

NEW JERSEY LAWYER

Volume 14, Number 12

The Weekly Newspaper

March 21, 2005

\$5

Ruling makes it harder to recoup cleanup cost

CERCLA contribution at issue

The recent decision by the U.S. Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.* held that a potentially responsible party (PRP) cannot bring a contribution action under Section 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) against other PRPs unless the party seeking contribution was sued under CERCLA.



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That holding has dramatically changed what most lower courts have held and what most environmental attorneys believed when advising clients, namely that a PRP that voluntarily incurs cleanup costs to remedy contamination could bring a contribution action against other PRPs under Section 113(f). *Cooper* changes long-established judicial precedent and will make it more difficult for PRPs to recover cleanup costs.

CERCLA was enacted in 1980 to address contamination on real property caused by hazardous substances, broadly defined under the statute. Further, the government is empowered to respond quickly and effectively to hazardous substance spills that threaten the environment and ensure that those responsible for any damage, environmental harm or injury bear the costs for their actions. Under CERCLA, the government is authorized to take remedial efforts to clean up hazardous substance spills, then seek reimbursement from responsible parties.

Similarly, where there's an imminent and substantial endangerment to public health, the government may take legal action under Section 106 to compel PRPs to undertake their own cleanup. In either event, the government may recover its response costs against "covered persons"

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who contributed to the release or threatened release of hazardous substances. These persons typically include owners or operators of the site where the release occurred, as well as entities that disposed of hazardous substances there. In most cases, these entities or PRPs are jointly and severally liable for all cleanup costs.

As originally enacted, CERCLA contained no express provision to allow one PRP to seek contribution from another. However, by the mid-1980s, a number of district courts held that Section 107 had an implied right of contribution. To clarify this, Congress in 1986 enacted the Superfund Amendments and Reauthorization Act (SARA), which added Section 113(f)(1) to CERCLA.

This new section, which is at the center of *Cooper*, states: "Any person may seek contribution from any other person who is liable or potentially liable under Section 9607(a) of this title, during or following any civil action under Section 9606 of this title or under Section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 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."

As amended by SARA, it appeared that CERCLA contained both the implied cause of action for contribution established by Section 107 and the express right of contribution recognized by Section 113(f).

Cooper case

Cooper Industries owned four properties in Texas that were sold to Aviall Services in 1981. Aviall operated at these properties several years, subsequently discovering soil and groundwater contamination; it notified state authorities. Although the state informed Aviall it was violating state environmental laws and directed it to remedy the contamination, neither the state nor the federal government took any enforcement action against Aviall.

Under state supervision, Aviall voluntarily cleaned up the site at an approximate cost of \$5 million. To recoup some of that, Aviall sued Cooper under CERCLA Sections 107(a) and 113(f)(1) and state law theories of recovery. Aviall later amended its complaint to combine its 107(a) and 113(f)(1) claims into one, as required by 5th Circuit precedent.

Both parties moved for summary judgment; Cooper's motion was granted. The U.S. District Court of the Northern District of Texas ruled Aviall abandoned its Section 107 claim, and that its Section 113 contribution claim was not viable since Aviall had not been sued under either Section 106 or 107 as required to maintain a Section 113 contribution claim.

Aviall appealed; the divided 5th Circuit panel affirmed, holding that to initiate a contribution action, a PRP must do so during or after a cost recovery action.

On rehearing *en banc*, the 5th Circuit reversed, holding Section 113(f)(1) "allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has been sued under [Section] 106 or 107." The *en banc* majority found Section 113(f)(1)'s "saving clause" controlling. That clause states Section 113(f) does not "diminish the right of any person to bring an action for contribution" absent a civil action under either 106 or 107(a). According to the majority, the saving clause prevents interpreting 113(f)(1) as limiting a PRP's right of contribution to only during or after a Section 106 or 107(a) civil action.

