

The incredible shrinking CERCLA recovery

Port of Tacoma case further limits parties' rights to sue for CERCLA contribution

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, provides the Environmental Protection Agency (EPA) with broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. In essence, CERCLA's provisions provide a three-pronged approach to the prevention and clean-up of hazardous waste sites. First, it establishes prohibitions against the inappropriate storage, transportation, or disposal of hazardous substances and requires the clean-up of closed and abandoned hazardous waste sites. Second, it provides for liability of persons responsible for releases of hazardous waste. Finally, it establishes a trust fund to provide for cleanup when no responsible party can be identified.

CERCLA authorizes two types of actions: short-term "removal" actions, where a prompt response must be taken to immediately address releases or threatened releases of hazardous substances; and longer-term "remedial" response

actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life-threatening. CERCLA also enabled the EPA to establish the National Priorities List (NPL), a list of hazardous waste sites that identifies and prioritizes clean-up at those sites nationally that required removal or remediation of hazardous substances or conditions.



Colleen Tarpey

Pursuant to CERCLA's provisions, any person or entity, including the government, that incurs costs associated with the clean-up of a contaminated site, may sue any other responsible person or entity to recover those costs. CERCLA section 106 governs actions by the government, whereas CERCLA section 107 confers a right to sue upon private parties. Other persons or entities that may have contributed to the contamination at a site are frequently referred to as "potentially responsible parties," or PRP's. Frequently, current landowners forced to clean up an environmental hazard will sue prior landowners, operators, or tenants to force their "contribution" to the clean-up costs that the current landowner has expended in cleaning up the site. A claim for "contribution" is governed by CERCLA section 113.

The interplay between CERCLA Sections 106 and 107, and Section 113,

has received significant judicial attention in the past, as the statutory language is less than clear as to who can sue whom for what cost-recovery, and under what conditions. Specifically, the Courts have been wrestling with the issue of whether a PRP has to have been a party to a Section 106 or 107 action, in order to then sue other PRP's under Section 113 for their contributory share of the clean-up costs. This interplay is important because PRP's may sometimes voluntarily clean up their own site, or settle with EPA or another environmental enforcement agency, without any party having to resort to commencement of a Section 106 or 107 suit. While voluntarily cleaning up one's environmental mess is laudable and should be encouraged, those engaging in voluntary cleanup are finding themselves subsequently unable to pursue other PRP's who may have been responsible for the contamination, as a result of judicial interpretation of CERCLA's Section 113, which governs their right to seek contribution.

The Supreme Court Sets The Stage With Its Decision In *Cooper v. Aviall*, But Leaves Questions Unanswered

The Supreme Court's 2004 decision in *Cooper Industries v. Aviall Services, Inc.* is the seminal case in which the availability of a Section 113 suit by a PRP that had engaged in a voluntary clean-up was narrowed. In *Cooper*, Aviall Services was the sole contribution claim (CERCLA Section 113) plaintiff and there had

been no prior civil action whatsoever concerning the subject site. The Court summarized the issue before it as "whether a private party who has not been sued under [CERCLA] section 106 or section 107 may nevertheless obtain contribution under [CERCLA] §113(f)(1) from other liable parties." The Court concluded, "[w]e hold that it may not." Parsing the language of the statute, the Court stated that "[s]ection 113(f)(1) does not authorize Aviall's suit" because, pursuant to Section 113's plain language, "contribution may only be sought subject to specified conditions, namely, 'during or following' a specified civil action." (emphasis added)

The difficulty with *Cooper* was that, because Aviall was the only plaintiff and because there had been no prior civil action regarding the site at all, it left open for interpretation whether a contribution claim could stand where there had been a prior civil litigation regarding a site, but the party seeking contribution had not, itself, been involved in that litigation. While the *Cooper* court was clear that there had to have been a prior action under CERCLA §106 or §107, *Cooper* left it to other courts to determine whether the mere existence of a prior section 106 or 107 suit was sufficient to allow plaintiffs in future actions regarding the same site to seek contribution from other PRP's, even though they themselves had not been directly sued.

This January, the United States

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District Court for the Western District of Washington, was faced with resolving the issue that the *Cooper* court so deftly avoided answering. In a ruling issued on January 14, 2009, the United States District Court for the Western District of Washington dismissed, upon reconsideration, a third-party claim for contribution under CERCLA §113 as premature, further refining the Supreme Court's 2004 landmark decision in *Cooper Industries v. Aviall Services, Inc.* The District Court, in *Port of Tacoma v. Todd Shipyards Corp.*, dismissed Defendant Todd Shipyards Corp.'s ("TSC") contribution action against third-party defendant, the United States, because TSC had not been directly sued by any party under CERCLA §106 or §107. In *Port of Tacoma*, there was no previous CERCLA section 106 or 107 defendant, even though there had been prior litigation under those sections concerning the subject site.

The *Port of Tacoma* case falls in line with those cases since *Cooper* that have broadly construed the Supreme Court's holding in that case, and is a blow to CERCLA defendants who, on a narrower reading of the *Cooper* holding, would have been entitled to sue for contribution under CERCLA section 113 if any section 106 or 107 action had been commenced involving the same site, even though they had not been a party to that action.

