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Article

The Assault On § 107 Cost Recovery Claims

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Since *United States v. Atlantic Research Corp.*, the United States has argued in numerous *amicus* briefs that private parties who perform cleanups under Comprehensive Environmental Response, Compensation and Liability Act settlements cannot pursue § 107 cost recovery claims. In light of some courts' acceptance of this argument, parties may want to consider alternative strategies for performing cleanups.

Current Legal Environment

As many CERCLA practitioners are aware, the U.S. Supreme Court's decision in *United States v. Atlantic Research Corp.,* 551 U.S. 128 (2007), left open the issue of whether a party who "sustain[s] expenses pursuant to a consent decree following a suit under § 106 or § 107" may pursue a contribution action under § 113, a cost recovery action under § 107(a), or both. Id. at 2338, n. 6. This is a significant issue for private parties asked to conduct cleanups at contaminated sites.

Since *Atlantic Research,* the United States has filed numerous amicus briefs arguing that parties who incur costs performing cleanups under administrative or judicially approved CERCLA settlements, including consent decrees, cannot pursue § 107 claims and are limited to contribution claims under § 113.

Although some courts have recognized the tension between this position and the Supreme Court's holding that § 107 claims are available to parties who have themselves incurred costs, lower courts have generally sided with the United States. This is not surprising given that these same courts previously held that § 107 was only available to "innocent" parties. It remains to be seen whether the Supreme Court will take a case to finally decide footnote 6. [1]

Risks of Settling Given Case Law Trend

The United States' position creates issues for parties deciding whether to agree to conduct cleanups pursuant to settlements with the United States and/or the U.S. Environmental Protection Agency. Often, an important factor to this decision is a party's ability to recover costs from other potentially responsible parties ("PRPs") at a site.

However, as many have experienced, the United States' position is that it can (and should) use its settlement policies and especially *de minimis* settlements to undercut a party's rights to pursue its costs. These settlement policies combined with the United States position discussed above can lead to a party suing other PRPs only to have the United States subsequently settle its costs (often administratively to avoid judicial review).[2] Given this risk, parties should carefully weigh the importance of recovering from other PRPs before entering into a current model.

Administrative Settlement Agreement and Order on Consent or RD/RA Consent Decree

The case *Solutia Inc. v. McWane Inc.,* 2010 WL 2976945, No. 1:03-cv-1345-PWG (N.D. Ala. July 2, 2010), provides an egregious example of the United States' propensity to undercut private parties' cost recovery rights.

For several years, Solutia Inc. and Pharmacia Corporation ("Solutia") voluntarily cooperated with the government in performing cleanup activities related to PCB contamination in Anniston, Ala. Then, in 2002, Solutia entered into a consent decree to perform residential sampling and removals and an RI/FS related to PCB contamination at the site. During the same time period, the United States was performing residential removals related to lead contamination in Anniston.

From the start of the cleanup, it was obvious that Solutia was cleaning up waste materials originating from local foundries. In 2003, after analyzing alternative sources of contamination and sharing this information with the government, Solutia sued a number of PRPs under §§ 113 and 107 of CERCLA. After the suit was filed and based on Solutia's investigation, the United States recognized that it had been cleaning up lead-contaminated foundry waste.

As it should have, the United States required the foundry defendants to assume responsibility for the lead cleanup. However, in exchange, the United States gave the defendants a de minimis settlement with respect to PCBs, which collected no money for the PCB cleanup. The United States merely horse-traded Solutia's claims to avoid incurring further costs itself.

Cooper Industries v. Aviall Services Inc., 543 U.S. 157 (2004) and *Atlantic Research* changed the CERCLA landscape and, in 2008, the court denied summary judgment based on the *de minimis* settlement and allowed Solutia to pursue § 107 claims.3 However, two years later, at the United States' urging, the court reconsidered itself and found that because Solutia incurred costs under a consent decree they are limited to § 113 claims. 2010 WL 2976945 at *26.

Contrary to CERCLA, the United States is pursuing a policy that discourages private party cleanups. As a result, PRPs should be wary of settling with the United States, especially at sites with other significant PRPs.

Alternative Approaches

The first approach to conducting a cleanup but preserving a § 107 claim is to pursue a "voluntary" cleanup. At a site not on the United States' radar, this may be as simple as performing the cleanup in compliance with the National Contingency Plan. At a site with government involvement, a party should consider refusing to enter into an AOC or consent decree but informing the United States that it intends to perform the cleanup and will pay oversight costs.

A district court recently approved of this approach. In *Ashland Inc. v. GAR Electroforming,* 2010 WL 2927374, No. 08-227ML (D.R.I. July 22, 2010), the EPA sent Ashland an AOC for design of a groundwater remedy and "Ashland sent EPA a letter confirming their agreement to be a Performing Party at the Site to finance, develop, and submit to EPA a Pre-Design Work Plan for the Site." Id. at *14. Ashland performed the work and submitted each phase of the work for the EPA's approval.

