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SUPERFUND

Earlier this year, the Supreme Court, in *U.S. v. Atlantic Research*, held that a private party may bring a superfund cost recovery claim under Section 107 after conducting a voluntarily cleanup. While the ruling resolved a question that had split the federal circuits, in this article, attorney Albert M. Cohen says the decision has thrown into doubt the ability of a party settling its liability with the government to secure contribution protection against a claim brought under Section 107.

Atlantic Research Clarifies the Right of Voluntary PRPs to Sue but Still 'Contributes' to the Confusion

ALBERT M. COHEN

On June 11, 2007, the United States Supreme Court issued its decision in *United States v. Atlantic Research Corporation*, holding that a private party that incurs response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) has a right to seek cost recovery under CERCLA § 107 if that party voluntarily cleaned up the site without any governmental involvement.

Albert M. Cohen is a partner in the Los Angeles office of Loeb & Loeb LLP where he specializes in environmental law. He filed amici in the United States Supreme Court on behalf of clients in both the Cooper v. Aviall and U.S. v. Atlantic Research cases. He can be reached at (310) 282-2228 or acohen@loeb.com.

While the decision clarifies a key aspect of CERCLA, it, at the same time, seriously scales back the level of contribution protection available, thereby opening up a new area of uncertainty which may have a significant impact on CERCLA settlements and litigation.

I. Background

A. CERCLA

Congress passed CERCLA in 1980 to impose liability upon responsible parties for response costs associated with releases of hazardous substances. The key liability provisions are contained in § 107 which provides, that current owners and operators, former owners and operators, generators and transporters (collectively potentially responsible parties (PRPs):

(a) (4) Shall be liable for –

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A. All costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]

B. Any other necessary costs of response incurred by any other person consistent with the national contingency plan.

These provisions impose liability upon PRPs for costs of removal or remedial actions incurred by governmental entities (§ 107(a)(4)(A)) and for other necessary costs of response incurred by any other person (§ 107(a)(4)(B).

Prior to the enactment of the Superfund Amendments and Reauthorization Act (SARA) in 1986, it was generally recognized that private parties that conducted cleanups could sue other liable parties pursuant to § 107(a)(4)(B). See *Wickland Oil Terminals v. Asarco Inc.,* 792 F. 2d 887 (9th Cir. 1986); *NL Indus. Inc. v. Kaplan*, 792 F. 2d 896 (9th Cir. 1986); *Bulk Distribution Ctrs. Inc. v. Monsanto*, 589 F. Supp. 1437 (S.D. Fla. 1984); and *City of Philadelphia v. Stepan Chemical Co.,* 544 F. Supp. 1135 (E.D. Pa. 1982).

However, one issue that appeared uncertain was whether a party that was sued for cost recovery or to conduct a cleanup, but had not itself undertaken a cleanup or incurred response costs, had a right to contribution. That is, could a party sued by the United States bring a claim for contribution against other PRPs even though it had not yet incurred any ''necessary costs of response.'' At least one court indicated that such a PRP could not bring such a claim. *D'Imperio v. United States,* 575 F. Supp. 248, 253 (D.N.J.1983) (PRP that had not yet incurred costs could not initiate claim under § 107).

B. SARA

When Congress passed SARA in 1986 it added an explicit contribution cause of action in § 113(f)(1). It clarified that ''during or following any civil action under [Section 107(a)],'' a PRP can seek contribution from other PRPs. Subsequently, courts generally agreed that a private party that voluntarily incurred environmental response costs to investigate or clean up hazardous substances, could bring a private action for contribution under § 113(f)(1) against other PRPs to recover costs it incurred and for declaratory relief for future response costs, whether or not EPA or a state had initiated any action against it.

C. *Cooper v. Aviall*

However, in *Cooper Industries Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Supreme Court noted that the plain language of § 113(f) provides that a PRP can only seek contribution from other liable parties ''during or following any civil action under Section 9606 . . . . or under Section 9607'' (§ 113(f)(1) or after it had entered into a settlement (§ 113(f)(3)(B). Therefore, the Court held that an innocent party that had not been sued and had not entered into a settlement could not seek contribution under § 113(f) of CERCLA.

