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U.S. Supreme Court Affirms Superfund Cost Recovery Right for Volunteers

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On June 11, the U.S. Supreme Court ruled, in *United States v. Atlantic Research Corp.*, that businesses and other parties that incur environmental cleanup costs under the Superfund statute, but who have not resolved their liability with the federal government, have a right to recover those costs from those responsible for contamination at a site. Until this decision, there was uncertainty over whether businesses in this situation had a statutory right to recoup such costs. Three years ago, the Court declared that only those that had been sued, or had settled with the government, had statutory "contribution" rights. So this decision is a significant affirmation of businesses' rights to recoup all or a share of their cleanup costs from other parties.

TWO DISTINCT BASES FOR SUIT

As a result of the *Atlantic Research* decision and the Court's decision three years ago, it is now clear that businesses can seek to recoup all or a portion of their cleanup costs in two distinct ways. First, if they have incurred cleanup costs consistent with the statute, they can bring a "cost-recovery" action under statutory section 107(a). Second, if they have resolved their liability with the government or have been sued by another party, they may bring a "contribution" action against other liable parties under statutory sections 113(f)(1) or 113(f)(3) to recover the amounts they have paid or will pay in excess of their relative share of culpability.

The Court emphasized that these are distinct bases for bringing suit. If a business is seeking to recoup costs it paid the government to settle the government's claims which it believes were greater than it was responsible for, then it must seek "contribution" under sections 113(f)(1) or (f)(3). If, on the other hand, the business is seeking to recover cleanup costs incurred from a "voluntary" cleanup (i.e., one for which the business was, in part, liable but was not compelled by the government to perform), it should seek "cost recovery" under section 107(a).

Businesses that have faced Superfund liability will recognize that their situation may not fit neatly into these distinct categories. For example, in a typical settlement with the government involving a Superfund site to which many facilities have sent their waste, settlers do two things. They repay some of the government's cleanup costs, and they commit to conduct the balance of the cleanup until the work is done. With respect to the repayment to the government, the settler would be entitled to bring a section 113(f)(1) contribution action against non-settlers. With respect to the commitment to undertake future work, the settler should be entitled to bring a section 107(a) cost-recovery action against non-settlers. The Court recognized this complexity in typical settlement agreements but left it for another day to resolve precisely what rights such settling parties have.

INDUCEMENT TO VOLUNTARY CLEANUPS

Potentially the greatest effect of the Court's decision is to create an incentive for liable parties to "voluntarily" undertake cleanups. Many business representatives urged the Court to rule as it did – with that benefit as an outcome.

How the decision will encourage voluntary cleanups can be seen from the facts of the *Atlantic Research* case itself. Atlantic Research leased property at a facility operated by the U.S. Department of Defense, where it retrofitted rocket propellers under a government contract. When soil and groundwater contamination was discovered at the site, Atlantic Research cleaned up the site at its own expense and then brought claims against the United States to recoup those costs.

Initially, Atlantic Research claimed both for cost recovery under section 107(a) and contribution under section 113(f)(1). But following the Supreme Court's decision three years ago that contribution was available only to those that had resolved their liability to the government – which Atlantic Research had not (it was a voluntary cleanup) – Atlantic Research dropped its contribution claim. The trial court sided with the government's position that Atlantic Research, as a liable party itself, could not seek cost recovery under section 107(a). The appeals court reversed, and the Supreme Court agreed with the appeals court.

What does this mean for other businesses that "voluntarily" clean up their (or others') property and then seek to recoup their costs from others? In order to recover costs, "volunteers" must continue to surmount certain statutory hurdles. First, to be recoverable, the costs volunteers incur must be consistent with a document called the National Contingency Plan. That Plan specifies how site contamination is to be characterized, how remedial alternatives are to be evaluated, and how remedies are to be chosen from among the alternatives. It also sets cleanup standards. Second, for costs to be recoverable, the public must be involved in the site characterization and remedy selection process. That is a step many businesses would prefer to avoid in the context of a voluntary cleanup. But for costs to be recoverable, it is mandated.

