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CERCLA Contribution Rights After *Cooper*: Supreme Court Shuts One Door But Will Lower Courts Open Others?

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I. Introduction

The U.S. Supreme Court's decision in *Cooper Industries Inc. v. Aviall Services Inc.*[1] marked a major transformation in how contribution actions are litigated under the federal Comprehensive Environmental Response, Compensation and Liability Act.[2] For nearly two decades prior to the December 2004 *Cooper Industries* decision, the primary means by which potentially responsible parties sought to recoup expenses from other PRPs for the cleanup of hazardous-waste sites was an action for contribution under Section 113(f)(1) of CERCLA. In *Cooper Industries*, however, the Supreme Court held that Section 113(f)(1) was available only to parties who had been sued under CERCLA Section 106 or 107(a).

As a result of *Cooper Industries*, therefore, many CERCLA plaintiffs are now seeking contribution through alternate means — principally Section 107(a), which permits the general recovery of CERCLA response costs, and Section 113(f)(3)(b), which authorizes contribution for parties who have settled their CERCLA liability with a state or the federal government. In the wake of *Cooper Industries* the lower federal courts have been grappling with the parameters of contribution rights under those parts of CERCLA.

This commentary provides a brief overview of key post-*Cooper Industries* case law, including a discussion of the divergent approaches taken by various federal courts.

Allowing PRPs who have initiated voluntary cleanups or settled their CERCLA liability to seek contribution under Sections 107(a) and 113(f)(3)(b), respectively, would promote CERCLA's twin objectives: prompt remediation of hazardous-waste sites and imposition of cleanup costs on responsible parties.

II. Brief Overview of CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act in 1980 following the federal government's declaration of a state of emergency due to environmental contamination in the Love Canal neighborhood of Niagara Falls, N.Y. Commonly known as "Superfund," the law imposed a tax on certain industries and created a trust fund to help finance the cleanup of hazardous-waste sites that may pose a threat to public health or the environment.

The law also provided mechanisms for the government, innocent parties (*i.e.,* those who are not liable under CERCLA) and certain PRPs to recover all or part of the costs they incur cleaning up a site. Courts interpreting CERCLA have consistently recognized the statute's broad remedial purpose, citing its legislative history and statutory scheme in support of the conclusion that its key purposes are the prompt remediation of hazardous-waste sites and the imposition of cleanup costs on responsible parties.[3]

Section 107(a) of the law defines "potentially responsible parties" as past and present owners or operators of a hazardous-waste site, persons who arranged for disposal (often referred to as "arrangers" or "generators") of wastes containing hazardous substances, and persons who transported hazardous substances to a site where a release or threatened release causes response costs to be incurred.

Section 107(a) also specifies that such PRPs are liable for all response costs incurred by the government and "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[4]

Section 107(a) has been relied upon at various times to provide two main types of relief: "cost recovery" and "contribution." Most courts recognize that the government or an innocent party may hold one or more PRPs jointly and severally liable in a direct action for recovery of response costs. In addition, because the original version of CERCLA did not expressly provide a PRP with a cause of action for contribution, courts in the early years of CERCLA often found that Section 107(a) provided an implied right of contribution by which a PRP could seek to recoup the equitable share of response costs owed by other PRPs.

In 1986 Congress enacted the Superfund Amendments and Reauthorization Act, which attempted, in part, to resolve this issue. SARA incorporated into CERCLA Section 113(f)(1), which expressly gives PRPs a cause of action for contribution. Section 113(f)(1) provides:

> Any person may seek contribution from any other [PRP], during or following any civil action under Section [106] of this title or under Section [107(a)] of this title. … 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 [106] of this title or Section [107] of this title."[5]

Most courts understood Section 113(f)(1) to be intended to provide the contribution rights that had been recognized, prior to SARA, as implied under Section 107 of CERCLA. The majority of federal courts thus found after 1986 that PRPs could pursue contribution claims under the express language of Section 113(f)(1), thereby effectively rendering moot the implied right to contribution under Section 107(a).

Most courts interpreted Section 113(f)(1) to allow any PRP that had incurred more than its equitable share of response costs to assert a contribution action against other PRPs. Some courts, however, interpreted Section 113(f)(1) to allow PRPs to bring contribution actions only if they had been subject to an abatement or cost-recovery action under Section 106 or 107.[6]

III. The *Cooper Industries* Decision

The Supreme Court addressed the controversy over Section 113(f)(1) in *Cooper Industries*. The case involved the remediation of four aircraft maintenance sites in Texas that Cooper Industries Inc. sold to Aviall Services Inc. in 1981. Several years after the sale, Aviall discovered contamination and reported it to the Texas Natural Resource Conservation Commission. The agency directed Aviall to remediate the site and threatened an enforcement action if it failed to do so. Aviall incurred about $5 million in remediation costs, although it was not formally compelled to conduct the cleanup.

Aviall filed a Section 113(f)(1) contribution action against Cooper in an effort to force Cooper to pay its equitable share of the cleanup costs. The U.S. District Court for the Northern District of Texas held that Section 113(f)(1) relief was unavailable to Aviall because it had not been sued under CERCLA Section 106 or 107. A panel of the U.S. Court of Appeals for the 5th Circuit initially affirmed the decision, but, after a rehearing *en banc,* the full court reversed and held that 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* court reasoned that the last sentence of Section 113(f)(1) preserved the right to bring a contribution action absent a Section 106 or 107 action and the word "may" in Section 113(f)(1) was permissive, meaning that the phrase "during or following" a civil action under Section 106 or 107 was not an exclusive requirement for contribution.

In a 7-2 opinion the Supreme Court reversed the 5th Circuit and held that Section 113(f)(1) is available only to PRPs who have been subject to a civil action under Section 106 or 107(a). The court ruled that the "natural meaning" of Section 113(f)(1) is that contribution "may only" be sought during or following a civil action under Section 106 or 107(a).[7] Therefore, a PRP who undertakes remediation voluntarily may not use Section 113(f)(1) to seek contribution from other PRPs.

The high court was not swayed by the last sentence of the statute, which says, "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 [106] of this title or Section [107] of this title."

The court held that the sentence served to clarify that Section 113(f)(1) does not diminish causes of action for contribution that exist independently of Section 113(f)(1). The court specifically refused to address whether a PRP could recover contribution costs under Section 107(a) because the issue had not been addressed by the lower courts or fully briefed by the parties.

Thus, *Cooper Industries* leaves PRPs who have not been sued under Section 106 or 107 without recourse to contribution actions under Section 113(f)(1) and in search of relief under

other provisions of CERCLA. Typically, PRPs who have conducted "voluntary" cleanups argue for cost recovery or an implied right of contribution under Section 107(a), and PRPs who have entered into settlements with state or federal governments seek contribution under Section 113(f)(3)(B).

As the 2d Circuit has recognized, absent the right to recover under Section 107(a) or 113(f)(3)(B), the *Cooper Industries* opinion would create the "perverse" incentive of encouraging PRPs to refrain from initiating cleanup activities unless and until they are sued, thereby delaying and increasing the expense of remediation.[8]

IV. Section 107(a)

The *Cooper Industries* opinion also raised, but did not resolve, the issue of whether a PRP who has undertaken a voluntary cleanup may bring a direct cost-recovery action or has an implied right of contribution under Section 107(a). Section 107(a)'s broad language, which makes certain classes of actors potentially liable for "any … necessary [CERCLA] costs of response incurred by any other person," allows for considerable latitude in interpretation. Although the lower federal courts have reached mixed conclusions in addressing these issues, CERCLA's goals of encouraging prompt cleanups funded by responsible parties would favor the expansion of Section 107(a) relief post-*Cooper Industries*.

A. Cost Recovery

In *Cooper Industries* the Supreme Court noted that numerous federal appeals courts have held that a PRP may not pursue a direct cost-recovery action against other PRPs for joint and several liability. Nevertheless, the one appellate court to have addressed the issue since the *Cooper Industries* decision held that PRPs may pursue cost recovery under Section 107(a) in the absence of a cause of action under Section 113(f).

More specifically, the 2d Circuit held in *Consolidated Edison Co. v. UGI Utilities Inc.* that "Section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under Section 107(a), to recover necessary response costs incurred voluntarily, not under a court order or judgment."[9] The 2d Circuit rejected the notion that Section 107(a) is available only to innocent parties, finding that its text provides no support for that interpretation and noting that defendants sued by a PRP under Section 107(a) could always assert a counterclaim for contribution under Section 113(f)(1).

Moreover, in *Cooper Industries* the Supreme Court raised the possibility that it or the lower federal courts could find that voluntary PRPs may pursue cost-recovery actions "for some form of liability other than joint and several."[10] In light of the broad remedial purposes of CERCLA and the expansive language of Section 107(a), the circuit courts may wish to reconsider earlier opinions that had been based on their pre-*Cooper* understanding of the rights provided by Section 113(f).

B. Implied Right of Contribution

The Supreme Court's brief reference to an implied right of contribution under Section 107(a) also leaves plenty of room for interpretation by the lower courts. On the one hand, the majority noted that the court has rejected the concept of an implied right of contribution under other statutes.[11] On the other hand, as noted by the dissent, in *Key Tronic Corp. v. United States*[12] all members of the court agreed that Section 107 "unquestionably provides a cause of action for [PRPs] to seek recovery of cleanup costs"; the justices simply diverged on whether Section 107(a) provided that right implicitly or expressly.[13]

Many lower courts have found that Section 107(a) creates an implied right of contribution for voluntary PRPs. As discussed above, this interpretation was most prevalent before Congress enacted the 1986 amendments and created the express rights to contribution found in Section 113(f). With the Supreme Court's narrowing of those rights, at least some courts have concluded that the pre-1986 interpretation allowing a PRP to pursue contribution under Section 107(a) should again hold sway.

In *Vine Street LLC v. Keeling,* for example, the U.S. District Court for the Eastern District of Texas held that PRPs may seek contribution for voluntary cleanups under Section 107(a).[14] The court recognized that numerous cases have held to the contrary, but it found, importantly, that "in all those cases, the issue was whether a [PRP] with a claim under Section 113(f) could concurrently bring a claim under Section 107(a)."[15]

As a result of *Cooper Industries,* of course, the issue before the court in *Vine Street* was whether a PRP "without a claim under Section 113(f)" could bring a claim under Section 107(a).[16] The *Vine Street* court held that because Section 107(a) is "broadly worded and allows a variety of claims," such an implied right of contribution was appropriate post-*Cooper*.[17] Several other courts have also concluded that Section 107(a) creates an implied right of contribution for PRPs.[18]

In contrast, several district courts in the post-*Cooper Industries* era have held that no such implied right of action exists under Section 107(a).[19] Most courts to do so, however, have reached this result due to controlling

circuit precedent that predates *Cooper Industries*. Indeed, one court even remarked that it was duty-bound to impose circuit precedent, leaving a voluntary PRP without a remedy, even though it found the result "quixotic" and contrary to the underlying purposes of CERCLA.[20]

V. Section 113(f)(3)(B)

Parties who have settled their CERCLA liability with a state or the federal government are generally entitled to contribution pursuant to Section 113(f)(3)(B). *Cooper Industries* did not directly address this provision, other than to simply note that, like Section 113(f)(1), it provided an "express avenue[] for contribution."[21] Section 113(f)(3)(B) provides:

> A person who has resolved its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [Section 113(f)(2)].[22]

The 2d Circuit is the only federal appellate court to have addressed what it means to have "resolved liability" to a state or the federal government in an "administrative or judicially approved settlement." In *Consolidated Edison* the court held that parties who have settled CERCLA claims, as opposed to only state law claims, with a state government may seek contribution under Section 113(f)(3)(B). Because the *Consolidated Edison* plaintiff's voluntary cleanup agreement with the state Department of Environmental Conservation referenced only state law claims, the court found that the plaintiff had not resolved its CERCLA liability to the state and could not pursue contribution under Section 113(f)(3)(B).[23]

Certain district courts to have addressed this issue in the aftermath of *Cooper Industries* have denied efforts to seek contribution under this section.[24] In so doing, they have typically relied either on the language of the purported settlements[25] or perceived procedural shortcomings in the states' authority to resolve PRPs' CERCLA liability.[26]

Other district courts, however, have permitted PRPs to pursue contribution claims based on Section 113(f)(3)(B), particularly where the language of the agreement itself suggests that it is intended to resolve CERCLA liability,[27] and notwithstanding any arguable procedural shortcomings regarding the settlement agreements or the state's authority under CERCLA.[28]

VI. Conclusion

The conflicting views of district courts regarding the scope of contribution and cost-recovery rights in the aftermath of *Cooper Industries* are now making their way to the circuit courts for review.[29] The Supreme Court's *Cooper Industries* opinion may have eviscerated a major avenue of relief for PRPs who take action to remediate polluted sites, but it also left open the possibility of alternate recourse under CERCLA for such PRPs. Allowing PRPs to seek contribution under Sections 107(a) and 113(f)(3)(b) would advance the important remedial goal of CERCLA to promote efficient cleanups that are paid for by responsible parties.

Notes

1 *Cooper Indus. Inc. v. Aviall Servs. Inc.,* 543 U.S. 157 (2004).

2 42 U.S.C. § 9601 (2006).

3 *See, e.g., Gen. Elec. v. Litton Indus. Automation Sys. Inc.,* 920 F. 2d 1415, 1422 (8th Cir. 1990); *accord Meghrig v. KFC Western Inc.,* 516 U.S. 479, 483 (1996) (citing *General Electric* for the proposition that CERCLA is principally designed to effectuate the cleanup of toxic-waste sites and compensate those who fund the remediation of environmental hazards).

4 42 U.S.C. § 9607(a) (2006).

5 42 U.S.C. § 9613(f)(1) (2006).

6 Section 106 of CERCLA allows the federal government to bring an action against a PRP to enforce an administrative order. 42 U.S.C. § 9606 (2006). Section 107(a) allows the government or non-liable parties to sue for direct recovery of cleanup costs under CERCLA's "joint and several liability" scheme. 42 U.S.C. § 9607(a) (2006).

7 *Cooper,* 543 U.S. at 166.

8 *Syms v. Olin Corp.,* 408 F.3d 95, 106 n.8 (2d Cir. 2005).

9 *Consol. Edison Co. v. UGI Utils. Inc.*, 423 F.3d 90, 100 (2d Cir. 2005).

10 *Cooper,* 543 U.S. at 169-70.

11 *Id.* at 172.

12 *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

13 *Cooper*, 543 U.S. at 172.

14 *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005).

15 *Id.* at 762-63; *accord Viacom v. United States*, 404 F. Supp. 2d 3, 6-7 (D.D.C. 2005) ("it is unclear what results these district courts would have reached if they had been unconstrained by older circuit precedents, which predated the Supreme Court's Dec. 13, 2004, *Aviall* ruling").

[16] *Vine St.*, 362 F. Supp. 2d at 763.

[17] *Id.* at 764.

[18] *See, e.g., Viacom*, 404 F. Supp. 2d at 6-7; *Metro. Water Reclamation Dist. of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913, 916 (N.D. Ill. 2005); *Kotrous v. Goss-Jewett Co. of N. Cal.,* 2005 WL 1417152, at *3 (E.D. Cal. June 16, 2005); *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1133 (D. Or. 2006); *Aggio v. Estate of Aggio*, 2005 WL 2277037, *5-6 (N.D. Cal. Sept. 19, 2005); *Ferguson v. Arcata Redwood Co.*, 2005 WL 1869445, *6 (N.D. Cal. Aug. 5, 2005).

