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Settling CERCLA Section 107 Claims

Law360, New York (February 25, 2009) -- Within the last five years, the U.S. Supreme Court has changed the landscape of CERCLA contribution claims in its decisions in *United States v. Atlantic Research Corporation* and *Cooper Industries Inc. v. Aviall Services Inc.*[1]

In *Atlantic Research*, the Supreme Court allowed Potentially Responsible Parties (PRPs) to recover against other PRPs under CERCLA Section 107.

Since then, environmental professionals have been discussing their concern that, when a PRP settles with the United States or one of the 50 states, CERCLA leaves the settling party open to later claims filed under Section 107 by other, non-settling PRPs.

But how concerned do we really need to be? To be sure, in the wake of these cases, the current statutory contribution protection is incomplete.

However, in a tell-tale sign, very few Section 107 claims have been brought on the heels of a state or federal settlement that provides contribution protection. In fact, such a claim may not be worth the litigation costs.

In a world of equitable allocation and where settlements with the United States often include a premium, it could be very difficult for the 107 Plaintiff to establish an additional right of recovery from a defendant who has already settled.

While settling parties should be aware that the risk of additional lawsuits and payments exists, the risk would not seem to justify walking away from a CERCLA settlement with the government if the settlement otherwise makes good business sense.

A Little Background

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was passed in response to the discovery of a number of headline-grabbing

abandoned contaminated sites. CERCLA gave the government the ability to investigate, designate and remediate contaminated sites in the United States.

Section 107(a) of CERCLA outlined the terms for who would be liable for these sites. CERCLA provided the government and certain private parties the ability to recover costs incurred in the remediation of these sites.

Although there was no explicit provision allowing liable parties to obtain contribution from other liable parties, courts routinely recognized an implied right of contribution.[2]

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA.

Among the SARA amendments: Congress created an express cause of action for contribution for certain parties liable or potentially liable under Section 107(a), codified as CERCLA § 113(f)(1), and an express right of contribution for those parties who resolved their liability to the United States or the State in an approved settlement, codified as CERCLA § 113(f)(3)(B).

Based on these provisions, courts nearly universally determined that Section 113(f) was a PRP's only available means of obtaining payment from other PRPs, and that Section 107(a) was reserved for the government or "innocent" parties to recover cleanup costs.[3]

That was the state of the law until 2004, when the Supreme Court handed down *Cooper Industries Inc. v. Aviall Services Inc.* In *Cooper*, the Supreme Court determined that a party who has not been sued under Section 106 or Section 107(a) may not obtain contribution from other liable parties under Section 113(f)(1).[4]

The court did not address the relationship and roles of Section 107(a) and Section 113(f).[5] Three years later, in *United States v. Atlantic Research Corporation*, the court took on some of those questions.[6]

In *Atlantic Research*, the court held that Section 107(a) allows PRPs to pursue cost recovery claims against other PRPs. While this additional cause of action solved problems for some PRPs, it raised a number of problems for others.

Settlement Protections: The Gap After Atlantic Research

In the SARA amendments, Congress provided the EPA with the authority to settle with PRPs as part of efforts to speed up site cleanups and minimize litigation.[7]

The EPA has the discretion to "provide any person with a covenant not to sue concerning any liability to the United States" under CERCLA.[8]

Additionally, Section 113(f)(2) provides that “a person who resolves their liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”[9]

As interpreted by case law prior to Cooper and Atlantic Research, Section 113(f)(2) protected settling parties from virtually any suit by a PRP because the courts considered the Section 113(f) contribution as the exclusive avenue for claims by other PRPs.

Following Atlantic Research and the renewed viability of section 107 claims, the protection afforded by Section 113(f)(2) is incomplete. In other words, after Atlantic Research, parties entering into state or EPA settlements, even with contribution protection language, are not protected from Section 107 cost recovery claims.

The possibility of future Section 107 litigation alone should not keep a party from settling with the EPA or one of the 50 states. The ability to bring a Section 113(f) counterclaim, and the limitations to a Section 107 cause of action narrow the avenues for recovery under Section 107.

Accordingly, if the settlement otherwise makes good business sense, the gap in contribution protection should not be a disincentive to settlement.

Section 107 Causes of Action: What Are the Risk Mitigants?

107 Plaintiffs Will Face Significant Challenges Defeating A Claim That A Settling Party Has Not Paid Its Fair Share

The potential for a Section 113 counterclaim acts as a strong deterrent to bringing a Section 107 claim against settling parties. A Section 113(f) counterclaim triggers equitable allocation, including consideration of the Gore factors¹⁰ and amounts already paid to the government in settlement.

Given that the EPA has already calculated that settling party's fair share of the site's cleanup and likely collected a premium on top of that, it could be very challenging for the Section 107 Plaintiff/113 Counterdefendant to prevail on a claim that the settling party should pay more.

