The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2010

PHILADELPHIA, THURSDAY, DECEMBER 16, 2010 VOL 242 • NO. 117 An ALM Publication

ENVIRONMENTAL LAW

30 Years Later, CERCLA Remains a Hot Topic in the Courts

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Special to the Legal

On Dec. 11, the Comprehensive Environmental Response, Cleanup and Liability Act, commonly known as the Superfund law, or CERCLA, turned 30. And with 30 years behind it, CERCLA remains one of the most heavily litigated statutes in the federal courts, with 2010 being a particularly busy year for Superfund practitioners. As we prepare to ring in 2011, this article looks back at some of the significant Superfund cases decided over the past year.

SECTION 107(A) AND SECTION 113(F) IN PRIVATE PARTY ACTIONS

CERCLA contains two different mechanisms for the recovery of cleanup costs: Section 107(a), which provides for joint and several cost recovery, and Section 113(f), which provides for contribution. The Supreme Court has in recent years tried to direct traffic between these two provisions, issuing two landmark decisions — *Cooper Industries v. Aviall Services Inc.* (2004) and *United States v. Atlantic Research Corp.* (2007) — that have in many respects redefined the nature of a private party's right of action to recover cleanup costs under CERCLA.

In *Aviall*, the court held that a potentially responsible party, or PRP, that has not been sued or settled under Section 106 or 107 may not obtain contribution from other PRPs under Section 113(f). Three years later, the court held in *Atlantic Research* that a PRP that "incurs" its own costs of response may bring a cost recovery claim under Section 107(a), but when a PRP merely pays to satisfy a settlement agreement or judgment, it does not incur its own costs of response, and thus cannot recover under Section 107(a).

But even after these decisions, open questions still remained, including one left expressly undecided in *Atlantic Research* — that is, whether a PRP that seeks to recover cleanup costs incurred pursuant to a consent decree or administrative settlement can bring a cost recovery claim under Section 107(a), a contribution claim under Section 113(f), "or both." The answer is a critical one, not only for statute of limitations reasons, but also, and perhaps even more so, for the burden of proof. A plaintiff asserting a claim for joint and several liability under Section 107(a) has the burden of proving that the defendant is a liable party under CERCLA. But under Section 113(f), the contribution plaintiff must also prove each party's equitable share of liability at the site, including its own.

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The 2nd and 3rd circuits both addressed this issue in 2010. First, the 2nd U.S. Circuit Court of Appeals in *Niagara Mohawk Power Corp. v. Chevron U.S.A. Inc.* held in February that a PRP that settles its CERCLA liability by consent order with a state environmental agency can seek contribution under Section 113(f), but not reimbursement under Section 107(a). Then in April, the 3rd Circuit in *Agere Systems Inc. v. Advanced Environmental Technology Corp.* held that: (1) consistent with *Niagara Mohawk*, a PRP that performs a cleanup pursuant to a consent decree with the EPA, and is therefore entitled to statutory contribution protection under Section 113(f)(2) of CERCLA, is limited to a contribution claim under Section 113(f); and (2) a PRP that has not been sued by or settled with the EPA, but that participates in a cleanup pursuant to a private settlement agreement with those that have, can assert a Section 107(a) claim to recover its costs.

Several district courts have since followed suit, and a common theme has emerged: A PRP that has a viable claim under Section 113(f) is limited to Section 113(f), whereas a PRP that performs a cleanup, but does not meet Section 113(f)'s requirement of a pre-existing civil action, retains a Section 107(a) claim to recover its costs.

STORMWATER RUNOFF FROM STATE HIGHWAY SYSTEM

The U.S. District Court for the Western District of Washington issued two significant opinions this year in *United States v. Washington DOT*, a suit brought by the United States against the Washington Department of Transportation to recover costs in responding to the discharge of contaminated stormwater from a highway system into what later became a Superfund site. In June, the court held that WSDOT could be liable as an "arranger" under CERCLA because it designed and operated a highway drainage system with knowledge that the system would convey contaminated stormwater from the highways to nearby waterways, and that it was inappropriate at the summary judgment stage to decide whether WSDOT was entitled to a defense based upon compliance with its stormwater discharge permits. The decision is one of the first to find a governmental entity liable as an arranger by virtue of owning and operating a stormwater system.

The court followed this opinion up with another in November, this time granting the government's motion for partial summary judgment on WSDOT's arranger liability, and rejecting WSDOT's argument that even if it "arranged" for the disposal of hazardous substances, the government could not prove a causal connection between the hazardous substances at the WSDOT property and the

response costs that the government incurred. The court concluded that, to prove arranger liability, a plaintiff "need only show that there was a contaminant at the site, that there is a chemically similar contaminant on the defendant's site, and that there is a plausible migration route." The burden then shifts to the defendant "to disprove causation, and prove issues of divisibility and apportionment."

