PHILADELPHIA, THURSDAY, SEPTEMBER 15, 2005

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

ALM

ENVIRONMENTAL LAW

3rd Circuit Tackles Thorny Issues in Environmental Law

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Special to the Legal

This year, the 3rd U.S. Circuit Court of Appeals is poised to consider three unrelated appeals involving the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, which together may dramatically reshape the circuits' CERCLA jurisprudence.

The first appeal, *United States v. General Battery Corp. Inc.* rejected the expansive so-called "substantial continuity" theory of successor corporate liability in CERCLA cases, but nonetheless held that the district courts should apply a uniform federal interpretation of corporate successor liability in CERCLA cases, rather than the potentially varied standards of individual states.

The second case is an appeal from the District of New Jersey in *E.I. du Pont de Nemours and Co. Inc. v. United States (DuPont I)*¸ wherein the 3rd Circuit may become one of the first appellate courts to decide whether a typical private plaintiff can seek contribution from other private parties under CERCLA for a voluntary environmental cleanup. This issue has moved to the forefront after the Supreme Court's decision in *Cooper Indus. Inc. v. Aviall Serv. Inc.*, in December 2004.

Finally, the 3rd Circuit heard argument, en banc, on Sept. 8, in an appeal from the District of Delaware in *United States v. E.I. du Pont de Nemours and Co, Inc.; and Ciba Spec. Chem. Corp. (DuPont II)*. At issue is whether the 3rd Circuit should reverse *United States v. Rohm and Haas Co.*, in which the 3rd Circuit held that the government cannot recover its so-called oversight costs associated with private party CERCLA investigations and cleanups.

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SUCCESSOR LIABILITY

In *General Battery*, the majority of the three-judge panel noted that the court was returning to the "difficult area of indirect liability under CERCLA," or in this case, corporate successor liability. In particular, the issue before the court was whether a transaction between Price Battery Corp. and General Battery Corp. in 1966 rendered General Battery responsible under CERCLA for the environmental contamination by Price Battery. As the majority noted:

"The general rule of corporate successorship accepted in most states is non-liability for acquiring corporations, with the following exceptions:

"The purchaser may be liable where: (1) it assumes liability; (2) the transaction amounts to a consolidation or merger; (3) the transaction is fraudulent and intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling company."

In addition to the "general rule," over the years, many federal courts have begun to develop a fifth exception applicable in CERCLA cases known as the "substantial continuity" theory of corporate successor liability. "Substantial continuity" is a hybrid of the traditional exceptions and is generally viewed as a more liberal standard for imposing successor corporate liability.

The majority in *General Battery* noted that "the threshold issue on appeal is whether to apply a uniform federal rule of successor liability, or whether to apply the law of a particular state." The majority concluded that a uniform federal rule should be applied, but was careful to note that it was not developing federal common law on the issue of corporate successor liability, but rather was engaged in the interpretation of a poorly drafted statute. "[T]he 'creation' of federal common law must be distinguished from statutory interpretation." Accordingly, the court articulated the applicable test of successor corporate liability based upon "the general doctrine of successor liability in operation in most states."

In doing so, the court rejected the judicially created and more liberal "substantial continuity" test because it "in effect creates a more expansive rule of liability than is accepted in most states." "Accordingly, 'substantial continuity' is untenable as a basis for successor liability under CERCLA." Although not explicitly addressed, the judicially created "substantial continuity" exception rejected by the 3rd Circuit is, presumably, under the

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court's analysis, also unwarranted federal common law — the creation of new law rather than the interpretation of existing law.

The dissent in *General Battery* objected that the majority's adoption of a uniform federal rule of successor liability was in itself the creation of improper federal common law and the Pennsylvania law of successor liability should have been applied. The dissent also maintained that the majority's opinion placed the 3rd Circuit in conflict with the two other courts of appeal to consider the issue of whether to apply state law or a uniform federal rule. The dissent went so far as to encourage en banc review of the matter. However, the dissent did not take issue with the court's rejection of the substantial continuity test.

In *General Battery*, the 3rd Circuit has reined in the circumstances in which a subsequent corporation may be held liable for the environmental contamination of a prior corporation under CERCLA by rejecting the "substantial continuity" test, but held that the courts must develop and apply a uniform federal rule of successor corporate liability under CERCLA rather then apply state law.

