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Section of Environment, Energy, and Resources

The Topsy Turvey World of CERCLA Uncertain Law -- Uncertain Science
Panel Overview

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CERCLA[1] lawyers face the daunting task of providing concrete advice in a fluid field. The legal landscape is ever-changing. The science is continually evolving. This panel will explore the key uncertainties that exist in the wake of recent Supreme Court decisions, and the effect of those decisions against a backdrop of emerging contaminant issues. The panel will also address strategies that may be available to manage these risks and navigate the topsy turvey world of CERCLA. You will find an introduction to these issues below and more detailed analysis in the papers presented by each speaker.

I. The Changing Legal Landscape of CERCLA

In 2004, the Supreme Court in *Cooper v. Aviall*[2] held that a party who voluntarily incurred response costs could not recover those costs pursuant to CERCLA section 113 as a contribution claim. This decision threatened to shut the door on the ability of a potentially responsible party (PRP) who undertook a voluntary cleanup to recover a portion of its costs from other liable parties under CERCLA. Three years later, and the Court in *Atlantic Research*[3] held that PRPs who voluntarily incur response costs potentially have an even stronger right – such parties can maintain a CERCLA section 107 cost recovery action. These two decisions provided a roller coaster ride for PRPs and their lawyers. Although the decisions clarified in some respects the rights of certain CERCLA litigants, their aftermath has created high degree of uncertainty into the way public and private parties approach CERCLA litigation, cost allocation and settlement.

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[1] Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601-9675 ("CERCLA").

[2] *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 161-162 (2004).

[3] *United States v. Atlantic Research Corp.*, __ U.S. __, 127 S.Ct. 2331 (2007).

Prior to the Court deciding these two cases, it was generally accepted that any claim by a PRP against another PRP was in the nature of a contribution claim, which since 1986 could be brought pursuant to CERCLA section 113(f). Courts would allocate response costs among PRPs using equitable factors, and parties approached CERCLA litigation, settlement negotiations and allocation using those ground rules. Parties generally understood that orphan shares (*e.g.* shares allocable to parties that were defunct, unknown or otherwise unable to pay their share) would be allocated among all viable, liable parties and would not be born solely by a single party of group of parties (with perhaps some share being borne by the government to encourage settlements). For more than two decades, the caselaw had developed such that a PRP was unable to maintain a CERCLA section 107 joint and several claim (separate from a contribution claim). This meant that a PRP could not shift all response costs to other PRPs simply by winning the race to the courthouse, or taking the lead in implementing a remedy.

The EPA CERCLA enforcement program relied heavily upon the ability of parties to settle their liability with a degree of finality. For example, at sites with multiple PRPs (sometimes numbering in the thousands or more), EPA would often settle with certain PRP groups, and make all or a portion of the settlement funds available to other groups of settling parties as an incentive to implement the work and assume the risks associated therewith. The "cashout" parties would pay a premium over their allocable share (sometimes as much as 100%), in large part due to the robust contribution protection available through such settlements with the government. That premium, in turn, would often provide an even greater incentive for work parties to implement the response action and also helped to address funding gaps that often arose from the orphan share. Insurance companies were generally willing to pay these settlement premiums because the settlement essentially eliminated the risk of future exposure and future litigation expenses, and such settlements provided a meaningful vehicle to escape the CERCLA litigation quagmire. Private parties could also settle complex litigation matters among themselves and receive protection from third party claims, by utilizing common law good faith hearing procedures.

The 2007 *Atlantic Research* decision poses new challenges to the traditional EPA enforcement approach and the way parties resolve claims among themselves. There, the Court held that a PRP (which in that case had conducted a voluntary response action) could maintain a CERCLA section 107 claim against other PRPs. While this holding provides a welcome relief for parties like Atlantic Research that voluntarily implement a response action (since a 2004 decision held that such volunteers could not maintain a CERCLA section 113 contribution claim), the *Atlantic Research* decision left a host of important questions unanswered. How these questions get resolved in the coming years could have a substantial impact on how clean-ups are funded, how parties interact with the regulatory agencies, how PRPs interact with each other, how the government incentivizes parties to implement response actions, and the degree of certainty that is or is not available to parties that have settled or will settle their CERCLA liability. This panel will explore many key questions (several of which are currently subject to litigation) that arise directly or indirectly from these two recent decisions, including:

- Can a PRP who has settled with the United States (or a state) and agreed to implement the remedy or a portion thereof sue other PRPs under CERCLA section 107? If so, can that PRP impose joint and several liability on other PRPs (if the harm is indivisible)?

