
CERCLA AND CONTRACTUAL INDEMNITY SUBROGATION: DID THE NINTH CIRCUIT GET IT WRONG IN CHUBB?

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Through contractual obligations, parties sometimes must reimburse others for response action costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* For example, such an obligation can arise from an environmental insurance policy. Or, property owners might include an indemnification provision in a sale agreement. Whatever the reason, the end result is that parties may spend considerable sums of money reimbursing others for CERCLA cleanup costs pursuant to contract. It seems rational to expect that through subrogation (i.e., stepping into the legal shoes of the reimbursed party) these reimbursing parties could pursue potentially responsible parties (PRPs) under CERCLA to recover some or all of their payments. After all, one of the key purposes of CERCLA is to make those persons responsible for causing the contamination pay their fair share of the cleanup.

In a non-unanimous decision, the Ninth Circuit Court of Appeals, the only United States Circuit Court of Appeals to address the issue, has held that reimbursing parties cannot bring CERCLA section 107(a) claims on the basis of common law subrogation because CERCLA section 112(c) (2) separately provides a subrogation claim to insurers (contract indemnitors), despite the fact that CERCLA section 112 exists almost exclusively to establish procedures for claimants making claims against the Hazardous Substance Superfund (Superfund). In coming to this arguably erroneous conclusion, the Ninth Circuit ignored plain language in CERCLA, which makes clear that only parties liable under CERCLA, not pursuant to contract, qualify for subrogation under CERCLA section 112(c). Moreover, in creating a subrogation



claim not contemplated by CERCLA section 112(c) (2), the Ninth Circuit established a burdensome procedural hurdle that subrogees must clear prior to bringing their CERCLA claim, further hampering the ability of subrogees to obtain cost recovery or contribution. These legal conclusions have been rejected by at least one district court in another circuit and should be rejected by other district and circuit courts when faced with the same issues.

In *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946 (9th Cir. 2013), *cert. denied* 134 S. Ct. 906 (2014), the Ninth Circuit held that an insurer seeking to assert a subrogated CERCLA section 107 cost recovery claim could not do so. According to the court, CERCLA section 107 is only available to parties who themselves directly incur response costs. And, because CERCLA section 112(c) specifically addresses subrogation and provides a potential remedy to insurers, the common law presumption favoring subrogation does not permit a subrogated section 107 action. However, the court's reasoning that CERCLA section 112(c) applies to the insurer, or any other contract indemnitor, appears to misconstrue and contradict section 112's language.

CERCLA section 112 provides, in relevant part:

- (a) Claims against Fund for response costs. No **claim** may be asserted against the Fund pursuant to section [111(a)] unless such **claim** is presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 107

- (c) Subrogation rights; actions maintainable.

- (2) Any person, including the Fund, who **pays compensation pursuant to this Act** to any **claimant** for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal

that the claimant has under this Act or any other law.
(Emphasis added.)

Section 112's role within CERCLA is to establish the "claim procedures" for persons making claims against the Superfund. As such, section 112(a) requires that before anyone can make a Superfund claim, it first must be presented to anyone known to the claimant who either caused the release or may otherwise be liable under CERCLA section 107. In short, Congress made the Superfund a "last resort" of cleanup funding, not the first place parties who pay CERCLA response costs look for reimbursement. In turn, CERCLA section 112(c)(2) provides that any person who pays compensation "pursuant to [CERCLA]" to any such a "claimant" is subrogated to all rights, claims, and causes of action of that claimant.

Thus, read in conjunction, subsections 112(a) and (c) apply only in the very limited fact scenario where a potential Superfund claimant first "presents" its "claim," i.e., a demand for money in writing for a sum certain, against someone either known to the claimant to have caused the release or who may otherwise be liable under CERCLA section 107, *and* is liable under CERCLA, and pays the claimant's claim "pursuant to CERCLA." In that case, the innocent claimant is reimbursed and removed from the CERCLA chain of liability, and the responsible party that paid the claimant is subrogated under CERCLA section 112(c) to all rights, claims, and causes of action of the claimant, including its CERCLA section 107 cost recovery claims. In contrast, a contract indemnitor pays nothing "pursuant to CERCLA."

In *Chubb*, the Ninth Circuit stated that, under CERCLA section 112(a), a claimant "is any person who presents a written demand for reimbursement of monetary costs under the statute—i.e., for a CERCLA violation." The claimant "demands reimbursement of environmental cleanup costs from (i) the Superfund or (ii) a potentially liable party." This interpretation is consistent with the plain language of section 112(a) and (c).