Although this latter holding is not the first of its kind — there are a number of decisions holding that causation is not a requirement for CERCLA liability to attach — it does highlight the potentially severe consequences of the court's expansive interpretation of arranger liability for stormwater runoff. Together, the two decisions, if followed by other courts, could have significant ramifications not only for highway departments across the country, but for everyone from local municipalities that discharge untreated stormwater to municipal storm sewer systems, to private developers that construct parking lots for their development projects.

THE BONA FIDE PROSPECTIVE PURCHASER DEFENSE

In November 2005, the EPA enacted its "All Appropriate Inquiry Rule," setting forth the regulatory and industry standard for prospective purchasers when performing environmental due diligence in real estate transactions, and for establishing one of the factual predicates to qualifying for the bona fide purchaser defense (among other defenses) in CERCLA. In theory, the bona fide prospective purchaser defense enables a purchaser to acquire contaminated property without subjecting itself to CERCLA liability. But in the first decision to interpret the requirements of the defense in a commercial real estate transaction, the U.S. District Court for the District of South Carolina rejected an experienced brownfields developer's attempt to escape liability, concluding that, even though it conducted "all appropriate inquiry," it did not satisfy several of the many requirements needed to prove the defense. In *Ashley II of Charleston LLC v. PCS Nitrogen Inc. v. Ross Development Corp.*, Ashley conducted a Phase I Environmental Site Assessment that identified several sumps and stained concrete pads as "recognized environmental conditions" on the property prior to its acquisition, but did not perform testing to see if the soil under those structures was contaminated. It then demolished all of the aboveground structures on the property, but failed to clean out and fill in the sumps, leaving them exposed to the elements. Based on these facts, the court held that Ashley failed to prove two statutory elements of their defense — namely, that there was no disposal during its ownership of the property, and that it exercised appropriate care to prevent possible releases.

Perhaps more significantly, the court also held that Ashley did not satisfy the "no affiliation" requirement of the bona fide prospective purchaser defense, because it released and indemnified the sellers from environmental liability for contamination of the site, and attempted to persuade EPA not to take enforcement action to recover for any harm at the site caused by the sellers. According to the court, "Ashley took the risk that the [sellers] might be liable for response costs," and its "efforts to discourage EPA from recovering response costs covered by the indemnification reveals just the sort of affiliation Congress intended to discourage."

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EPA CLAIM FOR OVERSIGHT RESPONSE COSTS TIME-BARRED

Finally, in a case with potentially significant ramifications for parties with liability at historic EPA-led cleanup sites in the 3rd Circuit, the U.S. District Court for the District of New Jersey dismissed in September a lawsuit filed by the EPA seeking recovery of past oversight response costs against defendants Rohm & Haas Co. and Morton International, Inc. In *United States v. Rohm & Haas Co.*, the defendants moved to dismiss the government's complaint as time-barred, arguing that the government's complaint was untimely because it was not filed within either the three- or six-year limitations periods provided in CERCLA. The government opposed the motion and responded by filing its own motion for partial summary judgment, arguing: (1) that its claims did not accrue as a matter of law until the 3rd Circuit held in *United States v. E.I. DuPont de Nemours & Co. Inc.* (2005) that oversight costs were recoverable response costs under CERCLA, thereby overturning *United States v. Rohm and Haas Co.* (3d Cir. 1993); and (2) that even if its claims did accrue, the government was entitled to equitable tolling.

The court rejected both of the government's arguments. The court held that when a statute, in this case CERCLA, explicitly states what actions mark the beginning of the accrual period for a claim, a party cannot rely on a non-statutory based accrual date. With respect to the equitable tolling issue, the court found that adverse precedent alone does not toll the statute of limitations, and that in any event, the government did not act diligently in pursuing its claims. On this latter point, the court noted that the government could have filed an action within the statutory limitations period, and then asked the 3rd Circuit to revisit *Rohm & Haas* (which it ultimately did successfully in *DuPont*). In addition, the court found that the government's decision to wait nearly three years after *DuPont* was decided to pursue its claims "does not bespeak of due diligence in preserving one's claim."

In recent years, the EPA has been actively pursuing claims for oversight response costs for a number of cleanup sites located throughout the 3rd Circuit, and this decision was the first to address the timeliness of such claims. A government appeal is currently pending before the 3rd Circuit.

DIVERSE AND COMPLEX QUESTIONS

As these cases highlight, even after 30 years of jurisprudence under CERCLA, issues continue to arise under the statute, providing practitioners and courts alike with diverse and complex questions to tackle and resolve. This past year was no doubt an interesting one for Superfund practitioners, and 2011 promises to be no different. •