Something else to keep in mind: the Superfund statute does not allow recovery of cleanup costs for non-waste petroleum releases, for example, releases from underground storage tanks that contain unleaded gasoline at service stations. So one cannot rely on the Superfund statute to afford an avenue for recovering cleanup costs for responding to gasoline releases. Statutory relief for gasoline releases under federal law is injunctive only. That is, one must obtain an order against the tank owner or operator to perform the cleanup.

SETTLEMENTS WITH THE GOVERNMENT PROVIDE LIMITED PROTECTION

While the business community is expected to warmly embrace the Court's *Atlantic Research* decision, the decision is not without some downside. In describing distinct cost-recovery and contribution rights, the Court noted that settlers' statutory protection from contribution actions under section 113 do not extend to cost-recovery actions under section 107.

For many years, a substantial inducement to settling a Superfund claim brought by the government has been obtaining "contribution protection" through a settlement with the government. That essentially meant freedom from further litigation risk in connection with the Superfund site. As long as the settler fulfilled its obligation under the settlement agreement, it was shielded from other claims associated with the site. In recognizing the distinct cost-recovery right, the Supreme Court indicated that the statutory provision allowing the government to shield settling parties from contribution actions did not protect against cost-recovery actions.

So, while one might be concerned that an unintended consequence of the *Atlantic Research* decision could be settlers facing more litigation, practically speaking that may be an infrequent outcome in typical cases. In the first instance, in settlements with the government, settling parties generally relinquish their claims against other settlers, so they could not assert cost-recovery rights against their fellow settlers. Depending upon how the courts ultimately decide the question that the *Atlantic Research* Court left for another day, such settlers would, however, have cost-recovery actions against non-settlers.

But what about non-settlers? Doesn't the *Atlantic Research* Court allow them to sue settlers? Theoretically, yes, but one has to go back to the predicate for maintaining a cost-recovery action to identify the practical effect of the decision. The non-settler would have to have incurred cleanup costs consistent with the statute to maintain such an action. It is possible – but generally unlikely – that non-settlers will have incurred substantial recoverable cleanup costs that will provide the basis for their bringing a cost-recovery action.

UNCERTAIN LIABILITY STANDARD

The Court's decision left unresolved the standard that applies to liable parties' cost-recovery right. Traditionally, section 107(a) and section 113(f) have been governed by different standards of liability. Actions brought under section 107(a) are said to be governed by a joint-and-several standard of liability. This is an extremely favorable standard for the claimant. It means that one liable defendant can be held accountable for the entire indivisible harm. Where wastes have mixed together, it is difficult to establish that the harm is anything but indivisible. The joint-and-several liability standard has allowed the government to

seek cost recovery from, for example, the dozen highest waste volume contributors to a site that received waste from hundreds of companies. The targets of the government action can, in turn, seek contribution from the hundreds of other companies that used the site.

Contribution actions under section 113(f), on the other hand, are governed by an equitable standard. Parties are liable, essentially, only to the extent they are culpable, and a good deal of law has developed for apportioning liability equitability, taking into account such factors as waste volume and the toxicity of the waste.

In a footnote in its decision, the Court coyly stated, "We assume without deciding that section 107(a) provides for joint and several liability." More directly, the Court held that a defendant in a section 107(a) cost-recovery suit could "blunt any inequitable distribution of costs by filing a section 113(f) counterclaim." Such a counterclaim would be available once a company was targeted by a section 107(a) cost-recovery action.

What the *Atlantic Research* decision did not address is a party's ability to recoup, under a joint-and-several liability standard, 100 percent of its costs from non-settling liable parties. That is a permissible outcome of the Court's ruling. Such an outcome would provide a somewhat strange inducement to voluntary cleanups.

Volunteers could rush to cleanup sites without government compulsion, in the hope of recovering all their costs from non-settlers.

Overall, the *Atlantic Research* decision is a positive development. It will not be "the last word" in this increasingly complex area of the law. One hopes that the chink in the contribution protection armor of government settlements will not be fatal to parties' continuing to enter into those settlements. Whether it will be the inducement to voluntary cleanups – as proponents of this outcome claimed it would – remains to be seen. There are some substantial hurdles to voluntary cleanup costs that the decision did not eliminate.

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