



Electronic Dispatch

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U.S. SUPREME COURT ISSUES SURPRISING FEDERAL SUPERFUND DECISION AFFECTING CONTRIBUTION ACTIONS

In 1986, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to include an express right of contribution. Specifically, the first sentence of CERCLA § 113(f)(1) allows “any person” to seek contribution from “any other person” liable or potentially liable “during or following any civil action” under CERCLA § 106 or § 107(a). However, the last sentence of that subsection states that nothing in CERCLA § 113(f) diminishes the right of “any person” to bring a contribution action absent a civil action under CERCLA § 106 or § 107. Since 1986, federal courts have generally given deference to the last sentence, and allowed private parties to commence CERCLA § 113(f)(1) contribution actions, even where they were not brought “during or following” CERCLA § 106 or § 107(a) civil actions. As a result, for nearly 20 years it has become commonplace for companies to investigate and remediate hazardous substance contamination under a consent order with a state environmental agency, and then commence a contribution action under CERCLA § 113(f)(1) against parties it claims are also responsible for the contamination.

On December 13, 2004, in Cooper Industries, Inc. v. Aviall Services, Inc., the United States Supreme Court held that a private party who has not been sued under CERCLA § 106 or § 107(a) cannot maintain a contribution action under § 113(f)(1). In view of the numerous cases that permitted such actions to proceed, the Cooper decision came as a surprise. The decision can be expected to have an immediate impact on pending CERCLA § 113(f)(1) contribution actions, and it will also impact the strategy of companies seeking to recover environmental response costs in the future.

Background

Cooper Industries, Inc. (Cooper) owned and operated several properties in Texas on which it conducted aircraft engine maintenance activities. In 1981, Cooper sold the sites to Aviall Services, Inc. (Aviall), which operated the properties. Aviall later discovered that it and Cooper had contaminated the properties, so Aviall notified the Texas Natural Resource Conservation Commission (Commission) of the contamination. The Commission instructed Aviall to clean up the contamination and threatened enforcement action, but did not take any judicial or administrative measures to compel the cleanup. Aviall did not sign a consent order, but conducted the cleanup under Commission supervision, incurring approximately \$5 million in cleanup costs to do so.

Aviall sued Cooper under CERCLA § 113(f)(1) and state law. The federal district court granted Cooper’s motion for summary judgment, finding that Aviall could not maintain a CERCLA § 113(f)(1) contribution claim because it had not been sued under CERCLA § 106 or § 107(a). The Fifth Circuit Court of Appeals initially affirmed, but on rehearing en banc, ruled in Aviall’s favor, holding that CERCLA § 113(f)(1) allowed a potentially responsible party to obtain contribution regardless of whether it had been sued under CERCLA § 106 or § 107.

Supreme Court Decision

In a 7-2 decision, the Supreme Court reversed, holding that because Aviall had not been sued under CERCLA § 106 or § 107(a), it could not commence a § 113(f)(1) contribution action against Cooper. The Court stated that the first sentence of CERCLA § 113(f)(1) – commonly referred to as the “enabling clause” – meant that contribution under that section could only be sought “during or following a civil action” under CERCLA § 106 or § 107(a). The last sentence of CERCLA § 113(f)(1) – termed the “savings clause” – simply means that other causes of action for contribution, in addition to the one authorized by the enabling clause, may be available to a potentially responsible party. In fact, the 1986 amendments to CERCLA also created a right of contribution in

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§ 113(f)(3)(B), available to a person who resolves its liability to the United States or a state for some or all of a response action in an administrative or judicially approved settlement.

The Court left open the question of whether a party who is itself a responsible party may sue under CERCLA § 107(a) to recover its response costs. Prior to the Cooper decision, many lower courts had held that a responsible party could not commence a CERCLA § 107(a) action, but this conclusion may be revisited in light of the Supreme Court decision.

Implications

It is too soon to be certain of all impacts of the Cooper decision, but it clearly has implications for parties in pending CERCLA litigation, as well as companies performing an investigation and cleanup that want to recover their costs in the future.

Practically, the decision means that a private party may only assert a CERCLA contribution claim if it satisfies the conditions of either § 113(f)(1) or § 113(f)(3)(B). It is not clear that the “administrative” settlement referred to in CERCLA § 113(f)(3)(B) would include the typical consent order issued by environmental agencies such as the New York State Department of Environmental Conservation. For this reason, environmental counsel should carefully evaluate the terms of any consent order that has been signed to determine whether it resolves a party’s liability for CERCLA response costs, which is the predicate for a contribution claim under CERCLA § 113(f)(3)(B). Moreover, plaintiffs in pending CERCLA § 113(f)(1) contribution actions who have not been sued under CERCLA § 106 or § 107 should consider whether they must take action to protect their contribution rights, or whether they can recover their costs under CERCLA § 107(a). Defendants in pending CERCLA § 113(f)(1) contribution actions should consider motions to dismiss.

Companies that have conducted environmental investigation and remediation activities, and that plan to commence an action to recover their costs, should carefully evaluate their litigation options. This evaluation should encompass steps to ensure that the prerequisites for a CERCLA contribution action, under either § 113(f)(1) or § 113(f)(3)(B) are met, and also consider other viable claims under federal and state law.

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