PRPs be under Section 113(f) with the attendant purely several liability.

The Seventh Circuit's "innocent landowner" rule solves some problems with other circuits' interpretations by allowing at least some PRPs to bring Section 107(a) actions, but falls short of fully implementing the policy embodied in CERCLA. Namely, the Seventh Circuit's innocent landowner exception does not achieve CERCLA's purpose of encouraging persons to voluntarily clean-up hazardous waste. This follows from the continuation of the problem that orphan shares will have to be borne by persons initiating the clean-up who do not qualify for the innocent land owner exception.

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[80] *Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*").
[81] *Id.*
[82] 42 U.S.C. § 9607(a)(4)(B).
[83] *See* Hernandez, *supra* n. 41, at 100 (discusses in great detail the historical aspects and characteristics of a contribution action).

Due to the problems effectuating the underlying policy of CERCLA, both the position taken by the majority of the circuit courts and the exception created by the Seventh Circuit need to be reevaluated to reconcile the construction of CERCLA with its policy of encouraging voluntary clean up of hazardous waste. By recognizing that PRPs should be able to bring initial actions for direct recovery under Section 107(a) when the plaintiff has incurred clean up costs and has not satisfied another judgment for clean up costs against themselves, courts will be encouraging parties to clean-up sites, because plaintiffs will be able to shift responsibility for orphan shares to defendants who did not initiate clean-up. This shift in circuit precedent would not run afoul of the Supreme Court's strong statements regarding the applicability of *stare decisis* to statutory construction, because even though the Supreme Court strongly disapproves of courts changing their interpretations of statutes, it has recognized that changes in construction are appropriate to reconcile the court's interpretation with the policy underlying the statute.[84]

VI. CONCLUSION

In order to fully implement the policy embodied in CERCLA, the circuit courts need to reevaluate their interpretation of CERCLA's direct recovery action provision in light of the traditional definition of an action for contribution. By carefully adhering to this traditional legal concept, the courts will find a guide for determining whether a Section 107(a) direct recovery action or a Section 113(f) contribution action is appropriate under the circumstances. Doing this will not violate the Supreme Court's directions on the application of *stare decisis* to statutory construction, because the Court itself recognizes that changes in precedent are appropriate to reconcile statutory interpretation with the legislative policy behind a statute. This reconciliation is exactly what needs to be done in regard to CERCLA's direct action and contribution provisions and will work to truly implement CERCLA as the Congress intended.

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[84] *See Neal*, 516 U.S. at 295.