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More CERCLA Recovery Hurdles For 'Compelled' Costs

Law360, New York (April 12, 2012) -- According to a number of United States Circuit Court of Appeals decisions, including an opinion handed down in March 2012 by the U.S. Court of Appeals for the Eleventh Circuit[1], a party that enters into a judicially approved consent decree cannot recover costs that it expended through an action for cost recovery under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2]

Even if that party incurred remediation costs directly, it is limited to bringing an action for contribution under CERCLA section 113(f).[3]

Prior to 2004, federal appellate courts generally expounded the view that a claim for cost recovery under section 107(a) could be stated only by so-called "innocent" parties. A private potentially responsible party (PRP) was restricted to obtaining cleanup costs from other PRPs by asserting a claim for contribution under section 113(f).

That section, signed into law by President Ronald Reagan in October of 1986 as part of the Superfund Amendments and Reauthorization Act (SARA) amendments to CERCLA[4], allows for "[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a)."[5]

Despite the plain language of the statutory provision, circuit courts seemed to agree that a PRP was allowed to bring a section 113(f) claim even if the PRP had never been sued by the government, but could not bring a section 107 claim even though the PRP sought to recover directly expended costs.[6]

In 2004, the U.S. Supreme Court upended this state of play when it issued its decision in Cooper Industries Inc. v. Aviall Services Inc. and held that "[t]he natural meaning of [section 113(f)] is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."[7]

As such, a PRP that voluntarily cleaned up a site — or, in other words, conducted a cleanup without first having settled or been sued under CERCLA — was foreclosed from recovering its costs from another PRP; it could not bring an action under either section 107(a) or section 113(f).[8]

Three years later, the Supreme Court resolved the conundrum faced by PRPs that voluntarily incurred remediation costs, again by simply applying the plain language of the statute. In United States v. Atlantic Research Corp., the court held that "any person," including a PRP, other than the "United States, a State, or an Indian tribe," could bring an action for cost recovery under section 107(a).[9]

Stressing that "neither remedy swallows the other," the court summarized the state of the law as: "[C]osts incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)."[10]

The court acknowledged, but refused to resolve, an open question regarding the interrelationship between sections 107 and 113 as applied to a common factual situation: "[A] PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a) [and,] ... [i]n such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both."[11]

Since the Supreme Court's decision in Atlantic Research, parties continue to disagree over the availability of section 107(a) claims. Parties often prefer to bring their claims under section 107(a), as there are four significant differences between claims brought under section 107(a) and those brought under section 113(f).

First, the Supreme Court has consistently assumed without deciding that section 107(a) imposes on parties joint and several liability[12], while section 113(f) only allows for an equitable allocation of responsibility between the plaintiff and defendant or defendants.

Second, the statutes of limitations imposed by each section differ, with section 107 generally allowing for a longer period of time during which a party may bring its claim.[13]

Third, a plaintiff cannot use section 113(f)(2) to obtain contribution from a party that has settled its liability with the federal or a state government.

Lastly, pursuant to section 113(f)(3)(C), such claims are subordinate to the rights of the United States or a state.

Seeking to take advantage of these differences, PRPs like Solutia Inc. have sought to assert claims under section 107(a) for costs it incurred directly pursuant to a consent decree.

Solutia — the product of a spin-off by the Monsanto Co. in 1997 — owns and operates an Alabama plant where Monsanto produced polychlorinated biphenyls (PCBs) from 1929 to 1971. The United States Environmental Protection Agency (EPA) filed a cleanup enforcement action under CERCLA in 2002 against Solutia and another Monsanto-related corporation, Pharmacia Corp.

In June 2003, Solutia and Pharmacia brought an action for both cost-recovery and contribution under CERCLA sections 107(a) and section 113(f), respectively, against the defendant PRPs.

In August of that year, Solutia and Pharmacia entered into a partial consent decree with the EPA that imposed joint and several obligations on the two companies. The defendant PRPs then sought summary judgment on Solutia and Pharmacia's section 107(a) claim.[14]

A panel of the Eleventh Circuit Court of Appeals joined the Second, Third, Sixth and Eighth Circuits in limiting the availability of section 107 claims by affirming the district court's grant of summary judgment to the PRP defendants.[15]

Conceding that no language in CERCLA requires a reading of section 107(a) and section 113(f) as exclusive remedies, the court made clear that the statute should be read "as a whole," and that, "[i]f a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined" and the settlement incentive built into the statutory provisions would be marginalized.[16]

There are two competing views regarding whether a PRP that incurs response costs at a site following the entry of a consent decree should be able to recover its costs under section 107(a), or be limited to section 113(f)(1).

The emerging majority view directs PRPs that incur costs directly pursuant to a consent decree to section 113(f) in order to protect the structural integrity of CERCLA. Congress enacted section 113(f) as part of the SARA amendments after — not contemporaneously with — section 107(a).

As such, allowing a party that engaged in remediating a site under the direction of a consent decree and a party that did so voluntarily — before first having settled or been sued under CERCLA — to assert the same cause of action nullifies the statutory carrot for parties that conduct voluntary cleanups.

