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The Fallout of *Cooper* on CERCLA Settlements And Voluntary Cleanups

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The U.S. Supreme Court ruling in *Cooper Industries v. Aviall Services*¹ limited the class of plaintiffs able to file cost-recovery claims under the Comprehensive Environmental Response, Compensation and Liability Act by holding that a contribution action under CERCLA Section 113(f)(1) or 113(f)(3)(B) against potentially responsible parties could not be pursued unless and until the plaintiff was named in a civil action or entered into an administrative or judicially approved settlement agreement.

This decision immediately had a chilling effect on Superfund settlement actions, in that it dissuaded certain parties from coming to the settlement table before an action was “ripe” against them. It also thwarted state policies encouraging voluntary cleanups, in that it took away the ability of the remediating party to thereafter recover from others. Already, other litigation has transpired in the wake of this challenging decision, to attempt to rebalance the equities. However, in doing so, paradoxically, new questions have arisen, creating fodder for future litigation, such as:

- Where is future Superfund litigation headed?
- Does *Cooper* sound the death knell for voluntary cleanups?
- Does *Cooper* create a disincentive for PRPs to come to the settlement table? and
- How will the potentially conflicting statutes of limitations under Sections 107 and 113 be applied?

This article discusses the landmark *Cooper* holding and how the above issues either have been or will be addressed by subsequent litigation.

The *Cooper* Litigation

Cooper Industries, which owned and operated four aircraft engine maintenance sites in Texas, sold the sites to *Aviall Services*, which later discovered contamination that was determined to be caused by both parties. *Aviall* notified the Texas Natural Resource Conservation Commission, which threatened to pursue an enforcement action against *Aviall* if it failed to undertake remediation.

In short, TNRCC made clear to *Aviall* that it had to “volunteer” for cleanup action or be conscribed into doing so. *Aviall* was left with no other alternative but to spend \$5 million to clean up the properties under TNRCC supervision. Thereafter, *Aviall* sought to recoup some of its costs from *Cooper* through a CERCLA contribution action.

Aviall originally filed pleadings claiming causes of action pursuant to CERCLA under both Section 107(a) for cost recovery and Section 113(f)(1) for contribution, as well as state law claims. *Aviall* later combined its two federal claims into a single CERCLA Section 113(f)(1) claim, however, reframing its complaint pursuant to precedent in the U.S. Court of Appeals for the 5th Circuit.² *Aviall*’s decision to drop its Section 107(a) cost-recovery claim unwittingly proved to be its undoing.

In an appeal before the U.S. Supreme Court, the justices held that *Aviall* could not recover its costs from *Cooper* under Section 113. The court also held that *Aviall* had abandoned its freestanding Section 107(a) cost-recovery claim, but it declined to rule on whether *Aviall* had an independent implied right to contribution under that same provision, as the issue had not been addressed by the lower court. This deferral of the Section 107 issue not only left *Aviall* with little recourse, but dismayingly left open an important question as to whether a party that itself is a

PRP can pursue a Section 107 action against other PRPs either for cost recovery or for contribution, where it does not have an action for contribution under Section 113.

It is important to understand the distinction between the terms “contribution” and “cost recovery” to fully grasp the significance of the *Cooper* holding. “Contribution,” specifically addressed in CERCLA Section 113, provides for an *equitable* allocation of responsibility among PRPs. Contribution rights allow a CERCLA plaintiff to recover from other PRPs *only* that portion of funds it has expended that exceeds its portion of the liability.³

“Cost recovery,” addressed in Section 107, permits the government or a private party who has incurred response costs to hold other PRPs *jointly and severally* liable for all of its costs (meaning 100 percent liable, regardless of the particular PRP’s contribution).⁴ Some courts have denied PRPs the right to sue each other for Section 107 cost recovery, on the basis that liability among PRPs is *several* only, not joint and several.⁵

The question addressed by the Supreme Court in *Cooper* was whether a private party who has not been sued in a CERCLA Section 106 or Section 107(a) civil action⁶ may nevertheless obtain contribution under Section 113(f)(1) from other liable parties. In a decision that shook the foundations of prior CERCLA precedent, the court held that it could not. The court held that the enabling clause of Section 113(f)(1), which provides that any person *may* seek contribution from any other person liable or potentially liable “during” or “following” a CERCLA civil action, should not be read permissively to allow a contribution action in the absence of a civil action.

