SEYFARTH SHAW
MANAGEMENT ALERT

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Supreme Court Limits Availability of CERCLA Contribution Action

A company interested in recovering from others the costs it incurs in remediating contaminated property will have a hard time doing so in light of the December 13, 2004 ruling by the Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.*[1]

Suppose a company is directed by a state environmental agency, under threat of enforcement, to clean up a site contaminated with hazardous substances. The company does so, then proceeds to seek recovery of the incurred remediation costs from the parties who created the environmental contamination. To recover the costs of remediation that exceed its fair share of responsibility, the company asserts a claim for contribution under Section 113 of CERCLA - the Comprehensive Environmental Response, Compensation and Liability Act.[2] Does the company state a viable claim?

The Supreme Court answered, "no" in a 7-2 decision. Relying on the plain language of the statute, the Court held that contribution under Section 113(f)(1) is available only "during or following a civil action" under Section 106 or 107(a) of CERCLA. Section 106 is an action to enforce an administrative order issued against a potentially responsible party ("PRP"), while Section 107(a) is an action brought to recover costs of response. Additionally, under Section 113(f)(3)(B) of CERCLA, a party may seek contribution if it 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." As such, a company that acted at the direction of a State agency, but not as part of an administrative settlement, has no claim for contribution under Section 113 of CERCLA. The Court rejected the interpretation offered by the company that the right to contribution existed under the last sentence of Section 113(f)(1), providing that nothing in that subsection "shall diminish the right of a person to bring an action for contribution in the absence of a civil action" under Section 106 or 107 of CERCLA. The Court concluded that this sentence merely preserved any contribution claims that exist independent of CERCLA, and did not create additional contribution actions.

The decision leaves unanswered many questions. Most significant is that raised by the dissent, which argued that the company would have a claim under Section 107 for cost recovery or, at least, an implied claim under federal common law for contribution arising out of Section 107. Many lower court cases that have grappled with claims among PRPs have held that a PRP itself lacks a claim under Section 107 and instead is relegated to a claim for contribution. The dissent stated that the language of Section 107 permits "any person" to pursue a claim for cost recovery, and felt that the Supreme Court itself had already so ruled in a prior case.[3] The majority however, declined to address this contention because it was raised for the first time during the briefing before the Supreme Court.

The immediate significance of this case may be that companies faced with state or federal directives to initiate clean up (and those wishing to voluntarily address contaminated "brownfield" sites) will be reluctant to do so where they feel other parties are responsible for the contamination and wish to recover some or all of the costs of remediation. Certainly, the availability of a CERCLA claim based on voluntary action is questionable. Moreover, even action under a unilateral administrative order does not appear to meet the requirements of either Section 113(f)(1) ("during or following any *civil* action") (emphasis supplied), or Section

1 http://www.supremecourtus.gov/opinions/04slipopinion.html.

2 42 U.S.C. § 9613.

3 *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

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113(f)(3)(B) (“resolved its liability … in an administrative or judicially approved *settlement*”) (emphasis supplied). Traditionally, companies often prefer to take action under a unilateral order rather than a negotiated settlement because, unilateral orders may preserve more defenses, do not involve stipulated penalties for non-compliance, and do not require companies to reimburse the government agency for the costs of overseeing the remedy. Given this ruling, we predict that companies will be reluctant to act under unilateral orders and instead will favor negotiating a settlement either through a judicial consent decree or by an administrative order on consent, so that the companies performing remediation will be assured of the ability to recover in contribution under CERCLA. We also predict that U.S. EPA will be mindful of its increased bargaining power and may use it to seek even more concessions from PRPs in negotiations.

Lastly, any company currently pursuing a claim in contribution under CERCLA should determine whether its claim fits squarely under Sections 113(f)(1) or Section 113(f)(3)(B) of CERCLA. If not, the company will need to revisit its litigation strategy, possibly adding a claim under Section 107 of CERCLA, because the continuing validity of any lower court precedent that a PRP has no claim under Section 107 of CERCLA (or a contribution claim implied under Section 107) has been brought into question by the issues the Supreme Court declined to address in *Aviall*.

Questions regarding this decision and its implications should be directed to any attorney in the firm’s Environmental Safety and Toxic Tort practice.

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ATLANTA
One Peachtree Pointe
1545 Peachtree Street , N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W, Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax