Voluntary Remediation Bars CERCLA Contribution Claim – Will the Supreme Court Delineate what Remedies are Available to Recover Costs, and to Whom?

09.23.2011 | By Reed W. Neuman

A federal court in New Jersey recently ruled that a party that voluntarily cleans up a site does not have a claim for contribution pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund. Following recent U. S. Supreme Court precedent that has significantly altered the CERCLA landscape, the district court held in *Queens West Development Corp. v. Honeywell International Inc.*, D. N.J., No. 3:10-cv-04876, 8/17/11, that a party incurring costs pursuant to a state voluntary cleanup program does not meet the prerequisite for asserting a CERCLA section 113 contribution claim, but rather must seek cost recovery under CERCLA section 107. Parties incurring site remediation costs – whether tied to historic manufacturing activity or management of an impacted property – often seek to spread some of those costs to other parties who may share responsibility. The *Queens West* decision illustrates one aspect of a more complex issue left unresolved by a 2007 Supreme Court decision, one that a recent petition for review may prompt the Court to address, that may clarify the legal pathways for parties seeking to shift site costs to others.

The action stemmed from the cleanup of a contaminated property in Long Island City, New York. The plaintiffs, current owners and prospective developers of the property, undertook investigation and remediation efforts under the oversight and approval of the New York State Department of Environmental Conservation (NYSDEC), pursuant to the NYSDEC's Brownfield Cleanup Program (BCP) and Voluntary Cleanup Program (VCP). The plaintiffs claimed that, at the conclusion of ongoing site investigation and remediation work under the BCP and VCP, they would receive a release from the NYSDEC absolving them of liability. The plaintiffs had filed claims in the alternative under CERCLA sections 107 and 113; the district

court granted the defendant's motion to dismiss the CERCLA section 113 contribution claim.[1]

The district court framed the issue as whether a party that voluntarily undertakes cleanup activities can simultaneously maintain a claim for contribution under CERCLA section 113(f)(3)(B) and for cost recovery under section 107(a). The district court's decision relied in large part on the Supreme Court's 2007 decision in *Atlantic Research* and the Court's focused discussion therein on the distinction between a Section 107 cost recovery action and a Section 113 contribution action. The *Queens West* district court held somewhat summarily that the plaintiffs did not have a CERCLA section 113 contribution claim because their investigation and remediation efforts were undertaken voluntarily, quoting the Supreme Court's observation in *Atlantic Research* that "costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B)..." *Atl. Research Corp.*, 551 U.S. at 139 n. 6.

The district court also supported its holding on the basis that the plaintiffs had not resolved their liability with the state or federal government in an administratively or judicially approved settlement, as required by the CERCLA section 113(f)(3)(B). In the district court's opinion, the plaintiffs' allegation that they had resolved or will resolve their liability with the state (under the VCP agreement) did not go far enough, and that resolution of liability must be accomplished through an administratively or judicially approved settlement. The district court also explained that the plaintiff had not alleged that it was itself a PRP, and that the plaintiffs were not in any way at fault or responsible for the contamination at the site.[2] Relying upon the Supreme Court's *Atlantic Research* decision, the district court noted that a contribution claim by its nature is available only to "tortfeasors" who are at fault for the contamination and who, by court judgment or settlement agreement, have paid a disproportionate share of a cleanup and, as a result, wish to recoup some of that overpayment through contribution from other responsible parties.

The *Queens West* holding further adds to an emerging reality of post-*Atlantic Research* CERCLA jurisprudence: that a party can wear only one hat for purposes of maintaining a CERCLA action. Putting aside the strategic reasons a party might wish to maintain both a Section 107 cost recovery and a Section 113 contribution claim, the district court's conclusion follows the Supreme Court's suggestion in *Atlantic Research* that a party may not elect one claim or the other if the party's procedural posture dictates the specific claim that can be maintained. However, the district court seems to struggle with how to reach what should be a simple conclusion. Indeed, the district court's first basis for its holding, that the plaintiffs had not alleged they were tortfeasors or the cause of the contamination, is not necessary: a property owner who did not cause or contribute to the contamination nonetheless can be held liable by virtue of its owner status and included in the pool of candidates to help implement and/or finance a cleanup.

Nevertheless, the district court's holding in *Queens West* held squarely, on the facts before it, that since the plaintiffs did not meet the Section 113 criteria, they were limited to a Section 107 claim. This falls in line with an emerging consensus of CERCLA jurisprudence that true "volunteers", i.e., site purchasers or developers who undertake cleanups under VCP-like programs, can avail themselves only of a 107 remedy.[3] Likewise, there is general agreement that "responsible parties" (PRPs) seeking compensation for costs paid to reimburse the government or other parties, under compunction of a judicial or administrative action, are limited to a 113 remedy.