The court reasoned that, because established principles of statutory construction require that each word of a statute be construed to have operative effect, Congress would not have specified that contribution from other liable parties is available “during” or “following” a civil suit if it intended Section 113 contribution rights to be available to parties against whom no civil suit had been filed. The court further opined that the statutory “saving clause,” which states that Section 113(f)(1) does nothing to diminish a party’s rights to contribution that may exist independently of this provision, does not itself establish a cause of action nor expand Section 113(f)(1) to authorize contribution actions not brought “during” or “following” a Section 106 or Section 107(a) civil action.⁷

Although the court said numerous district court cases had held an implied right to contribution under Section 107 to be impermissible, the dissent duly noted that Supreme Court precedent had already been established by *Key Tronic Corp. v. United States*,⁸ which held that *any person*,

whether or not itself a PRP, can recover from another PRP under this general provision.⁹

Furthermore, the dissent noted that the district courts had allowed Section 107(a) to provide a common-law right to contribution before the enactment of the Section 113 provisions in the 1986 Superfund Amendments and Reauthorization Act.

The Fallout From *Cooper* Results in Circuit Court Split on Section 107

As a result of the landmark *Cooper* decision, the only plaintiffs with rights of “contribution” under CERCLA are those who have *not* voluntarily engaged in cleanup efforts. The plaintiff who does perform a voluntary cleanup, like Aviall, is foreclosed from seeking “contribution” under Section 113 and must instead sue other PRPs for “cost recovery” under Section 107.

However, the issue of whether a CERCLA plaintiff may sue other PRPs for “cost recovery” under Section 107 has been decided differently by the various circuit courts. In certain circuits, the CERCLA plaintiff who may itself be liable under Section 107(a) may seek cost recovery for all or part of its costs under Section 107 — recovering *all* of its costs even if it is liable for only a portion of the environmental condition. In other circuits, a CERCLA plaintiff who has incurred cleanup costs may only sue PRPs under Section 107 if the plaintiff itself would *not* be held liable under that section; in other words, only the “innocent landowner” may recover all of its costs, not a party who is partially responsible for the contamination.

The dichotomy among the circuits with regard to the availability of Section 107 cost-recovery actions is best exemplified by two particular cases. The first is *Consolidated Edison Co. of New York v. UGI Utilities Inc.*,¹⁰ decided by the 2d Circuit post-*Cooper*. The second is the 9th Circuit’s *Pinal Creek Group v. Newmont Mining Corp.*,¹¹ which was decided pre-*Cooper*, but which remains the law in the 9th Circuit even after the *Cooper* decision.

In the 2d Circuit, parties who voluntarily undertake cleanup efforts need not be deemed “innocent landowners” to recover under Section 107 from other PRPs. In the 9th Circuit, however, one PRP cannot recover its cleanup costs from another PRP under Section 107, creating a disincentive for any party who knows it is partially responsible for contamination to engage in voluntary cleanup prior to the initiation of a civil action.

In the 2d Circuit case plaintiff Consolidated Edison sued UGI Utilities for “contribution,” for costs it incurred, pursuant to a voluntary cleanup agreement that Con Ed had made

with the New York State Department of Environmental Conservation, to clean up 100 of its manufactured-gas plants. The agreement predated the *Cooper* holding. The 2d Circuit held that, in light of the holding in *Cooper*, Con Ed could not bring a contribution claim under Section 113(f)(1), as no civil action had been filed against it, nor under Section 113(f)(3)(B) since the voluntary cleanup agreement had not “resolved” Con Ed’s liability under CERCLA.