Under the plain language of section 112(c), however, only a person who pays the claimant money *pursuant to CERCLA* shall be subrogated to all of the claimant's rights, claims, and causes of action for "damages and costs of removal." Reading sections 112(a) and (c) together shows the subrogation addressed by section 112(c) works as follows: If Party A, a claimant, submits a claim for reimbursement to Party B, a CERCLA liable party described in section 112(a), and if Party B pays the claim, then Party B is subrogated to Party A's rights against other liable parties. But even then, this language does not expressly create a CERCLA cost recovery or contribution claim separate from those made available under CERCLA sections 107(a) (cost recovery) or 113(f) (contribution). It merely recognizes that a person who is liable under CERCLA, and pays a claimant who has incurred CERCLA response costs, is subrogated to that claimant's rights under section 107(a) or 113(f), whichever is applicable. However, this is not how the Ninth Circuit interpreted section 112(c).

In *Chubb*, the insured requested that Chubb reimburse it for cleanup costs pursuant to an insurance policy. Chubb did so and then, through subrogation, sought to recover response costs against liable parties. Clearly, section 112 did not apply to this situation. Chubb's insured did not make a claim for payment from Chubb because it was "the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, [or] any other person known to the claimant who may be liable under section 107" as required by section 112(a) as a prerequisite to making a claim for reimbursement from the Superfund. Chubb instead bore liability pursuant to an insurance contract, a fact recognized by the Ninth Circuit. ("Here, Chubb did not become statutorily liable for [the insured's] response costs under CERCLA, but only contractually responsible for those costs pursuant to the terms of an independent insurance policy.") Since Chubb's payment was made under the insurance policy, it did not "*pay[] compensation pursuant to this Act to any claimant.*" CERCLA section 112(c)(2). As such, the Ninth Circuit

arguably should have held that since Chubb was not made a subrogee to its insured's rights pursuant to CERCLA section 112(c), that section simply has no application to these facts whatsoever.

While the plain language of the statute indicates section 112 had no application to Chubb's reimbursement payments to its insured, in a confusing decision the Ninth Circuit not only created a section 112(c)(2) claim for cost recovery/contribution by subrogees previously unrecognized by any other circuit court, it created an entirely new procedure, imported from section 112(a), that it now requires be followed by subrogees before they can avail themselves of this newly created section 112(c) subrogation claim. The court stated: "[T]he definition of claimant required **Chubb to make a written demand** for payment for its response costs from potentially liable parties (alleged to be Defendants). If Chubb reimbursed [the insured] for the response costs, it could then bring a subrogation claim under section 112(c) (2). Here, however, Chubb has not alleged **that [the insured] has made such a demand** on Defendants, the Superfund, or any other PRP." (Emphasis added.) While this language is unclear -- is it Chubb or the insured who is supposed to submit a claim against liable parties? -- later in the opinion, the court states "Section 112(c) permits an insurer like Chubb to file a subrogation action for reimbursement of costs from PRPs, so long as it complies with the statutory requirements, including the requirement that [the insured] be a 'claimant.'" Thus, the Ninth Circuit appears to hold that, under section 112(c), an insurer may seek reimbursement from other PRPs through subrogation for money paid to an insured under an insurance policy provided the insured has first submitted a claim to other liable parties. However, the Ninth Circuit appears to have erred in ignoring that Chubb's payment was not made "pursuant to this Act," as required for section 112(c) to be applicable, a critical fact that would not change the inapplicability of section 112(c) regardless of whether the insured first submitted a claim to other liable parties or not and a fact that made Chubb, or any other insurer, ineligible to seek subrogation

under section 112(c). The prerequisite action of making a claim imposed by the Ninth Circuit incorrectly imports the section 112(a) requirement that was meant to only apply to claimants who intended to make claims against the Superfund.

The court's incorrect finding that CERCLA section 112(c) provides a subrogation remedy to insurers led the Ninth Circuit to reach the further incorrect conclusion that Congress intended to preclude all subrogees, including insurers, from relying on common law subrogation principles to assert cost recovery claims under CERCLA section 107(a). "In this case, the presumption in favor of subrogation does not apply under CERCLA section 107(a) because there is clear congressional intent to the contrary, as evident from the statutory text of section 107(a); its interaction with section 112(c), which 'speak[s] directly' to the issue of subrogation."

