Settling Party Barred from Bringing a CERCLA Section 107(a) Claim

March 8, 2012 By Sedina L. Banks

This week, in the case of Solutia, Inc. and Pharmacia Corp. v. McWane, Inc. (Solutia), the Eleventh Circuit held that a party that performs a cleanup in compliance with a consent decree has no right under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") section 107(a) to recover its cleanup costs. This case represents a continuance of the courts' clarification of when claims can be brought under CERCLA sections 107(a) and 113(f). To understand the significance of this case, it is best to start by examining the United States Supreme Court cases that proceeded it, beginning with the Supreme Court's decision in Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

In Cooper v. Aviall, the Supreme Court turned decades of CERCLA jurisprudence on its head. Relying on the plain language of CERCLA section 113(f), the court held that a potentially responsible party ("PRP") can only seek contribution under section 113(f) from other parties "during or following" a civil action under CERCLA section 106 or 107. Therefore, a party that had not been sued and had not entered into a settlement could not seek contribution under CERCLA section 113(f). The court did not address when a party could bring an action under section 107.

Prior to Cooper v. Aviall, courts as a matter of course permitted PRPs to bring contribution actions under section 113(f), regardless of whether they had been sued under CERCLA. Conversely, many courts did not permit PRPs to bring suit under section 107(a), which provides for joint and several liability. The Supreme Court left open the question of whether PRPs that voluntarily incurred response costs could now bring suit under section 107(a). Three years later the Supreme Court answered this question with a resounding YES.

In United States v. Atlantic Research Corp., 127 S.Ct. 2331 (2007), the Supreme Court held that all persons who voluntarily incurred response costs may bring a cost recovery action under section 107,

regardless of whether they were a PRP. Thus, PRPs who voluntarily cleaned up a site were no longer foreclosed from bringing a section 107 action. While this decision certainly brought a sigh of relief from those private parties seeking cost recovery under CERCLA, it left open some issues for further consideration. Namely, in footnote 6, the court recognized that there may be situations in which a PRP sustains expenses pursuant to a consent decree following a suit under CERCLA. In this situation, the "PRP does not incur costs voluntarily but does not reimburse the costs of another party." The court expressly did not decide whether these "compelled costs" of response were recoverable under section 107(a), 113(f) or both. In other words, the court left open the question of what action can a party bring that incurs costs performing cleanups pursuant to a consent decree?

This brings us to the Eleventh Circuit's decision in Solutia. In Solutia, Solutia, Inc. and Pharmacia Corp. ("Solutia and Pharmacia") entered into a consent decree to cleanup PCB contamination at a site. Solutia and Pharmacia discovered that they were cleaning up lead waste materials originating from local foundries. After sharing this information with the government, they sued the foundries under sections 107 and 113 of CERCLA. Meanwhile, the government entered into a de minimis settlement with respect to PCBs with the foundries, in exchange for them assuming responsibility for the lead cleanup.

The lower court found that Solutia and Pharmacia's section 113(f) claim against the foundry defendants was barred under CERCLA section 113(f)(2). Section 113(f)(2) provides that a person who has settled with the United States in a judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Because the foundry defendants had settled with the EPA, Solutia and Pharmacia could not bring a section 113(f) claim against them.

Citing the prior Supreme Court cases, the Solutia court stated that cleanup costs incurred voluntarily and directly by a party are recoverable only under section 107(a). In contrast, if a person is forced to reimburse a third party for its cleanup efforts, as mandated by a settlement under CERCLA, than that party may only seek contribution for those reimbursement costs under section 113(f). The court held that section 113(f) is the exclusive remedy for a party to recover response costs incurred pursuant to a consent decree. In reaching this decision, the court cited its concern that allowing parties to

recover under either provision would allow them to circumvent the different statue of limitations for bringing a section 107(a) recovery claim versus a section 113(f) contribution claim. It could also allow the parties to "thwart the contribution protection afforded to parties that settle their liability with the EPA," like the foundry defendants. Finally, the court cited its concern that it would allow defendants to impose joint and several liability.

The court effectively foreclosed Solutia and Pharmacia from bringing any CERCLA action against the foundry defendants. In light of this case, parties will need to consider whether they want to settle with the government before recovering their costs from other PRPs. If parties prematurely settle with the government, they may be foreclosed from bringing any CERCLA action against other PRPs if these parties settle with the government first. In hindsight, Solutia and Pharmacia may have been better off had they voluntarily cleaned up the site and never settled with the EPA. Under that scenario, they still could have brought a section 107(a) claim against the foundry defendants. In any event, it will not be surprising if the Supreme Court takes up a case to finally resolve this issue.