The dissent in *Cooper*, however, urged the majority to find that even if there was no right of action under § 113(f), such a party could bring a cost recovery claim under § 107, citing, among other things, the Court's decision in *Key Tronic Corp. v United States,* 511 U.S. 809, 818 wherein the Supreme Court had stated that ''§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs.'' The majority refused to reach this issue, primarily because it had not been briefed below. As a result, it was unclear whether a private party that voluntarily incurred response costs could recover those costs from other PRPs.

D. The Post-*Cooper v. Aviall* Period

After *Cooper*, there was considerable litigation regarding this issue. Some courts held that PRPs that voluntarily incurred response costs could seek cost recovery under § 107. See e.g. *Consolidated Edison Co. of N.Y. v. UGI Utilitiies Inc*., 423 F. 3d 90 (2d Cir. 2005); *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings Inc*., 473 F. 3d 824 (7th Cir. 2007). Other courts, however, held that § 113(f) provides the exclusive cause of action available to PRPs. See e.g. *E.I. du Pont de Nemours & Co. v. United States,* 460 F. 3d 515 (3rd Cir. 2006).

II. *Atlantic Research*

A. Background

Atlantic Research Corp. v. U.S. 127 S. Ct. 2331, ____ U.S. ___ (2007) involved property which Atlantic Research leased from the Department of Defense. During its lease term, hazardous substances were released which caused soil and ground water contamination. As an operator at the time of disposal and as a generator, Atlantic Research was a PRP under CERCLA. Atlantic Research cleaned the site and then sought to recover some of its costs by suing the United States under both Sections 107(a) and 113(f) of CERCLA.

When the decision in *Cooper v. Aviall* foreclosed relief under 113(f), Atlantic Research proceeded under Section 107. The United States moved to dismiss, arguing that Section 107 does not allow PRPs such as Atlantic Research to recover costs. The United States argued (see discussion below) that the term ''any other person'' in § 107(a)(4)(B) was intended to exclude the PRPs identified in § 107(a) so that only non-liable parties could bring a cost recovery action under § 107(a)(4)(B).[1]

The District Court granted the motion to dismiss. However, the Court of Appeals reversed. It held that Atlantic Research had a right to seek recovery of its costs under § 107. The Eighth Circuit analysis was simple and straight forward. It noted that § 107 imposes liability upon responsible parties for ''any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.''

It then held that the term ''any other person'' means any person other than the statutorily enumerated '' 'United States Government or a State or an Indian tribe' [discussed in § 107(a)(4)(A)].'' Since Atlantic ''is such a '*person*' . . . on its face, § 107 applies.'' Thus, Atlantic Research had a right to bring a cost recovery action under § 107.

In support of its position, the United States argued that § 107 imposes joint and several liability upon PRPs (i.e., it allows 100% cost recovery) and that Congress could not have intended to allow responsible parties to

[1] The government's position in *Atlantic Research* was inconsistent with the position taken by EPA, in its capacity as the agency responsible for CERCLA's enforcement, for over twenty years. However, the United States took this position in cases in which it was a defendant in an apparent attempt to avoid CERCLA liability.

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recover 100% of their costs and effectively escape liability.

The Eighth Circuit Court noted that some pre-*Cooper v. Aviall* cases ''justified denying liable parties access to § 107, reasoning that Congress would not have intended them to recover 100% of their costs and effectively escape liability.''

It held, however, that § 107 ''is not limited to parties seeking to recover 100% of their costs,'' and that while § 107(a)(4)(A) permits governmental entities to recover ''all costs of response . . . not inconsistent with the national contingency plan, § 107(a)(4)(B) only permits recovery of ''any other necessary costs of response . . . consistent with the national contingency plan.''

It held that these words ''do not compel'' full recovery. It further noted that ''if a plaintiff attempted to use § 107 to recover more than its fair share, a defendant would be free to counterclaim for contribution under § 113(f).''

B. The Supreme Court's Decision

As it asserted below, the government's primary argument in the Supreme Court was that ''the most natural reading of the phrase 'any *other* person' is that it excludes the persons who are the subject of the sentence: i.e., PRPs.''

That is, it argued that subparagraph (B) only permits suits by non-PRPs and, since Atlantic Research was a PRP, its claim was barred. It argued that the Eighth Circuit's holding that the term ''any other person'' means any person other than the statutorily enumerated '' 'United States Government or a State or an Indian tribe' . . . lacks merit.''