Allowing parties in such disparate postures to assert the same section 107(a) claims would contravene the Supreme Court's statement that "the remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances.'"[17]

Additionally, the Supreme Court allowed PRPs to assert claims under section 107(a) because, inter alia, "a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim."[18]

However, as the court took note in Solutia, allowing Solutia and Pharmacia to assert a section 107(a) action would then bar the defendant PRPs from asserting any counterclaims for contribution under section 113(f), because section 113(f)(2) would prohibit the PRP defendants from suing for contribution a party that has settled its liability with the federal government.[19]

A strong argument, however, can be made for the countervailing position: that section 107(a) is available to a PRP compelled to incur costs directly.[20] Under this view, section 113(f)(1) exists only when a PRP is forced to pay another PRP that has incurred costs, and operates solely as a contribution right of action.

Whenever a party pays for the cleanup directly, either "voluntarily" or under the compulsion of a consent decree, it may pursue those costs under section 107(a). This view comports with the plain text of CERCLA, as section 107(a) does not indicate that voluntariness is a factor, only that costs must be incurred directly.[21]

The court in Atlantic Research held that "costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B)" — not that only costs incurred voluntarily are recoverable by way of section 107(a).[22]

Therefore, under this view, limiting section 107(a) actions to parties that have not settled their liability or been sued under CERCLA contravenes the spirit of the court's textual analysis of section 107(a), to wit: Any person, other than the United States, a state or an Indian tribe, can bring an action for recovery of costs directly expended under that section.

However, if the voluntariness-involuntariness distinction has no place in the inquiry of which parties can bring section 107(a) claims, Justice Clarence Thomas need not have noted this ambiguous distinction as one left unresolved by the court in Atlantic Research's dicta.

Atlantic Research Corp. conducted a voluntary cleanup of the site at issue in that case; as such, the question of whether costs incurred involuntarily could be recovered under section 107(a) was not squarely before the court.

Finally, allowing a party that incurred costs directly to bring an action under section 107(a) allows that party potentially to impose joint and several liability on the other PRPs at the site — a critical factor if there is an orphan share of the remediation costs, or a percentage of the total cost that should be borne by a party not present in the litigation.

From an incentives-based viewpoint, it is beneficial for the CERCLA scheme to encourage a party to settle claims with the EPA and directly conduct a cleanup of a site by removing the risk of that party bearing an orphan share.

Despite these various arguments, the state of the law as to the availability of section 107(a) claims for the recovery of compelled costs is becoming clearer. The Solutia court brings the total number of circuits limiting section 107(a) claims to five, and there is yet to be a split at the circuit level.

Additionally, the likelihood of Supreme Court review of this issue in the near term is low: The court has denied petitions for certiorari in Morrison[23] and Agere Systems Inc.[24]

As such, under no circumstances should a party that has incurred compelled response costs directly bring only a section 107(a) claim against other PRPs, like the plaintiffs did in Morrison.[25] Such a party should assert claims under both section 107(a) and 113(f) with the understanding that it may be precluded from advancing the section 107(a) claim.

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[1] Solutia Inc. v. McWane Inc., --- F.3d ---, 2012 U.S. App. LEXIS 4634 at *6 (11th Cir. Mar. 6, 2012) (per curiam).

[2] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a).

[3] 42 U.S.C. § 9613(f).

[4] Superfund Amendments and Reauthorization Act of 1986.

[5] 42 U.S.C. § 9613(f).

[6] See, e.g., Aviall Servs. v. Cooper Indus., 312 F.3d 677, 681 (5th Cir. 2002) (en banc), rev'd, 543 U.S. 157 (2004).

[7] 543 U.S. 157, 166 (2004) (emphasis added).

[8] See, e.g., E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 532 (3d Cir. 2006); but see Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 92-95 (2d Cir. 2005) (allowing a PRP to maintain a section 107(a) action in light of Aviall).

[9] 551 U.S. 128, 135 (2007).

[10] Atlantic Research, 551 U.S. at 139 n.6.

[11] Id. at 139.

[12] See, e.g., id. at 140 n.7.

[13] Compare 42 U.S.C. § 9613(g)(2) with 42 U.S.C. § 9613(g)(3).

[14] Solutia, 2012 U.S. App. LEXIS 4634 at *6-9.

[15] Id. at *17. A number of circuit courts have reached the same conclusion. See Morrison Enter., LLC v. Dravo Corp., 638 F.3d 594, 603 (8th Cir. 2011) ("§ 113(f) provides the exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under §§ 106 or 107); Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 229 (3d Cir. 2010) (holding that a party subject to a consent decree cannot bring a section 107(a) claim); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 128 (2d Cir. 2010) (determining that allowing a liable party that incurred response costs as a result of a consent order "to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113"); ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 458 (6th Cir. 2007) ("To maintain the vitality of § 113(f) . . . [PRPs] who have been subject to a civil action pursuant to §§ 106 or 107 or who

have entered into a judicially or administratively approved settlement must seek contribution under § 113(f).”); see also Atl. Research Corp. v. United States, 459 F.3d 827, 836-37 (8th Cir. 2006) (“[L]iable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113.”), aff’d, 551 U.S. 128 (2007).

[16] Solutia, 2012 U.S. App. LEXIS 4634 at *15.

[17] Atlantic Research, 551 U.S. at 139.

[18] Id. at 140.

[19] Solutia, 2012 U.S. App. LEXIS 4634 at *15.

[20] At least one district court has reached this conclusion. See New York v. Solvent Chem. Co., 685 F. Supp. 2d 357, 425 (W.D.N.Y. Jan 26, 2010), rev’d in part on other grounds, 664 F.3d 22 (2d Cir. 2011).

[21] 42 USC § 9607(a).

[22] Atlantic Research, 551 U.S. at 139.

[23] --- U.S. ---, 132 S. Ct. 244 (Oct. 3, 2011).