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DISTRICT COURT CLARIFIES SUPERFUND ADMINISTRATIVE SETTLEMENT REQUIREMENT IN WAKE OF COOPER INDUSTRIES, INC. V. AVIALL SERVICES, INC.

Parties who entered into consent orders with the New York State Department of Environmental Conservation settling their liability for the cleanup of hazardous waste sites may find those consent orders insufficient to maintain an action for contribution under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") in the wake of a recent decision by the United States District Court for the Western District of New York, W.R. Grace & Co.-Conn. v. Zotos International Inc., 2005 U.S. Dist. LEXIS 8755 (W.D.N.Y. May 3, 2005).

Congress amended CERCLA in 1986 to add § 113(f)(1), which permits "any person" to seek contribution from "any other person" liable or potentially liable "during or following any civil action" brought under CERCLA § 106 or § 107(a). Section 113(f) also states nothing in that section diminishes the right of "any person" to bring a contribution action absent a civil action under CERCLA § 106 or § 107(a). Reading those two sentences together, for nearly 20 years it was common practice 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 claimed were also responsible for the contamination.

That all changed when the Supreme Court decided Cooper Industries, Inc. v. Aviall Services Inc., ___ U.S. ___, 125 S.Ct. 577 (2004) late last year. The Court held a private party who has not been sued under CERCLA § 106 or § 107(a) cannot maintain a contribution action under § 113(f)(1). After Cooper, 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), which creates a right of contribution for parties who resolve their liability to the United States or a state in an administrative or judicially approved settlement.

An open question post-Cooper was whether an "administrative settlement" under § 113(f)(3)(B) would include the administrative consent orders typically entered into with environmental agencies, such as the New York State Department of Environmental Conservation ("DEC"). The recent decision by the Western District of New York held that the typical DEC consent orders were not administrative settlements within the meaning of CERCLA § 113(f)(3)(B), and thus could not be the basis for a CERCLA contribution claim.

In W. R. Grace & Co.-Conn. v. Zotos Int'l Inc., Grace sought to recover contribution for costs incurred in connection with its investigation and remediation of hazardous waste at a company-owned landfill. Grace sought contribution pursuant to § 113(f)(1) and New York law. Prior to the Cooper decision, the parties had conducted a bench trial on the issue of liability, but the court had not rendered a decision. After the Supreme Court issued its decision in Cooper, Zotos moved to dismiss the complaint in its entirety, arguing (1) Grace had not been sued under § 106 or § 107, (2) the consent order Grace entered into with the DEC was not an administrative settlement as contemplated by CERCLA § 113(f)(3)(B), and (3) contribution was not available under New York law because Grace neither plead nor proved a tort predicate for its state law contribution claim. The court (Skretny, J.) agreed, and dismissed the complaint.¹

After noting that Grace could not rely on § 113(f)(1) because it had not been sued under § 106 or § 107, the court focused on the CERCLA provisions governing settlements. The court found that under CERCLA § 104, a state that wants to carry out actions authorized by CERCLA must first enter into an agreement to do so with the Environmental Protection Agency ("EPA"). Grace, 2005



U.S. Dist. LEXIS 8755, at * 14. Absent such an agreement, the state has no CERCLA authority, and the EPA is free to take separate actions, or select different remedies, that could expose the settling party to additional liabilities. Id. at * 17. While states may choose to act on their own, “section 113(f)(2) clearly contemplates a settlement under CERCLA liability.” Id. at *18 (internal quotations and citations omitted). Thus, the court concluded:

a state may settle a [potentially responsible party’s] CERCLA liability, assuming it has been delegated that authority to do so, by entering into an administrative settlement (monetary settlement pursuant to § 122(g) or (h) or a judicially approved settlement (cleanup settlement pursuant to §122 (d)(1)(A)).

Id. at * 18-19. The court then found the consent order entered into by Grace was not an administrative settlement within the meaning of CERCLA because (1) it was never judicially approved; and (2) it resolved only Grace’s liability to the state under state environmental laws, and not under CERCLA. The court noted the consent order “does not state that the DEC was exercising any authority under CERCLA, does not indicate that the EPA concurred with the remedy selected and does not provide a release as to any CERCLA claims.” Id. at * 23-24.

Having found Grace had no right to contribution under CERCLA, the court turned to Grace’s state law contribution claim. Contribution is a derivative claim, so a “party seeking contribution must be able to make out all the essential elements of an underlying cause of action.” Id. at * 29. Grace argued it could obtain state law contribution based on Zotos’ alleged arranger liability under CERCLA. The court disagreed, and dismissed the state law contribution claim. Id. at * 40.

The court found the source of a state law contribution claim must be derived from state law, not federal law. Id. at * 32. The court held:

In sum, CERCLA does not provide a right of contribution to parties such as Grace – ie, parties who have not been sued under CERCLA and who have not entered into an administrative or judicially approved settlement of their CERCLA liability. Grace has not identified any state law under which Zotos is liable, in tort or otherwise, for contamination at the Brewer Road site. Where Grace seeks to recover based on Zotos’ CERCLA liability, it is bound by the limitations on contribution actions imposed by CERCLA. Grace cannot circumvent those express limitations by seeking CERCLA-based contribution under New York’s contribution statute.

Id. at * 32-33.

Grace is appealing the decision to the United States Court of Appeals for the Second Circuit, where the issue will be one of first impression.

Environmental counsel should examine the terms of any proposed consent order entered into with New York State Department of Environmental Conservation to determine whether it settles both liability under state law and under CERCLA. In pending cases, motions to dismiss based on Cooper and Grace may be successful. Counsel negotiating settlements with the State should also consider having consent orders judicially approved, which would require the State to commence an action in federal court, and not rely upon administrative procedures. Moreover, plaintiffs in pending § 113(f)(1) contribution actions who have not been sued under §§ 106 or 107 should consider pursuing cost recovery under state law, such as a state law contribution cause of action predicated upon a finding of liability of the plaintiff under state law, or a cause of action based on restitution or indemnity.

If you have any questions, please contact:

<p>In the Capital District, call 518-533-3000 or e-mail: Robert H. Feller rfeller@bsk.com Kimberlee S. Parker kparker@bsk.com</p> <p>In Central New York, call 315-218-8000 or e-mail: Thomas R. Smith smithtr@bsk.com Robert R. Tyson rtyson@bsk.com</p>	<p>On Long Island, call 516-267-6300 or e-mail: Terry O’Neil toneil@bsk.com</p> <p>In New York City, call 646-253-2300 or e-mail: Louis P. DiLorenzo ldilorenzo@bsk.com</p> <p>In Western New York, call 716-566-2800 or e-mail: Richard C. Heffern rheffern@bsk.com</p>
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