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PERSPECTIVE

Recent Decision Unsettles EPA Practices

By Jeffrey D. Dintzer and Elizabeth M. Burnside

On July 22, 2010, a largely unnoticed but important decision was filed by the Rhode Island District Court in *Ashland Inc. v. GAR Electroforming*, 2010 U.S. Dist. LEXIS 74969 (D.R.I. July 22, 2010). In Ashland, District Court Judge Mary Lisi ruled that the Comprehensive Environment Response, Compensation, and Liability Act's (CERCLA) settlement bar, codified at 42 U.S.C. Section 9613(f)(2), would not serve to bar the CERCLA Section 107(a) claims of a potentially responsible party (PRP) who declined to settle with the U.S. government, against a PRP who had previously entered into a consent decree with the U.S. Environmental Protection Agency (EPA). Judge Lisi's decision, premised on the plain language of CERCLA's settlement bar, and the U.S. Supreme Court's seminal CERCLA decision in *United States v. Atlantic Research*, 551 U.S. 128 (2007), thus permanently alters the landscape for EPA by effectively nullifying the federal government's ability to provide settlement protection as a carrot to coerce PRPs into the settlement of pending CERCLA litigation.

The Supreme Court's decision in *United States v. Atlantic Research*, 551 U.S. 128 (2007) is widely recognized as one of the most formative decisions in CERCLA law since the statute's passage in 1980. However, while the decision is lauded primarily for its distinction between the separate rights afforded by CERCLA Sections 107(a) and 113, its discussion of Section 113(f)(2)'s settlement bar may have just as extensive practical import.

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In *Atlantic Research*, the United States argued, in part, that permitting PRPs involved in CERCLA litigation to proceed with claims for cost recovery under CERCLA's Section 107(a) would eviscerate the settlement bar codified at CERCLA Section 113(f)(2). Section 113(f)(2) provides that, "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. Section 9613(f)(2). The federal government has thus traditionally been able to offer PRPs who agree to settle with EPA protection from future contribution claims by other non-settling PRPs.

With respect to the United States' concerns over Section 107(a) cost recovery claims, however, the Supreme Court rejected the United States' argument unanimously, reasoning that "[t]he settlement bar does not by its terms protect against cost-recovery liability under [Section] 107(a)." It is by this simple statement, coupled with the plain language of Section 113(f)(2), that the Rhode Island District Court effectively cut the legs out from under EPA in Ashland.

At issue in Ashland was a 10 acre chemical waste disposal site in Rhode Island operated in the 1970s (the "Davis Site"). In 1982 the EPA listed the Davis Site on the National Priorities List, and in 1987 the federal government took certain remedial action at the site, for which it ultimately brought an action for cost recovery against numerous PRPs in the 1990s. During the pendency of the government's cost recovery litigation, a number of defendants, including United Technology Corp. entered into a consent decree with the federal government, the terms of which included bars from future action by other PRPs. Certain defendants, however, refused to enter into such consent decrees, and elected to challenge those consent decrees that were entered by other parties. At the time, Ashland, who was also a defendant in the government's CERCLA cost recovery action, did not enter into a consent decree with the government and challenged the consent decrees that were entered at the time, arguing that non-settling PRPs may "incur disproportionate liability related to performance of the groundwater remedy since Ashland was not protected under a consent decree and was barred from seeking contributions from parties that had settled before." The 1st Circuit Court of Appeal rejected such arguments, however. Over 15 years later, on June 6, 2008, Ashland filed a federal complaint under CERCLA Section 107(a), alleging it had "voluntarily" incurred approximately $2 million in response costs related to groundwater remediation and that it would continue to incur future costs at the Davis Site. Ashland argued that these costs were excluded from the consent decree, which pertained only to "soil" remediation and not "groundwater" remediation. Both United Technology and the U.S. government argued that these claims were barred by Section 113(f) of CERCLA. But the District Court rejected United Technology and the United States' arguments, holding that "[b]ased on the plain language of Section 107(a)(4)(B) and the Supreme Court's holding in Atlantic Research, this Court concludes that Ashland may bring a Section 107(a) against the defendants to seek recovery of necessary costs it incurred in performing remedial work at the Davis Site." The court determined that the settlements United Technology had entered into with the U.S. government (and state authorities) did not "address the possibility of direct recovery claims pursuant to Section 107 against [United Technology] or any of the other settlors. The Court reasoned, therefore, the settlement agreements...do not serve to bar

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Ashland's Section 107(a) recovery claims against [United Technology]." The court thus effectively held, then, that the United States' consent decree with a settling PRP provided no means under the plain language of CERCLA by which to afford that settling PRP protection from claims subsequently brought by other non-settling PRPs. This ruling fundamentally alters the manner in which EPA can conduct federal CERCLA litigation because, without the ability to provide an effective release of liability for settling parties, the United States can provide no incentive for parties to pay a premium to settle with the federal government.

This ruling is necessitated by the text of the statute. And other district courts have similarly relied on CERCLA's plain meaning in the context of Section 113(f)(2)'s settlement bar: In *Solutia Inc. v. McWane Inc.,* 2010 U.S. Dist. LEXIS 90853, *87 (N.D. Ala. July 2, 2010), the Northern District of Alabama held that, "[g]iven the Supreme Court's emphasis in *Atlantic Research* that CERCLA's cost recovery and contribution remedies are separate and distinct, which included a discussion of the settlement bar, this court declines to ignore or judicially rewrite the plain language of [Section] 113(f)(2) to protect against cost recovery liability." And the New Jersey District Court similarly recognized that "[Section 113(f)(2)'s] settlement bar...does not apply to [Section] 107(a) cost recovery claims." *Litgo N.J. Inc. v. Martin*, 201 U.S Dist. LEXIS 57390, at *90 (D.N.J. June 10, 2010).

CERCLA is abundantly clear. The only way that EPA may avoid these rulings then, is by congressional amendment of the statute itself — a result similarly improbable given Congress' current composition. Thus, until CERCLA is amended, the bottom line for EPA may be that it's out of business when it comes to settling CERCLA claims.