CERCLA CONTRIBUTION

In *DuPont I*, the company brought claims against various federal defendants under CERCLA for environmental cleanup costs incurred by DuPont at facilities where wartime production took place at the direction of the United States. One of the central issues on appeal is whether and how a potentially responsible party, or PRP, under CERCLA may seek contribution from other PRPs after the December, 2004 United States Supreme Court decision in *Cooper Indus. Inc. v. Aviall Serv. Inc*. To appreciate the potential importance of the issue, a short history of CERCLA is necessary.

In 1980, CERCLA was enacted with a strict liability scheme that is set forth at Section 107, which provides that any covered person shall be liable for cleanup costs incurred by the United States or a state and "any other necessary costs of response incurred by any other person." Early on, the cases began interpreting Section 107 to allow contribution claims between PRPs.

While the case law recognizing a right of contribution under Section 107 continued to expand, a line of cases in the securities field refusing to recognize implied rights of contribution under a different statutory scheme began to cast some doubt on the propriety of CERCLA contribution claims under Section 107. Before it was decided whether Section 107 was an explicit authorization of contribution claims or merely gave rise to an implied right of contribution, and whether any such implied right was appropriate, Congress amended CERCLA.

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act, or SARA, which added Section 113 to CERCLA. New Section 113(f) was titled "Contribution." Over the years, the courts of appeal fairly uniformly held that one PRP could sue another PRP for contribution under Section 113 and that since 113 creates an explicit right of contribution, such claims should not be brought by a PRP under Section 107, except in certain limited circumstances. This became the law of the 3rd Circuit in *New Castle County v. Halliburton NUS Corp*. This notion that Section 113 was the preferred mechanism for seeking contribution between PRPs also began to be applied to voluntary cleanup situations where the party incurring the cleanup costs had not been sued by the government under CERCLA.

In December 2004, this broadly accepted notion that Section 113 was the proper way to seek contribution under CERCLA, even in voluntary cleanup situations, was unsettled by the Supreme Court decision in *Cooper*, which held that, based upon its reading of Section 113, only PRPs that had been sued by the government, or PRPs that had entered into a judicially approved settlement with the government, could seek contribution from other PRPs under Section 113.

Left unresolved by the Supreme Court was the issue of whether a PRP that had voluntarily cleaned up a site, without the initiation of a government action, could still seek contribution from other PRPs under Section 107. The answer in most circuits was "no," at least based upon existing case law, but those decisions were premised upon a statutory interpretation of CERCLA that, according to the Supreme Court, read Section 113 too broadly.

The issue being revisited by many circuits, including the 3rd Circuit in *DuPont I*, is whether a right of contribution should again be recognized under Section 107, now that the Supreme Court has corrected the lower courts on how to interpret and apply Section 113.

Ultimately, if a PRP cannot seek contribution from other PRPs for cleanup costs incurred voluntarily cleaning up a property, we may see more PRPs refusing to clean up properties they otherwise would have voluntarily addressed, in order to force the government's hand to initiate litigation. Once the government initiates litigation, the PRP can seek contribution from other PRPs under Section 113. The 3rd Circuit's decision in *DuPont I* will have a profound impact on contribution claims arising from voluntary cleanups.

GOVERNMENT OVERSIGHT COSTS

Another DuPont case involving CERCLA is pending before the 3rd Circuit. This time the appeal is from the District of Delaware and DuPont is a defendant in a government cost recovery action. In *DuPont II* the United States is seeking to recover its oversight costs associated with overseeing cleanup work undertaken by the defendants, even though such costs are not recoverable under existing 3rd Circuit precedent as set forth in *Rohm and Haas*. Since the United States' appeal, if sustained, would require the reversal of existing 3rd Circuit precedent in *Rohm and Haas*, the appeal was heard en banc on Sept. 8.

In *DuPont II*, the United States sought to recover its "oversight costs," which consist of government payroll and contract costs, associated with reviewing, monitoring and approving actions taken by PRPs at the direction of the government. Relying upon *Rohm and Haas*, the district court held that the United States' remedial design oversight costs, remedial action oversight costs, and litigation costs associated with the effort to recover these oversight costs, could not be recovered.

The ability of PRPs to sue other PRPs without government involvement may diminish depending upon the outcome of *DuPont I*, but the cost of involving the government in the cleanup process so that a contribution claim can be asserted, may dramatically increase a PRP's costs depending upon the outcome of *DuPont II*. •

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