However, the 2d Circuit provided a reprieve for Con Ed by holding that the plain language of Section 107 allows it to pursue UGI for recovery of its costs, incurred voluntarily, even though Con Ed had never asserted a Section 107(a) claim in its pleadings. The court held that the plain language of Section 107 indicates that its provisions are available to “any person” who has incurred “costs of response,” reflecting the “economic disincentive” to voluntary cleanups that would result from a narrower reading of the statute. The 2d Circuit opined that Con Ed’s failure to cite a Section 107 claim did not effect a waiver of the company’s rights to pursue meritorious claims under that section.

The 2d Circuit went on to distinguish Con Ed’s position from the circumstances of the plaintiff in the court’s prior ruling in *Bedford Affiliates v. Sills*.¹² There, the 2d Circuit held that Section 107(a) could *not* be used by a PRP. However, Bedford Affiliates had performed a cleanup pursuant to several consent orders, which had established the percentage of Bedford’s liability for the cleanup.

The 2d Circuit in *Consolidated Edison* handily distinguished the two plaintiffs in these cases by noting that Bedford had been found liable for 5 percent of cleanup costs pursuant to the consent orders. Thus, recovery under Section 113 was available to it, since it had not truly engaged in “voluntary” cleanup efforts, but rather was compelled to participate in the cleanup by the consent orders. Accordingly, Bedford would be entitled, even after *Cooper*, to contribution from other PRPs under Section 113. As Con Ed’s cleanup was truly voluntary and the percentage of its liability had not been established, recovery of costs was available to Con Ed under Section 107.

The *Consolidated Edison* case did not address whether Section 107 contains an explicit or implied right of contribution, since the court had already importantly held that a party that, itself, is potentially liable for a portion of a cleanup can, nonetheless, pursue *all* of its cleanup costs from other PRPs under “cost recovery.” While this issue does not appear to have reached other circuit courts since *Cooper*, other district courts have followed the 2d Circuit’s lead.¹³

While being hailed as an incentive to PRPs to voluntarily engage in cleanup activities, it is the CERCLA plaintiff’s ability to recover 100 percent of costs from other PRPs under *Cooper* — despite being potentially liable for a portion of the problem — that has given the 9th Circuit and other courts pause and has resulted in the circuit split.

In *Pinal Creek* the 9th Circuit, analyzing the same language as the 2d Circuit in *Consolidated Edison* case, held that Pinal Creek Group, which had admitted that it was partly responsible for a portion of the contamination of the Pinal Creek drainage basin, could not bring a Section 107 “cost recovery” claim against other PRPs.¹⁴ However, the court did allow that a liable plaintiff who voluntarily incurred cleanup costs could unquestionably pursue a Section 107 “contribution” action against other PRPs, which the court said was an historically implicit right under that provision, the “contours and mechanics” of which are governed by Section 113.

Pinal Creek predates *Cooper*, however. As previously explained, *Cooper* eliminated a PRP’s contribution rights in the absence of a civil suit compelling it to engage in cleanup activities.

Unfortunately for PRPs seeking to avoid a civil action, *Pinal Creek* is still the law of the 9th Circuit and has been followed elsewhere. Accordingly, a PRP who has admitted to some liability for cleanup costs, or would be liable for such costs were a civil action commenced, cannot assert a Section 107 claim against other PRPs. As the U.S. District Court for the Eastern District of California recognized recently in *Adobe Lumber Inc. v. Hellman*, in the post-*Cooper* world, “[u]ntil the 9th Circuit cuts the implied right to contribution under Section 107(a) loose from the moorings of Section 113(f), PRPs ... who have voluntarily incurred cleanup costs will want for a clear right to seek contribution from other PRPs.”¹⁵

As a result of the above split in decisional law, PRPs must take pause before engaging in voluntary cleanup efforts. Some parties may prefer to wait for the commencement of a civil action under Section 106 or Section 107(a), to ensure contribution rights against other PRPs under Section 113(f)(1), rather than engage in a voluntary cleanup and be left with a limited or no right to recover their costs. This issue is ripe for resolution by the Supreme Court or Congress.