While it is true that section 112(c) speaks to subrogation, it addresses the subject only in a very narrow circumstance—when a party has paid money to a claimant "pursuant to [CERCLA]." It does not purport to address the situation where a party reimburses another pursuant to a contractual obligation. That common law subrogation should be allowed to those contract subrogees is supported in some circumstances by CERCLA Section 107(e), which provides that "[n]othing in [CERCLA], including the provisions of [Section 107(e)(1)], shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, *by reason of subrogation* or otherwise against any person." 42 U.S.C. § 9607(e)(2)(emphasis added). Clearly, this provision states that nothing, including the existence of Section 112(c), which is inapplicable to all contract subrogees, should bar a subrogation cause of action that otherwise may exist for those meeting section 107(e)(2)'s qualifications. This would include the presumptive common law right to subrogation and the ability of the subrogee to bring a cost recovery claim under CERCLA section 107(a).

In addressing the subrogation reference in section 107(e)(2), the Ninth Circuit stated "107(e)(2) simply clarifies that nothing in CERCLA shall 'bar,' i.e., operate as an impediment to the assertion of proper subrogation claims. This is consistent with the district court's acknowledgment that subrogation claims are not foreclosed to Chubb, as long as they are brought in a manner authorized by the law, such as under section 112(c) and relevant state law claims." Chubb did bring separate subrogated state law claims, but they were held barred by applicable statutes of limitation. Of course, by saying that the mere existence of section 112(c) bars common law subrogation under section 107, the court used section 112(c) as an impediment to subrogation. It is unclear if the Ninth Circuit would have maintained the same position if it had concluded, as it should have, that section 112(c) was inapplicable to Chubb's claim.

At least one district court outside the Ninth Circuit has refused to apply *Chubb*. See *Blue Tee Corp. v. Xtra Intermodal Inc.*, 2014 U.S. Dist. LEXIS 68118 at *13–14 (S. D. Ill., May 19, 2014). In that case, one of the plaintiffs, Gold Fields Mining, LLC (Gold Fields), paid the CERCLA response costs incurred by plaintiff Blue Tee Corp., apparently as part of a contract obligation, although the decision does not specify why Gold Fields paid them. Gold Fields then sought cost recovery pursuant to subrogation rights under CERCLA and other laws. Defendants brought a motion to dismiss, in part relying on *Chubb*. Gold Fields argued that *Chubb* was not binding in the Seventh Circuit and cited Judge Gould's dissent in *Chubb*, which argued that a subrogee could bring a section 107 claim on behalf of a subrogor since to hold otherwise would "delay cleanups, putting public health and safety at risk and undermining the purpose of CERCLA." Gold Fields also argued that as a "payor," it was subrogated to all rights and causes of action that its payee had, and because the reimbursed plaintiff had a section 107 claim, Gold Fields should too. *Id.* The *Blue Tee* court held that, "due to the stage of the litigation [motion to dismiss] and because of the state of the case law on this issue, the Court agrees with plaintiffs and finds that plaintiffs have

alleged a cause of action against defendants for a [subrogated] Section 107 claim.”

Simply put, based on its plain language, CERCLA section 112(c) was intended to address only the narrow situation where a CERCLA-liable party has accepted a claim presented to it under section 112(a), and seeks to be subrogated to that party’s rights. In that narrow context, section 112(c) acknowledges that the payor is subrogated to the claimant’s CERCLA and other rights. It does not address subrogation in the context of cleanup cost payments made by a party under contract, such as an insurer. Nor does it, we contend, create a new cost recovery or contribution cause of action under CERCLA separate and distinct from actions under sections 107(a) and 113(f). Nor did it import the claims procedure set forth in section 112(a), which was intended to apply only as a prerequisite to making a Superfund claim, into all subrogation claims. In section 112, Congress did not speak to the issue of subrogation for indemnitors who incur response costs pursuant to contract, not “pursuant to [CERCLA],” and the common law presumption in favor of subrogation should allow such contract indemnitors to step into the shoes of their subrogors and seek cost recovery under CERCLA section 107(a) or contribution under section 113(f), as the facts dictate. While for now, until *Chubb* is reversed, contract subrogees, particularly in the Ninth Circuit, should request that their indemnitees, insureds, or other parties receiving reimbursement (i.e., their subrogors) first submit claims to CERCLA liable parties, satisfying *Chubb*’s requirements, they should also continue to argue that the common law presumption favoring subrogation provides contract indemnitors with CERCLA section 107(a) and/or 113(f) claims, until *Chubb* is reversed.