The United States then asserted that § 107(a) must be read in light of § 113(f) and that ''the better view is that the subsequently enacted Section 113(f) specifies the exclusive circumstances in which one PRP may bring suit against another under CERCLA.'' It argued that if this were not the case, a PRP could circumvent § 113(f) simply by pursuing an action under § 107, ''thereby rendering Section 113(f) effectively superfluous.

Thus, for example, a PRP could circumvent § 113(f)'s shorter statute of limitations simply by proceeding under § 107. Or, PRPs could attempt to rely on Section 107 instead of Section 113 in order to ''eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a).'' The United States also argued that allowing claims under § 107 would ''eviscerate the settlement bar set forth in § 113(f)(2).''

The Supreme Court found that the government's argument ''makes little textual sense.'' It agreed with Atlantic Research that the language in subparagraph (B) could be understood only with reference to subparagraph (A) and that they are ''adjacent and have remarkably similar structures.'' It noted that the phrase ''other necessary costs'' used in subparagraph (B) ''refers to and differentiates the relevant costs from those listed in subparagraph (A).''

'Any Other Person.' Thus, it held that ''it is natural to read the phrase 'any other person' by reference to the immediately preceding subparagraph (A) which permits suit only by the United States, a State or an Indian tribe. The phrase 'any other person' means any person other than those three.''

Thus, the Court held that ''the plain language of subparagraph (B) authorizes cost recovery actions by any private party including PRPs. See *Key Tronic*, 511 U.S. at 818 (stating in dictum that § 107 'impliedly authorizes private parties to recovery cleanup costs from *other* PRP[s]' '' (emphasis added).

The Supreme Court rejected the government's other arguments as well, holding that because §§ 107 and 113 created two ''clearly distinct'' remedies, PRPs could not simply choose one or the other. It held that § 113(f) creates a right of contribution which it defined, in its classical sense, ''as the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.' *Black's Law Dictionary* 353 (8th ed. 1999).''

'During or Following.' It held that § 113 permits a PRP to seek contribution '' 'during or following' a suit under Section 106 or 107(a).'' Thus, it held that ''§ 113(f)(1) permits suit before or after the establishment of common liability.'' However, regardless, ''a PRP's right to contribution under Section 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties.''

On the other hand, the Supreme Court then held that ''§ 107(a) permits recovery of cleanup costs but does not create a right to contribution.'' Thus, a private party is permitted to recover cleanup costs under § 107 ''without any establishment of liability to a third party.'' Furthermore, the Court held that ''§ 107(a) permits a PRP to recover only costs it has 'incurred' in cleaning up a site. 42 U.S.C.§ 9607(a)(4)(B).'' It held that ''when a party pays to satisfy a settlement agreement or a court judgment [as it generally does in a settlement with the government], it does not incur its own costs of response.

Rather, it reimburses other parties for costs that those parties incurred.'' Thus, if a PRP pays money, either through a settlement or judgment, it is permitted to seek contribution from other parties that are also potentially liable under § 113(f), but it ''cannot simultaneously seek to recover the same expense under § 107(a).''

On the other hand, if the PRP actually incurs costs to clean up a site, it has a right to recover those costs under § 107. Therefore, the Court held that PRPs cannot, as the government claimed, choose the six-year statute of limitations for cost-recovery actions over the shorter limitations period for § 113(f) contribution claims and cannot not choose between the joint and several liability provisions in § 107 and the equitable apportionment provisions in § 113(f).

The Supreme Court did note that there could be instances of overlap. For example, a PRP could enter into a settlement with the United State pursuant to which it agreed to clean up a site. In such a case, ''the PRP does not incur costs voluntarily but does not reimburse the costs of another party.'' The Court did not decide whether such costs were recoverable under Section 113(f), Section107(a), or both.

One of the most significant aspect of the Court's decision was how it dealt with the settlement bar in § 113(f)(2). That provision provides that ''a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement'' is entitled to contribution protection.

As noted above, the government argued that if a party could sue under § 107, it could get around the bar and that this would create a strong disincentive for par-

ties to settle. The Court first held that this provision ''does not by its terms protect against cost-recovery liability under § 107(a).''