[19] *See, e.g., City of Rialto v. U.S. Dep't of Def.,* No. EDCV 04-0079-VAP(SSx) (C.D. Cal. Sept. 23, 2005); *City of Waukesha v. Viacom Int'l*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005); *Mercury Mall Assocs. v. Nick's Mkt.,* 368 F. Supp. 2d 513, 519 (E.D. Va. 2005); *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.,* 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005); *Blue Tee Corp. v. ASARCO Inc.*, 2005 WL 1532955, *6 (W.D. Mo. June 27, 2005); *Atl. Research Corp. v. United States*, No. 02-CV-1199 (W.D. Ark. May 31, 2005).

[20] *Mercury Mall,* 368 F. Supp. 2d at 519; *see also Boarhead Farm,* 381 F. Supp. 2d at 435 (disallowing contribution action by PRP under Section 107 due to 3d Circuit precedent but noting that *Cooper Industries* "calls this ruling into question"); *cf. Gen. Motors Corp. v. United States,* 2005 WL 548266, at *4-5 (D.N.J. Mar. 3, 2005) (allowing amendment of complaint to state claim for implied contribution under Section 107(a) while issue is pending on appeal in separate case before 3d Circuit).

[21] *Cooper*, 543 U.S. at 167.

[22] 42 U.S.C. § 9613(f)(3)(B) (2006).

[23] *Consol. Edison*, 423 F.3d at 95-96.

[24] *See, e.g., ASARCO Inc. v. Union Pac. R.R. Co.*, 2006 WL 173662, *6 (D. Ariz. Jan. 24, 2006); *Blue Tee*, 2005 WL 1532955, *7; *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1084-85 (S.D. Ill. 2005); *W.R. Grace & Co. v. Zotos Int'l,* 2005 WL 1076117 at *7 (W.D.N.Y. May 3, 2005); *Ferguson*, 2005 WL 1869445.

[25] *See, e.g., W.R. Grace,* 2005 WL 1076117 at *7 (finding that because the consent orders at issue did not reference CERCLA, they only resolved liability under state law and the plaintiff could not maintain an action under Section 113(f)(3)(B)); *accord City of Waukesha*, 362 F. Supp. 2d 1025 at 1027; *Ferguson*, 2005 WL 1869445 at *5; *ASARCO,* 2006 WL 173662 at *7.

[26] *See, e.g., ASARCO*, 2006 WL 173662 at *6-7; *Blue Tee*, 2005 WL 1532955 at *7; *W.R. Grace*, 2005 WL 1076117 at *7; *Ferguson*, 2005 WL 1869445 at *5.

[27] *See, e.g., Seneca Meadows Inc. v. ECI Liquidating Inc.*, 2006 WL 1030321 at *4 (W.D.N.Y. Apr. 20, 2006) (noting the parties clearly viewed the agreement as settling plaintiffs' liability to the state for purposes of CERCLA); *Benderson Dev. Co. v. Neumade Prods. Corp.,* 2005 WL 1397013 at *12 (W.D.N.Y. June 13, 2005) (allowing plaintiff to seek contribution from third party where consent order with state provided that "the provisions of 42 U.S.C. § 9613(f)(3) shall apply"); *Fireman's Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 2d 1197, 1212 (E.D. Cal. 2003) (finding agreement that partially resolved liability to state for CERCLA response costs to be "administrative settlement" within meaning of Section 113(f)(3)(B)); *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys. Inc.*, 255 F. Supp. 2d 134, 154 (W.D.N.Y. 2003) (finding consent orders with state that reference CERCLA provide basis for Section 113(f)(3)(B) claim).

[28] *See Seneca Meadows*, 2006 WL 1030321 at *5-6 (finding that that Section 107(a)(4)(A) does not require states to obtain authorization from the federal government before engaging in response actions and recovering costs from PRPs); *accord Wash. State Dep't of Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793, 801 (9th Cir. 1995); *State v. Shore Realty Corp.*, 759 F.2d 1032, 1047 (2d Cir. 1985).

[29] At the time this article went to press, cases that addressed the scope of contribution rights under Section 107(a) or 113(f)(3)(B) were pending before at least the 2d, 7th and 9th Circuits.

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