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New CERCLA settlement obstacles

By Robert Olian

A decision handed down by the Third Circuit on April 12, 2010 will have a broad-reaching effect on potentially responsible parties (PRPs) who resolve their Superfund liability to the United States or a state and later seek to recover some of their costs from other PRPs. See *Agere Systems, Inc., et al. v. Advanced Environmental Technology Corporation, et al.*, ___ F.3d ___, No. 09-1814 (3rd Cir. April 12, 2010), available at www.ca3.uscourts.gov/opinarch/091814p.pdf. The decision raises two key warning flags for all PRPs who settle with the United States or a state pursuant to Sections 106 or 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

First, any PRP who settles with the United States or a state expecting to recover part of its costs against non-settling PRPs in a later contribution action may be out of luck if the cost recovery statute of limitation (*not* the contribution statute of limitations) had run on the government's potential claims against the non-settlers by the time the contribution cause of action first accrued. Slip op. at 22. This may become a significant issue, for example, in situations where the settling PRPs had entered into a tolling agreement with the United States or state and the non-settling PRPs had not.

Second, any PRP who settles with the United States or a state and who is entitled to "contribution protection" pursuant to Section 113(f)(2) of CERCLA will *only* have a contribution action against non-settling PRPs under Section 113(f)(1) available to it, not a cost recovery action under Section 107(a). Slip op. at 38-41. This holding partly resolves an issue left open by the Supreme Court in *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007).

The Court also addressed other CERCLA issues of interest. For example, it held that a PRP who did not settle with the government but later settled with other PRPs in a side agreement for a lump sum cash payment did "incur" response costs and therefore, in theory, has a Section 107(a) claim against non-settling PRPs. Slip op. at 33-36.

The Agere Systems case

The case involved the convoluted multi-year history of the Boarhead Farms Superfund Site in Bucks County, Pennsylvania. A core group of PRPs entered into two consent decrees with the United States, one for each of two operable units at the site. Additionally, a few other PRPs entered into private settlements with the core PRP group and contributed cash to that group. This collective assemblage of settling PRPs then sued the non-settling PRPs, most of whom settled out or were dismissed, leaving just one contribution defendant to go to trial. At the conclusion of a bench trial, the district court assigned the majority of the liability to the defendant, who appealed.

Predicate to CERCLA Contribution Rights: "Common Liability." Based on the Supreme Court's discussion of CERCLA contribution rights in *Atlantic Research*, the Third Circuit held that CERCLA's contribution rights only attach where the contribution plaintiffs and defendants have "common liability." Slip op. at 21-22. In *Agere Systems*, a portion of the plaintiffs' contribution claims were premised on one of the two consent decrees the settling PRPs had entered into with the United States. As is customary, the consent decree had been pre-negotiated and then filed by the United States simultaneously with a complaint. The crux of the defendant's concern

was the timing of that filing: at first blush, it appeared that the statute of limitations applicable to the United States' claim against the PRPs had expired on November 18, 2001, while the complaint and consent decree were not filed until December 6, 2001. Thus, by the time the settling PRPs' contribution rights accrued under Section 113(f)(1) (*i.e.*, December 6, 2001), the settling PRPs and the non-settling PRPs no longer had "common liability" because the government could not have sued the non-settling PRPs for cost recovery due to the expiration of the cost recovery statute of limitations. Slip op. at 21-23. Due to ambiguity in the record before it as to whether the cost recovery statute of limitations really had expired on November 18, 2001 or not, the Court ultimately remanded the case for additional fact finding. Slip op. at 24.

Resolving the Unresolved: The Overlap Between Section 107(a) and 113(f) Claims. Because the contribution plaintiffs raised both contribution and cost recovery claims against the remaining defendant, the Court was forced to address in part an issue expressly left open by the Supreme Court in *Atlantic Research*: can a CERCLA plaintiff who itself is a PRP pursue *both* types of claims? Looking to dicta in the Supreme Court's decision for guidance, the Third Circuit held that PRP plaintiffs *only* have Section 113(f)(1) claims where the contribution defendants would not have contribution counterclaims available to them. Slip op. at 40. This seeming peculiar holding was driven by a combination of two factors: first, the Supreme Court's statement that a party defending a Section 107(a) claim brought by another PRP could avoid the imposition of joint and several liability by filing a contribution counterclaim, thus forcing an equitable allocation, Slip op.

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at 39-40; and second that PRPs who have resolved their liability to the United States or a state are entitled to “contribution protection” under Section 113(f)(2), which has the effect of immunizing them from contribution counterclaims. As applied, the Court found that the plaintiffs could only have a Section 113(f)(1) claim because otherwise the defendant would not have a clear defense to joint and several liability in response to a Section 107(a) claim.

Cautionary Notes

While some arguments may be made for narrowing the precedential effect of the Third Circuit’s decision, the case will likely

have an immediate impact on litigation among Superfund PRPs in Pennsylvania, New Jersey, and Delaware and may have a much broader impact if followed by district and circuit courts elsewhere.

Moreover, for cooperating and settling PRPs, the decision may alter the process of deciding whether and when to settle with the United States or a state. It is common in Superfund matters for the government to secure tolling agreements from the principal PRPs. However, the government may not seek, or may not obtain, such agreements from smaller or non-cooperative PRPs. If so, then by the time the matter is resolved with the settling PRPs and some action has been

taken by the government to trigger contribution rights (such as the filing of a complaint and consent decree), the cost recovery statute of limitations may have lapsed against the non-settling parties, leaving the settling parties without a clear CERCLA contribution remedy. To make matters worse, those same parties would not have a CERCLA cost recovery remedy themselves because of the Third Circuit’s holding that PRPs who are immunized by “contribution protection” do not have a Section 107(a) claim against other PRPs. ■

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