It then opined that the lack of contribution protection for § 107 claims would not discourage settlements. First, it noted that a defendant in a § 107 action could trigger equitable apportionment by filing a § 113(f) counterclaim and thereby avoid being required to pay a disproportionate share. Second, it noted that the contribution bar still offered considerable protection from contribution suits. Third, it noted that settlement carries the benefit of resolving liability vis-à-vis the United States or a state.

In sum, the Supreme Court's decision reaffirmed the right of private parties to seek cost recovery under CERCLA while, at the same time, limiting the protection from suit that settling parties can receive.

III. Impacts of the *Atlantic Research* Decision

First, and most significantly, the decision clarifies that PRPs that voluntarily investigate and cleanup hazardous waste sites have a right to seek cost recovery from other potentially responsible parties under § 107. This should encourage parties to voluntarily clean up hazardous wastes sites.

At the same time, however, the Court created a significant disincentive to settlement by holding that the § 113 contribution bar does not bar claims under § 107. This could have wide-ranging impacts. PRPs will now have to consider this new risk in evaluating future settlements and PRPs that settled with EPA with the understanding that they were immune from liability may now be subject to cost recovery actions under § 107.

With regard to future settlements, it is common for EPA to take a two-track approach to settlements at superfund sites. First, it attempts to negotiate a consent decree with major PRPs at the site (''work parties'') pursuant to which those parties agree to investigate and/or clean up the site. Second, EPA attempts to enter into cashout settlements with other PRPs at the site (''cashout parties'').

Funds raised in cashout settlements are generally used to either reimburse EPA for its past costs or to help pay the costs of future investigation or cleanup. EPA generally seeks a premium from the cashout parties in exchange for providing those parties with releases and contribution protection, i.e., assurances that they will not be subject to future cleanup actions regarding the site. Parties are often willing to pay the premium in exchange for these assurances.[2]

However, because the Supreme Court held that the § 113 contribution bar only applies to contribution claims under § 113, but not § 107 cost recovery claims, cashout parties will still be subject to § 107 suits by the other PRPs at the site.[3] They will certainly be subject to suit by any parties that voluntarily clean up the site and, as noted above, they may also be subject to suit by the work parties.[4] Therefore, PRPs may be more reluctant to enter into cashout settlements, particularly settlements that demand significant premiums.

There are other sites where different groups of PRPs agree to perform different aspects of the work or to address different operable units. PRPs were generally willing to do this with the understanding that they will not be subject to suit by the parties dealing with the other operable units. Now, however, because each set of work PRPs may retain the right to sue the other for cost recovery, each set may be more reluctant to agree to perform work at the site.

EPA may be able to partially address this problem by demanding that work parties agree not to sue other settling parties. Thus, for example, EPA's Model RD/RA Consent Decree has a provision which provides that ''Settling Parties agree not to assert any claims and to waive all claims or causes of action they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final CERCLA § 122(g) *de minimis* settlement with EPA with respect to the Site as of the Effective Date.''

EPA could consider expanding this provision so that it expressly includes § 107 claims. In addition depending on the circumstances, EPA could consider expanding this provision to include all settlements, not just *de minimis* cashouts, and to cover settlements entered into after the effective date.

Still, in cases involving cashout settlements, such an approach will only be effective if EPA first settles with the work parties. And, in cases where more then one set of work parties is involved, EPA may need to enter into the agreements simultaneously so that both groups are assured that they will not be subject to future suits. In addition, the fact that work parties may retain rights to sue under § 107 gives them additional leverage over EPA.

Before *Atlantic Research*, work parties generally assumed that they did not have a right to sue other settling parties. Now, however, they may be reluctant to give up their potential § 107 claims because those claims provide them with a cause of action against other settling parties in the event that cleanup costs are higher than expected. They may not be willing to give up their rights to sue other PRPs unless EPA gives them something in return such as use of the funds raised in the cashout settlements.[5]

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[2] This is particularly true in the case of *de minimis* cashout settlements where the transaction costs would likely exceed the cost of the premium.

[3] Another interesting question is whether the *Atlantic Research* decision will impact the issue of whether state law contribution claims are pre-empted by CERCLA and therefore barred. Some cases have held that Congress enacted § 113, including the contribution bar, as part of a comprehensive settlement scheme designed to promote efficient resolution of environmental disputes. Since allowing common law remedies would allow parties to circumvent the bar, these Courts held that such claims are pre-empted. See e.g., *Matter of Reading Co.*, 115 F.3d 1111, 1117 (3rd Cir. 1997). However, since the Supreme Court effectively held that Congress did not intend to bar all claims, it held that § 107 cost recovery claims were not barred, there is an argument that state law claims contribution claims should similarly not be barred. On the other hand, a court might find that state law contribution claims are barred, but that cost recovery type claims are not barred.

[4] As noted above, the Supreme Court refused to resolve whether such parties could proceed under § 107, § 113, or both.

[5] On the other hand, if cashout parties pay a premium, it is unlikely that the work PRPs would pursue them unless the cleanup costs were much higher than anticipated because with the premium it would be difficult for the work PRPs to prove that the cashout parties had not paid their equitable share.

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PRPs may be more reluctant to enter into cashout settlements, particularly settlements that demand significant premiums.

Courts could attempt to fashion a solution for this problem. For example, one commentator has suggested that courts could hold that settlements with the government create a presumption that a party has paid its fair share so that it can defeat a § 107 claim filed against it. That is, they could, in essence, adopt a judge-made contribution protection rule for § 107 claims to parallel the statutory provision for § 113 claims. See Joel Gross, ''Supreme Court Decides That Liable Parties Can Seek Cost Recovery Under Section 107 of CERCLA.''

However, to the extent such a rule is just a presumption, it would mean that parties are still at risk of being sued. And, there may be obstacles to courts creating a contribution protection rule for § 107 claims. First, the Supreme Court held in *Atlantic Research* that § 107 claims are not contribution claims. Second, in both *Cooper Industries v. Aviall*, 543 U.S. at 171, and *Atlantic Research,* at fn. 8, the Supreme Court indicated, rather strongly, that it is very reluctant to imply common law remedies.

Thus, in both cases the court indicated that it did not believe it appropriate to find an implied right of contribution under CERCLA. If it is not willing to imply a right of contribution would it be willing to imply a legal bar to a statutory right?

Third, it is not clear that a Court has any authority to take away a § 107 statutory claim enacted by Congress. See e.g., *Alliance of Descendants of Texas Land Grants v. U.S.*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (holding that a legal cause of action is a property right which cannot be taken without just compensation).

With regard to past settlements, PRPs that paid premiums to enter into cashout settlements may be able to take some solace in the fact that because they paid premiums it will be difficult for other PRPs to prove that they have not paid their fair shares, making it less likely that they will sue.[6] In addition, as noted above, the Supreme Court did not decide whether parties that enter into consent decrees or comply with orders are entitled to bring § 107 claims.

Therefore, prior settlers can argue that such parties are limited to § 113 actions and, therefore, that § 107 actions are barred. As noted above, at sites where EPA is involved, EPA can attempt to require future work parties to give up their potential § 107 claims as part of future settlements. In addition, as also noted above, PRPs that settled and are then sued can try to convince the courts to impose a bar on § 107 actions.

The decision also affects private party settlements. At many sites work parties that enter into settlements with EPA, attempt to negotiate their own settlements with PRPs. However, they are often unwilling to indemnify the settling parties, offering instead to ask the court to issue an order barring future claims because the settlement was in good faith. See e.g., *City of Denver v. Adolph Coors Co.*, 829 F. Supp. 340 (D. Colo. 1993). However, such protection is now unlikely to protect settling parties from § 107 claims since, as the Supreme Court held, these are not contribution claims. Therefore, parties are likely to be less willing to settle unless the work parties provide them with additional protections they were previously reluctant to provide.

IV. Conclusion

The *Atlantic Research* decision confirms what most CERCLA practitioners understood for over 20 years—that private parties that engage in voluntary cleanups have a right to seek cost recovery from other PRPs. At the same time, by holding that the § 113(f) contribution bar does not bar § 107 claims, it creates a new level of uncertainty which PRPs will need to face and which EPA and the courts will need to address.

[6] Of course, those parties are most likely to sue if cleanup costs greatly exceed prior estimates in which case meeting this burden of proof will be less difficult.