U.S. SUPREME COURT GIVES REMEDY TO PARTIES THAT VOLUNTARILY CLEAN UP CONTAMINATED SITES

On June 11, 2007, the Supreme Court of the United States ruled unanimously that a party that incurs costs to clean up property contaminated with hazardous substances has a right under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA," also known as "Superfund") to recover certain costs jointly and severally from other potentially responsible parties ("PRPs") even where the party acts without an order to do so and is itself potentially liable for cleanup. *United States v. Atlantic Research Corp.*, No. 06-562, 2007 WL 1661465 (June 11, 2007). Prior to this ruling, uncertainty existed about whether a party could bring an action for recoverable costs absent an order or litigation and, even then, whether the remedy would be limited to a contribution action with a shorter statute of limitations and no joint and several liability.

CERCLA lists four broad categories of persons as PRPs, who by definition can be liable for performing or paying for cleanup. These include: (1) current owners of contaminated property; (2) owners at the time of disposal; (3) parties that arrange for the disposal or treatment of hazardous substances; and (4) parties that transport hazardous substances to facilities they select for disposal or treatment.

In *Atlantic Research,* Atlantic Research leased property at a facility operated by the United States Department of Defense. Operations performed by Atlantic Research resulted in contaminated soils and groundwater at the site. Atlantic Research voluntarily cleaned the site at its own expense and sought to recover some of its costs by suing the United States as a PRP. The United States argued that without an order or civil litigation pending against it, Atlantic Research had no claim under CERCLA.

As the Court pointed out, courts have "frequently grappled" with the manner in which PRPs may recoup CERCLA-related costs from other PRPs. CERCLA contains two provisions, Sections 107 and 113, which set forth the statutory mechanisms by which a private party can seek reimbursement of costs incurred in connection with the remediation of contaminated facilities. Sections 107 and 113 provide two "clearly distinct" remedies. Section 107(a) provides for a joint and several right to cost recovery and Section 113(f) provides a separate right to contribution. A right to contribution under Section 113 is contingent upon an equitable distribution of liability amongst liable parties. Another key distinction between the two provisions is that there is a six-year statute of limitations for cost recovery actions after costs are incurred and a three-year limitations period for Section 113 contribution claims.

The Court's *Atlantic Research* opinion now makes it clear that PRPs can bring a claim under Section 107 provided certain conditions are met. These include, among others, that cleanup costs be incurred (rather than reimbursed), that the costs be consistent with the National Contingency Plan, that the cleanup involve cleanup of "hazardous substances" within the

meaning of CERCLA (which in most instances would not include petroleum, for example) and that the cleanup not have been compelled by a unilateral order. Where cleanup has been compelled by a government order, or where a party has reimbursed another's cleanup costs, claims under CERCLA would be limited to actions for contribution under Section 113.

Among the questions left open by the Court include whether a party that cleans up contamination pursuant to a consent order is limited to an action for contribution under Section 113, whether such party can proceed with an action for cost recovery under Section 107, and whether both remedies would be available to pursue against other PRPs. Further, the decision in *Atlantic Research* has raised concerns that parties that previously settled their cleanup liability with the government in exchange for "contribution protection" could be exposed to cost recovery actions brought by other PRPs under Section 107. In that case the Court noted that parties could bring a counterclaim under Section 113 which would trigger an equitable allocation of liability. As a practical matter, this would mean that the risk of further suit is greatest where one party incurred costs to clean up a site that represent more than its fair share and other parties paid substantially less so as to warrant litigation. No lower courts have opined on these open questions as yet.

The Court's decision in *Atlantic Research* means that: (1) parties that have performed cleanups should consider evaluating whether they might have worthwhile claims against other PRPs, including the United States; (2) parties that have been sued for cleanup should consider possible counterclaims for contribution; (3) parties entering settlements should consider documenting that the settlement is voluntary; and (4) parties that are contemplating performing cleanups should consider taking steps to meet the conditions necessary to preserve their rights to pursue cost recovery under CERCLA.

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July 25, 2007