In analyzing Ashland's § 107 claim, the court rejected the United States' argument that the work was "compelled" and found Ashland was not subject to a direct civil or administrative action under §§ 106 or 107, nor was it seeking contribution for payments pursuant to a settlement agreement or court order. Id. at *16.

Thus, the court allowed Ashland's § 107 claim based on the plain language of § 107(a)(4)(B) and the Supreme Court's holding in *Atlantic Research*. Id. Further, the court found that Ashland's claim was not barred by contribution protection in other parties' settlements. Id.

The United States may attempt to thwart this approach. For example, the United States may file a § 107 claim against any party performing a voluntary cleanup and argue that the lawsuit authorizes a § 113 claim and bars the party's § 107 claim. This procedural maneuver should illustrate the United States' lack of respect for *Atlantic Research* but may be effective if the lower courts continue on their current path.

The second alternative to consider is agreeing to perform work under a Unilateral Administrative Order. Long considered the ultimate "stick" in the CERCLA regime, *Atlantic Research* appears to have lessened the threat of receiving a UAO. In *Cooper Industries,* the Supreme Court noted that it "need not decide whether [a unilateral administrative order under § 106] would qualify as a 'civil action.'" Id. at 168, n. 5.

Since that decision, at least one court has found that a party incurring costs under a UAO could not pursue a contribution claim under § 113(f)(1). *See Pharmacia Corp. v. Clayton Chemical Acquisition LLC,* 382 F.Supp.2d 1079, 1091 (S.D. Ill. 2005). Under even the United States' analysis, a § 107 claim must be available where a party has itself incurred response costs and a § 113 contribution claim is not available. However, no court has decided this exact issue yet.

A party should evaluate the specific circumstances at a site to decide between a consent decree or a UAO. A 1999 U.S. EPA Guidance Memorandum titled "Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites" outlines incentives that EPA staff should emphasize to encourage PRPs to enter into RD/RA Consent Decrees.

This includes financial incentives (access to special account money, orphan share compensation, and/or mixed funding) and some advantageous consent decree terms (more limited factual findings, contribution protection, dispute resolution, and covenants not to sue).

The financial incentives may be illusory where the EPA is intent on requiring one PRP or a group of PRPs to incur all cleanup costs at a site. Similarly, contribution protection is only valuable where other PRPs have incurred or may incur response costs. On the other hand, the EPA emphasizes that a UAO is not a negotiated document.

Overall, a party should weigh the potential of recovering from other PRPs and the risk that the U.S. EPA may undercut such efforts against the value of being able to negotiate settlement terms, including possible technical issues not covered in the ROD.

Conclusion

The United States' position that parties who

enter into settlements agreeing to perform work at a site should not be able to pursue § 107 cost recovery claims discourages private party settlements and is contrary to the policies of CERCLA.

Of course, the Supreme Court rejected the United States' arguments on related issues in *BNSF, Cooper Industries* and *Atlantic Research.* Nevertheless, private parties may want to consider alternative vehicles for performing cleanups in light of this position, including potentially performing work under UAOs. ■

1. On Aug. 20, 2010, Carpenter Technology Corporation filed a petition for *writ of certiorari* to the Supreme Court regarding the Third Circuit's decision in *Agere Systems Inc. v. Advanced Environmental Technology Corp.,* 602 F.3d 204, 70 ERC 1385 (3rd Cir. 2010). In its petition, Carpenter Technology is asking the Court to determine whether a party who does not settle with the United States but pays money into a common account to fund cleanup costs that a PRP group is incurring pursuant to a CERCLA settlement should be limited to a § 113 contribution claim. Carpenter Technologies misrepresents the holding of *Atlantic Research* by ignoring the issue left open in footnote 6. However, presumably, the PRP group will also petition the court on whether they can pursue § 107 claims for the cleanup costs they themselves incurred (as opposed to paid to the United States) under their settlement. This would provide the Court with an opportunity to finally decide footnote 6.

2. Allowing parties who perform cleanups to pursue cost recovery and joint and several liability would encourage private party cleanups and discourage parties from sitting on the sidelines; however, the United States apparently views its settlement policies as paramount to cleaning up sites.

3. Also, the court that entered the consent decree held that the United States would repudiate the decree if it settled with the foundry defendants and gave them contribution protection. To avoid a dispute that threatened to stop the cleanup, Solutia entered into a stipulation with the United States that was not to be used as evidence of Solutia's cleanup obligations. The United States violated this agreement as well and the court is considering sanctions.

Husch Blackwell represented Solutia Inc., Monsanto Company and Pharmacia Corp. in the Solutia v. McWane and the Pharmacia Corp. v. Clayton Chemical cases referenced in the article.