High court reversal

Cooper sought review from the Supreme Court, which reversed the appeals court. In writing the opinion, Justice Clarence Thomas focused on the plain meaning of Section 113(f)(1). The court determined the use of "may" in the section's first sentence was not permissive and in the context of that section meant contribution claims under Section 113 were authorized only under certain conditions, namely "during or following" a civil action under either 106 or 107.

The court further observed that allowing a PRP to sue under 113(f)(1) at any time would render other language in that section superfluous. The court reasoned that if Congress intended a PRP to file a contribution action at any time, the words "during or following" would not be needed. The court stated there is "no reason why Congress would bother to specify conditions under which a person may bring a contribution claim and at the same time allow contribution actions absent those conditions."

Thomas also rejected the argument that the savings clause permitted contribution actions without a civil action initiated. The court stated the purpose of the saving clause was to preserve any claim a PRP had independent of Section 113(f)(1). The court noted that to read the saving clause as Aviall suggested (that a Section 113 contribution action could be filed at any time) would render other provisions of the section meaningless.

Because of the statute's plain language, the court refused to consider CERCLA's purpose — to encourage voluntary cleanups of contaminated property. However, the court acknowledged Aviall's argument that it may be able to recover its cleanup costs under Section 107(a). While acknowledging the argument, the court refused to decide that issue, citing numerous lower court decisions holding a private PRP may not pursue a Section 107(a) cost recovery action against other PRPs for joint and several liability. The court, however, left open Aviall's right to pursue a Section 107(a) cost recovery action against Cooper for some form of liability other than joint and several. The court also refused to determine whether the implied right of contribution that existed

prior to SARA was still viable and also left open whether an administrative cleanup order would qualify as a civil action under Section 113(f)(1). Therefore, based on these open issues, the court remanded the decision to the lower court.

Justice Ruth Bader Ginsburg, joined by Justice John Paul Stevens, dissented. While agreeing with the majority's interpretation of Section 113(f)(1), Ginsburg would have allowed Aviall to pursue its contribution claim under Section 107. The dissent criticized the majority's opinion for deferring whether Aviall had a right to pursue a Section 107 contribution claim.

Impact in New Jersey

The impact of *Cooper* may be minimal for cost recovery actions involving properties in New Jersey because of the state's Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq.* While the Spill Act is similar to CERCLA, it does not contain the limitation for contribution actions. However, owners of properties outside New Jersey seeking to hold other PRPs responsible for cleanup costs may find it difficult to recover if that state does not have a law similar to the Spill Act.

Without a strong state law, a PRP that voluntarily cleans up a property can't recover from other PRPs under CERCLA unless it is sued by a federal or state agency. However, given limited government resources to initiate such actions and that most contamination sites do not pose an imminent public threat, any government action against a PRP is unlikely. It is clear, therefore, without such a suit, recovery under Section 113(f)(1) is not possible.

Thus, a PRP that intends to voluntarily remedy contamination and seek contribution from other PRPs should involve governmental agencies. Specifically, the PRP should enter into an administrative or judicially approved settlement with the federal government. While it is unclear whether this approval would satisfy the prerequisites of a civil action under Section 106 or 107 for a contribution action under Section 113(f)(1), the party would at least have an argument that it does, given that the U.S. Supreme Court left this issue open. Another option is the use of CERCLA's citizen provisions to obtain relief to force the other PRPs to remedy the contamination.

As to PRPs embroiled in litigation, amending their complaint to include a claim under Section 107 is advisable. Again, the uncertainties of the Supreme Court decision regarding a right to contribution under Section 107 will allow the PRP to make an argument for contribution under CERCLA.

Purchasing property in states that lack strong environmental laws similar to the Spill Act will require purchasers to think twice without adequate representations and indemnifications. Without such contractual obligations, the former owners may avoid contributing to any cleanup. Similarly, while pre-acquisition audits were usually done, their importance is even more so if a potential purchaser's right to pursue other PRPs is limited. Therefore, it is critical that any environmental consultant performing such an audit be held accountable for failure to identify environmental contamination so that the purchaser won't be left shouldering all environmental cleanup costs.