What's still unclear is what options are available to PRPs with cost claims arising under the more complicated fact situations falling between the two ends of the spectrum. Whether in response to a government directive, or as a prudent response to a credible threat of government enforcement action or private liability suit, or even just for strategic business reasons, PRPs often become "compelled" to

implement cleanup work and incur cleanup costs. These are not true "volunteers," initiating redevelopment of someone else's contaminated land, nor are they signatories to a "settlement" prescribed in CERCLA section 113. Rather, these PRPs are motivated to conduct the work themselves, often as a risk- or cost-management action, while accepting the consequences of taking on a disproportionate share of costs. The federal courts, and more recently the Supreme Court, while anything but clear about the options available to PRPs like these that wish to spread some of those costs over other responsible parties, have generally accepted the notion that pro-active undertakings help further CERCLA policy. As a result, courts have generally sought ways to avoid leaving these "compelled" PRPs without a remedy.

Which remedy is available to whom can make a real practical difference, as proceeding under Section 107 generally is more advantageous for claimants than Section 113. Section 107 prescribes a longer statute of limitations than does Section 113, and the courts have regularly afforded Section 107 claimants the ability to hold defendants jointly and severally liable for cleanup costs, which also enables claimants to be more selective in naming defendants, eliminating the risk of failing to name all equitable contribution targets. Likewise, proceeding under Section 107 can shift to defendants at least a portion of the risk of unaccounted-for, or "orphan" shares of responsibility. Through a recent petition for review, the Supreme Court has the opportunity to speak more clearly as to what options are available to whom , and under what circumstances, an area it left open in *Atlantic Research* and further clarify the 107/113 dichotomy.

The Supreme Court recently was asked to grant certiorari in a matter involving a CERCLA question decided by the Eighth Circuit in *Morrison Enterprises LLC v. Dravo Corp.*, in which the plaintiff was precluded from maintaining a section 107 action because it was eligible to maintain a claim under section 113(f). In *Morrison*, the plaintiff remediated a site that it alleged was contaminated in part by hazardous substances (TCE) from a non-party whose facility was upstream of the plaintiff's site. The plaintiff sought to assert a claim under section 113(f) in connection with remediating the hazardous substances for which it was liable in addition to asserting a claim under section 107 to recover all of its costs associated with cleaning up the TCE for which it was not liable. The defendant moved to dismiss the section 107 claim. Both the district and the Eighth Circuit agreed that the plaintiff's section 113 contribution claim was its exclusive remedy, notwithstanding the plaintiff's assertion that costs to clean up the TCE for which it was not liable were incurred "voluntarily" and provided the basis for a section 107 cost recover claim for those costs.

The complex factual situation in *Morrison Enterprises* allows the Supreme Court to declare more comprehensively what remedies are available to whom in those factual situations falling outside the parameters in *Atlantic Research*. The type of multifaceted fact scenario presented by *Morrison Enterprises* is becoming more commonplace, where a PRP settles a portion of a cost claim – by judgment or settlement agreement -- and then finances a "voluntary" cleanup under a state program. In this circumstance, will the court allow the PRP to bifurcate its claims for cleanup costs into both a Section 107 cost recovery claim and a Section 113 contribution claim? It is hoped that the Supreme Court will accept the *Morrison Enterprises* petition to decide not only the facts before it, but also to bring some clarity to the muddied Section 107/113 landscape.

[1] By its terms, CERCLA section 107(a) allows a party that has incurred costs to investigate and/or clean up a site to initiate an action against any other party that falls into one of the following categories: (1) has owned/operated a site, or (2) has generated, (3) transported or (4) arranged for the transport of hazardous substances to a site. Parties falling into one or more of these categories commonly are referred to as "potentially responsible parties" or "PRPs". As a corollary, CERCLA section 113(f) allows any party that has

paid costs pursuant to a claim by a private or government party or a party that has "resolved its liability" with the federal or state government to assert a claim against any other party for contribution towards such costs.

[2] One plaintiff was the owner of both parcels at the time the investigation and remediation activities took place and the associated costs were incurred. The district court did not evaluate whether the plaintiffs might be PRPs by virtue of being the current "owners" of a facility.

[3] Use of the term "volunteer" by the courts, and adopted by the Supreme Court in *Atlantic Research*, is somewhat misleading in the context of whether a party has a CERCLA section 107 or 113 claim. The government, be it state or federal, can effectively coerce a party to investigate or clean up a site through notice letters, directives and other actions short of a formal administrative order or judicial action. A party taking action is not necessarily acting "voluntarily" in response to this "persuasion." Nonetheless, as these situations differ from those prescribed as the requisites to bring a CERCLA section 113 contribution action, investigation and cleanup activity performed in response to these tools are referred to by the courts as "voluntary."