Remaining Issues

While resolving the issue of when Section 113 contribution rights are available to a party under CERCLA, *Cooper* raised a series of other issues not addressed by the

Supreme Court that the lower courts have endeavored to resolve.

For example, *Cooper* did not address how its holding would operate to affect the conflicting statutes of limitations governing actions under Sections 113 and 107. The *Consolidated Edison* court did, however, discuss the resolution of which statute of limitations should be applied if a plaintiff pleads both a Section 107(a) cost-recovery action, which carries a six-year limitations period, and a Section 113(f) contribution action, which carries a three-year limitations period.

The *Consolidated Edison* court responded to this question by holding that actions by parties who might themselves be liable were actually actions for contribution, and thus if Section 107 were being used for its implicit right to contribution, it would be governed by details set forth in Section 113.¹⁶ Hence, the three-year limitations period would apply.

In addition, *Cooper* spawned the question for ensuing litigation of what sort of settlement is sufficient to trigger contribution rights under Section 113(f)(3)(B). For example, by holding that a covenant not to sue from the New York Department of Environmental Conservation did not equate to settlement of federal CERCLA actions, the 2d Circuit cut off Con Ed's option for contribution under Section 113(f)(3)(B). The court read Section 113(f)(3)(B) to mean that an administrative settlement with a state that resolves liability to the state under state law only does not sufficiently resolve liability under CERCLA to trigger contribution rights under this provision.

Most states have analogs to CERCLA and those states routinely resolve liability with PRPs through administrative settlements. In some states, such as New York, such settlement schemes have been in place for many years, so that the state can settle cleanup cases without spending funds for litigation. However, the success of such a settlement format is typically dependent on preserving the contribution rights of settling parties.

For example, this viewpoint was expressed by the state of New York in an *amicus curiae* brief in *Seneca Meadows Inc. v. ECI Liquidating Inc.*,¹⁷ wherein the state distinguished *Seneca* from *Cooper* since *Cooper* involved an effort to seek contribution following a voluntary cleanup and *Seneca* involved a contribution action following a cleanup conducted pursuant to three consent orders. The state argued that it derives its right to settle cleanup actions under CERCLA Section 106, thus CERCLA contribution rights under Section 113(f)(3)(B) should follow for *Seneca Meadows*.

According to recent case law on this issue, there are critical factors to consider in interpreting whether settlement agreements go far enough to resolve CERCLA liability. In *Pharmacia Corp. v. Clayton Chemical Acquisition LLC*¹⁸ the U.S. District Court for the Southern District of Illinois held that an "administrative order on consent" with the U.S. Environmental Protection Agency did not constitute an administrative settlement for Section 113(f)(3)(B) purposes because the AOC never used the word "settlement." The court also denied the plaintiff's Section 113(f)(1) claim, holding that an AOC does not qualify as a civil action either.

Similarly, the 9th Circuit held in *ASARCO Inc. v. Union Pacific Railroad Co.*¹⁹ that ASARCO's cleanup agreement with the Nebraska Department of Environmental Quality under the state's voluntary cleanup program did not constitute an administrative settlement for the purpose of Section 113(f)(3)(B) since the agreement did not even mention CERCLA, listed only state laws as controlling, and even explicitly stated that its provisions were not a waiver, modification or suspension of any applicable federal law or regulation, which remained in full force and effect.

Although ASARCO did submit certain remedial work plans to the EPA for comment, it did not enter into any formal agreement with that federal agency. In fact, in its response to a letter from the mayor of Omaha, who expressed worry that the EPA would possibly prevent the cleanup from proceeding as planned, the EPA ceded lead agency status to the Department of Environmental Quality. Unfortunately for ASARCO, in this instance such agency deference ended up foreclosing its contribution rights.