The specter of the counterclaim and equitable allocation are meaningful risk mitigants, and perhaps the biggest reasons that there are not more Section 107 claims filed against settling parties.

107 Plaintiff Claims Must Still Fit Within the Statutory Parameters

As always, a Section 107 Plaintiff has to prove its right of recovery, which includes establishing that costs were necessary costs of response consistent with the National Contingency Plan.

This may very well be too burdensome for the potential 107 Plaintiff. These obstacles seem particularly significant when combined with equitable allocation.

Settlement costs and reimbursement costs are not recoverable under Section 107, which also limits the risk associated with a Section 107 claim.

In *Atlantic Research*, the court determined that money paid to others as a result of settlement or legal judgment may only be recovered under Section 113(f), not Section 107.[11]

Of course, recovery of settlement costs may also be barred by the terms of a covenant not to sue in a State or EPA Administrative Order on Consent (“AOC”).

Language in an AOC Makes a Difference in Mitigating Section 107 Risks

To attempt to make available all potential mitigants to a Section 107 claim, AOCs should include language that preserves the settling party’s right to assert counterclaims if sued.

AOCs nearly universally contain covenants not to sue, which prevent the settling parties from pursuing Section 107 or Section 113(f) causes of action against other parties.

Because asserting a Section 113(f) counterclaim is a vital component of mitigating Section 107 risks, it is important that the AOC include a carve out permitting the settling party to assert counterclaims if sued.

Preserving the right to assert the Section 113(f) counterclaim ensures that equitable allocation will be available in any potential litigation after settlement.

Additionally, as always, contribution protection extends only to those “matters addressed in the settlement.”[12]

Matters outside of those addressed in the AOC may be open to litigation; therefore, restrictive language with regard to dates, operable units, remediation activities and the like could open doors to further litigation and liability under Section 107(a).

Where Does That Leave Us?

The imperfect world of contribution protection after *Atlantic Research* should not deter settlements that otherwise make good business sense.

The gap in contribution protection opened by *Atlantic Research*, which allows PRPs to bring a Section 107 cost recovery claim, is not a significant enough risk to justify rejection of an otherwise appropriate settlement.

Practically speaking, a Section 107 Plaintiff has much to overcome to recover against a party who has already settled with a state or the EPA.

Assuming the 107 Defendant has brought a Section 113 counterclaim, the 107 Plaintiff will have to work to show that the settling party/107 Defendant has not paid its fair share.

That will be difficult given that the EPA or state has already made a calculation regarding fair share and tacked on a premium to that amount.

Additionally, as in all cost-recovery actions, the 107 Plaintiff will have to establish that the costs incurred were necessary costs of response under the National Contingency Plan, a challenge under the best of circumstances.

To reduce risks, counsel should seek to ensure that the right to bring a counterclaim if sued is carved out of the Covenant Not To Sue. With a right to bring a counterclaim and in light of the inherent limitations of a Section 107 claim, the risks associated with the gap in contribution protection are manageable.

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[1] United States v. Atlantic Research Corp., 551 U.S. 128, 127 S. Ct. 2331 (2007); Cooper Indus. Inc. v. Avial Servs. Inc., 543 U.S. 157 (2004).

[2] See e.g., United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985).

[3] See e.g., Dico Inc. v. Amoco Oil Co., 340 F.3d 525, 530 (8th Cir. 2003)(holding that an action brought by one PRP against other PRPs must be an action for contribution and citing authority from ten circuit courts with the same or similar holdings); FMC Corp., v. Vendo Co., 196 F. Supp. 2d 1023, 1032 (E.D. Cal. 2002) (citing Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997)); Taylor Farm Ltd. Liab. Co. v. Viacom Inc., 234 F. Supp. 2d 950, 970-72 (S.D. Ind. 2002) (citing Centerior Serv. Corp. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998)).

[4] Cooper Industries Inc. v. Avial Services. Inc., 543 U.S. 157, 160-61 (2004).

[5] *Id.* at 169.

[6] 551 U.S. 128, 127 S. Ct. 2331 (2007).

[7] CERCLA § 122; 42 U.S.C. § 9622.

[8] CERCLA § 122(f)(1); 42 U.S.C. § 9622(f)(1).

[9] 42 U.S.C. § 9613(f)(2).

[10] The Gore factors are derived from a 1980 bill that then Senator Al Gore introduced to amend CERCLA joint and several liability and include the following:

- 1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous substance can be distinguished;
- 2) the amount of the hazardous substance involved;
- 3) the degree of toxicity of the hazardous substance involved;
- 4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous substance;
- 5) the degree of care exercised by the parties with respect to the hazardous substance concerned; and
- 6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.

[11] *Id.*

[12] CERCLA § 113(f)(2); 42 U.S.C. § 9613(f)(2).