History of the Tacoma Superfund Site And Litigation

The *Port of Tacoma* case centers around the Mouth of the Hylebos Waterway of the Commencement Bay

Nearshore/Tideflats Superfund Site (CB/NT Site), located in Tacoma, Washington. The CB/NT Site was used for naval shipbuilding activities during both WWI and WWII. In 1983, the EPA placed the CB/NT site on the National Priorities List and in 2005, the federal government filed a complaint at the request of the EPA against the Port of Tacoma and other defendants (the EPA suit), seeking recovery of response costs associated with the cleanup of the CB/NT Site under CERCLA § 107. TSC was not named as a defendant in the EPA suit. On March 15, 2005, the Port and the other defendants in the EPA suit entered into a Consent Decree, whereby they agreed to incur response costs associated with the release of hazardous substances at the CB/NT Site.

Thereafter, on March 5, 2008, the Port filed its suit for contribution under CERCLA §113 against TSC and others of the named defendants, seeking to recover costs it incurred for investigative and remedial actions taken in connection with the Consent Decree. TSC thereafter filed a third-party complaint against the United States, seeking contribution from the United States pursuant to CERCLA §113 on the grounds that the United States was also an "owner/operator" and had controlled all shipbuilding operations at the CB/NT Site.

Judge Benjamin Settle initially declined to dismiss TSC's Section 113 claims against the U.S., but, upon reconsideration, issued his January 14, 2009 ruling, finding that the court had "erred in determining that [TSC's] contribution claim could proceed because [TSC's] potential liability 'stemmed' from the liability the Port incurred as a result of a suit brought pursuant to [CERCLA section 107]."

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OCTOBER

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DECEMBER

- 3 Asset Preservation

Since the CERCLA §107 Action Failed to Resolve Liability, No CERCLA §113 Contribution Claims Are Available

TSC's lawyers, in opposition to the United States' motion to dismiss, cited the case of *Boarhead Farm v. Advanced Environmental Technology*. In *Boarhead Farm*, the United States District Court for the Eastern District of Pennsylvania (Davis J.) resolved the issue in favor of two plaintiffs who were not parties in the prior litigation regarding the site involved, and allowed them to seek contribution under CERCLA § 113. The *Boarhead Farm* court relied specifically upon the language of Section 113(f)(1), which states that "[a]ny person may seek contribution during or following any civil action under section 9606 of this title or under section 9607(a) of this title." (emphasis added) Distinguishing its holding from the holding in *Cooper*, the *Boarhead Farm* court noted the narrow grounds upon which *Cooper* was decided, relied upon the plain language of the statute, and asserted that the factual differences between the cases required a different result than in *Cooper*.

But other courts have disagreed. Indeed, the United States, in its motion for reconsideration, cited cases after *Cooper* in which the courts have construed the *Cooper* holding broadly, so as to prevent any plaintiff who has not pre-

viously been directly sued pursuant to CERCLA §106 or §107 from seeking contribution. For example, in the case of *United States v. Atlantic Research Corp.*, the Supreme Court recognized that a section 113(f)(1) action brought "following" a section 107 action is permitted if the section 107 action "establish[ed] common liability." In *Port of Tacoma*, however, the EPA's section 107 action against the Port did not quantify, resolve, or establish any liability whatsoever for TSC. The court, accordingly, held that a contribution claim was not available to it.

Conclusion

Despite initially concluding that TSC's contribution action was authorized, Judge Settle's reconsideration and dismissal of TSC's contribution claim recognizes the power of the *Cooper* holding (followed by *Atlantic Research*) with regard to limiting claims for contribution by potentially responsible parties in CERCLA actions who have not, themselves, been previously sued under §106 or §107. Indeed, in order to proceed with a contribution claim, potentially responsible parties must first be sued under section 106 or 107, and cannot rely merely on the possibility that they will, in future, potentially be subject to a claim.

Colleen M. Tarpey is a litigation associate at Garfunkel, Wild & Travis, P.C. representing clients in commercial, environmental, and estate litigation matters.

Shoemaker's Children program at NCBA

By Ellen G. Makofsky

The Nassau County Bar Association is providing its member attorneys and their guests the opportunity to discuss and execute a health care proxy on Wednesday, September 23, 2009 between 12 and 2 p.m. This is not a seminar but is designed to provide participants with an executed a health care proxy.

A Health Care Proxy allows an individual to appoint another to make health care decisions if the individual becomes incapacitated. The agent appointed is required to make decisions according to the principal's wishes. Where the wishes are unknown, the agent must act according to the principal's best interest except where decisions are made regarding

artificial nutrition and hydration. When a health care proxy does not exist, the individual's spouse or child cannot make medical decisions.

No one expects to become catastrophically ill or involved in an automobile accident. None of us wants to contemplate our own inability to make health care decisions because we are too sick to do so and/or we lack basic capacity. Life is capricious and sometimes awful things happen. We often counsel clients but many attorneys are the proverbial shoemaker's child, who has never executed a health care proxy. This just should not be. Stop by at the Nassau County Bar building and execute a health care proxy.

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