- The Supreme Court suggested that a defendant PRP could ameliorate the harshness of joint and several liability by filing a CERCLA section 113(f) contribution claim against the plaintiff PRP. However, the Court appeared to only consider a voluntary PRP who did not have contribution protection pursuant to CERCLA section 113. For example, if the plaintiff PRP has settled with EPA, the defendant PRPs may be unable to file a counter-claim for contribution pursuant to CERCLA section 113 (because the plaintiff PRP would enjoy contribution protection). Does that mean that a party that settles with EPA can shift 100% of the costs to the non-settling parties? This could upset the expectations of parties that have already settled with EPA and provide a strong disincentive to settle with the agency in the future. Can work parties (who are generally the parties with the largest individual shares) shift 100% of the cost to *de minimis* parties, who individually have a very small share? Those *de minimis* parties will face huge transaction costs if sued by the major work parties, particularly in relation to their equitable share. Did Congress intend for the de minimis parties to bear 100% of the cost where the work parties enter a consent decree with EPA and receive contribution protection?
- How do courts allocate the orphan share when a PRP sues other PRPs under CERCLA section 107? Does a portion of the orphan share get re-allocated to the plaintiff PRP? Is that consistent with traditional concepts of contribution?
- When one PRP sues another under CERCLA section 107, who has the burden of proof and on what issues?
- Under what circumstances can a PRP maintain a CERCLA section 107 claim? After *Atlantic Research,* a PRP who voluntarily conducts a response action can recover its costs only pursuant to CERCLA section 107. A PRP who reimburses another party pursuant to a settlement or judgment may only seek to recover those costs pursuant to CERCLA section 113. The Court has left unanswered for now the question of whether a PRP who is subject to an EPA order or who conducts work pursuant to a consent decree following a civil action may maintain its action under CERCLA section 107, 113 or both. The Court did not address whether a PRP who conducts a cleanup pursuant to an injunction (such as a Resource Conservation and Recovery Act ("RCRA") injunction) may recover those costs under CERCLA section 107, 113, both or neither. How courts resolve these and related questions will affect the how parties interact with government regulators (and each other) in order to allocate response costs in a manner that is fair and efficient. The answer to these questions may affect the willingness and approach of parties with respect to EPA consent decrees (work and cashout settlements), EPA administrative orders, *de minimis* settlements, voluntary remediation, and resolving multiparty private litigation matters.
- What statute of limitations applies to the claim by a PRP to recover all or a portion of its costs from other PRPs? CERCLA section 107 and 113 have different statutes of limitations.
- How do parties litigate claims against each other in multi-party CERCLA litigation where different parties have received and responded to different government orders and/or

settlements to implement work? Are claims among parties compelled to incur response costs (e.g. pursuant to a government order, settlement or a lawsuit) contribution claims that could be subject to the CERCLA section 113 contribution bar because such costs are in substance a claim by one tortfeasor against other tortfeasors to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share (with the the shares being determined as a percentage of fault)? If so, can such claims be subject to the contribution bar contained in CERCLA section 113 even if framed as CERCLA 107 claims?

- How can parties craft settlements that restore the finality that was assumed to exist prior to the *Atlantic Research* decision?
- What steps are being taken by the United States to address these uncertainties, both in court and administratively? What are the prospects for a legislative fix to these uncertainties?
- What are the best strategies for parties to implement in their negotiations with regulators in order to maximize the ability of the client to recover all or a portion of its costs from others?
- How does this perceived change in law affect how clients interact with insurance carriers, and the tension between voluntary actions and insurance coverage claims? What effect does the potential for CERCLA 107 claims by PRPs have on the willingness of insurers to settle liability claims?

II. The Changing Technical Landscape

The panel will also explore the unique challenges posed by how regulators, the public and the regulated community respond to emerging contaminants after *Atlantic Research*. The panel experts on emerging contaminants will discuss the most important chemicals and pathways now being evaluated at sites across the country, how regulators have responded to new contaminants in their negotiations with PRPs, and what the experience with these chemicals and pathways tells us about the likelihood and magnitude of similar new risks and costs in the future. The panel will explore strategies and approaches for integrating the evolving understanding of emerging scientific and technical principles into the ever-changing legal environment posed by *Atlantic Research* and its future progeny.

After *Atlantic Research,* parties that have already settled with the government or other parties may be at greater risk for future claims for emerging contaminants. In light of *Atlantic Research,* the possibility exists that work parties now might be able to bring CERCLA section 107 claims against parties who have received contribution protection. The presence of these emerging chemicals (or more stringent standards for existing contaminants) may increase the response costs in a way that creates new incentives for work parties to bring such claims, and to argue that the settling parties may not have paid their fair share of the response costs. In addition, many EPA and state settlements contain reopeners for new information and unknown conditions, and regulators may themselves seek to reopen settlements or invoke this reservation due to the presence of these new contaminants. While these reopeners have always existed, the risks of claims from work parties under CERCLA 107 could alter the playing field for parties who thought they had left the stadium.

How the government responds to emerging contaminants at a particular site may also depend on the status of the existing response action. Is the site in the early stages of investigation, at the consent decree negotiation stage after remedy selection or is the remedy complete but the site still subject to the five-year review process. In many cases, the federal government may not have set national standards for these chemicals, and only limited information is available for state or local agencies to set a clean-up level. The panel will explore how this uncertainty can affect the ability of regulators and the regulated community to reach agreement on clean-up standards, costs and risks. Disputes may exist with respect to whether a chemical is a hazardous substance under CERCLA. Uncertainty can also affect the perceived risks associated with toxic tort claims. The panel will evaluate what tools are available to clients to manage risks from emerging contaminants and third party claims (both remedial costs and toxic tort).

III. Conclusion

More than two and a half decades have passed since the enactment of CERCLA, yet environmental lawyers confront a surprisingly fluid and uncertain legal and technical landscape. While one would have expected science to evolve and change over this time, it is perhaps surprising that so much remains in flux on several key liability questions, even on questions that could have dramatic impacts on the rights and strategies of the affected parties. It is too early to tell whether the post-*Atlantic Research* world is one that better comports with the public policy and legislative goals of CERCLA. What we can say, however, is that these uncertain times present exciting opportunities and challenges for environmental lawyers to shape and affect how parties respond to releases and threatened releases of hazardous substances, and how those costs of response should be allocated.