To avoid this result in subsequent cases, the Department of Justice issued a guidance memorandum²⁰ in August 2005 to clarify contribution rights under AOCs and changed the title of the AOC models to "administrative settlement agreement and order on consent." With the guidance, the Justice Department clarifies that the EPA's AOCs resolve a settling PRP's liability within the meaning of Section 113(f)(3)(B). However, the guidance may receive only limited deference in federal court since it was not promulgated in accordance with the Administrative Procedure Act.²¹

Conclusion

In summary, *Cooper v. Aviall* has created new uncertainties, thus continuing the unfortunate long tradition of CERCLA implementation, whereby more costs are expended on litigation of the statutory complexities rather than in accomplishing the underlying legislative goal of remediation.

Hopefully, subsequent cases will resolve these uncertainties. In the meantime, however, lawyers need to be aware of and factor in these conflicting court decisions when crafting the best strategy for their clients.

Notes

¹ *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157 (Dec. 13, 2004).

² *Geraghty & Miller Inc. v. Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000) (holding that a Section 113 claim becomes a type of Section 107 claim for statute-of-limitations purposes, following the reasoning of the 10th Circuit in *Sun Co. v. Browning-Ferris Inc.*, 124 F.3d 1187 [10th Cir. 1997]).

³ To make the point clear, a PRP who is assessed to have caused 20 percent of the contamination at a site, but who pays 100 percent of the cleanup costs, can seek contribution from other PRPs for up to 80 percent of costs under Section 113.

⁴ *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945 (9th Cir. 2002) ("Importantly, because liability is joint and several, a defendant PRP in a cost-recovery action under Section 107 may be held fully liable for the entire cleanup costs at a site, despite the fact that the defendant PRP was in fact responsible for only a fraction of the contamination.").

⁵ *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) ("As is the case traditionally in contribution actions between tortfeasors, CERCLA's claim for contribution creates several-only liability among PRPs. Accordingly, the Pinal Group is foreclosed from imposing joint and several liability on [defendants], even with respect to any amount that may exceed the Pinal Group's own equitable share of the cleanup costs.").

⁶ CERCLA Section 106 authorizes the federal government to compel responsible parties to clean up contaminated sites whereas Section 107 authorizes the government to recover its response costs from potentially responsible persons. "Civil action" is commonly understood to mean a judicial proceeding.

⁷ The savings clause reads, "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under Section 9606 of this title or Section 9607 of this title."

⁸ *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

⁹ The *Key Tronic* court was divided on the question of whether the right to contribution is implicit in Section 107(a), as the majority held, or explicit, as the dissent argued. Notwithstanding, all of the

justices held that Section 107 enables a PRP to sue other covered persons for reimbursement.

¹⁰ *Consol. Edison Co. of N.Y. v. UGI Utils. Inc.*, 423 F.3d 90 (2d Cir. 2005).

¹¹ *Pinal Creek Group*, 118 F.3d 1298.

¹² *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

¹³ See, e.g., *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005); *Viacom Inc. v. United States*, 404 F. Supp. 2d 3 (D.D.C. 2005); *Metro. Water Reclamation Dist. of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913 (N.D. Ill. 2005); *Raytheon Aircraft Co. v. United States*, 2006 WL 1517762 (E.D. Kan. May 26, 2006).

¹⁴ *Pinal Creek*, 118 F.3d 1298 (9th Cir. 1997).

¹⁵ *Adobe Lumber Inc. v. Hellman*, 415 F. Supp. 2d 1070 (E.D. Cal. 2006).

¹⁶ *Consol. Edison*, 423 F.3d at 98.

¹⁷ *Seneca Meadows Inc. v. ECI Liquidating Inc.*, No. 95-CV-6400L, o *amicus brief filed* (W.D.N.Y. Apr. 29, 2005).

¹⁸ *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005).

¹⁹ *ASARCO Inc. v. Union Pac. R.R. Co.*, 2006 WL 173662 (D. Ariz. Jan. 24, 2006).

²⁰ U.S. Department of Justice, Interim Revisions to CERCLA Removal, RI/FS and ROD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f) (Aug. 3, 2005).

²¹ 5 U.S.C. § 551 *et seq.*

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