

FYI

## Comprehensive Environmental Response, Compensation & Liability Act's (CERCLA) Settlement Minefield

*A well established mechanism that has enabled small parties to quickly settle environmental liabilities at multi-party cleanup sites is threatened by a dramatic shift in federal environmental liability jurisprudence.*

One of the primary goals of the Federal Superfund Law, formally known as the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), is to facilitate prompt liability settlement and quick clean up of contaminated sites by potentially responsible parties ("PRPs") deemed responsible for causing or contributing to contamination. To achieve this goal, Congress drafted an expansive liability scheme, imposing strict, and usually joint and several, liability upon virtually

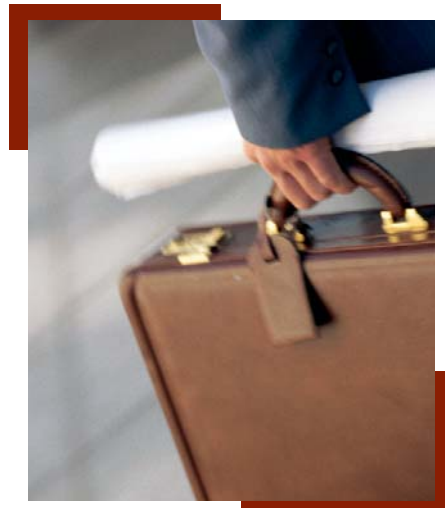
any person or entity who had any connection with the generation, transporting or handling of hazardous substances that ultimately pollute the environment at a given site.

At sites such as landfills or waste handling sites, where PRPs frequently number in the hundreds, if not thousands, the U.S.

Environmental Protection Agency ("EPA"), as well as its various state counterparts, have commonly offered early cash out settlements to those parties who contributed very small percentages of the total identified waste stream at a given site. The agencies then typically seek to have the more significant contributors undertake the actual cleanup of the site.

These so-called "de min-

imis" settlements are often attractive to smaller PRPs, in that they allow such parties to resolve their potential liability relatively quickly and cheaply, avoiding significant transaction costs associated with the protracted litigation -- and often years-long investigation and remediation -- that typically characterize Superfund cleanups. A crucial aspect of these *de minimis* settlements is the "contribution protection" afforded to the



settling parties. Pursuant to CERCLA, a party that settles with the government receives not only a release from the government (subject to certain standard re-openers), but also protection from lawsuits by other PRPs seeking contribution for costs associated with the site cleanup. Given the breadth of liability under CERCLA, and the fact that PRPs can -- and routinely do -- sue one another for a portion of a site's cleanup costs, the absence of this contribution protection would seriously undercut the incentive for smaller parties to enter into *de minimis* settlements, since there would be little guarantee of finality in settling early in the litigation/cleanup process.

#### **UNITED STATES V. ATLANTIC RESEARCH CORP. :**

Unfortunately, following the recent decision by the U.S. Supreme Court in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), it is now not clear that settling parties will, in fact, automatically receive contribution protection in many cases where the actual cleanup work will be performed by other PRPs. While the case did not

directly involve the issue of CERCLA's grant of contribution protection to settling parties, the Court's treatment of the nature of a PRP's claim where it directly incurs its own cleanup costs (as opposed to reimbursing the government or another party for cleanup costs) has created a great deal of uncertainty in this area. To explain exactly why, some additional background on CERCLA's cost recovery scheme is necessary.

#### **PROVISIONS AUTHORIZING ACTIONS TO RECOVER CLEANUP COSTS :**

CERCLA contains two provisions authorizing actions to recover cleanup costs. Section 107(a) authorizes the government or "any other person" to recover "necessary costs of response" from four classes of responsible parties, and Section 107 has been interpreted to impose joint and several liability on those responsible parties. Section 113(f), on the other hand, provides that a PRP "may seek contribution" from any other PRP either "during or following" any action commenced under Section 107 or following an administrative or

judicially approved settlement. Liability under Section 113 has been interpreted as several only, meaning that a Section 113 defendant can be held liable only for its equitable share of the total cleanup costs.

Prior to 2004, a relatively uniform body of case law developed at the district and circuit court levels holding that, notwithstanding Section 107(a)'s reference to "any other person" in authorizing cost recovery actions, PRPs were limited to bringing claims pursuant to Section 113(f), reasoning that any claim between PRPs was necessarily in the nature of contribution, and further concluding that any contrary holding would render Section 113 meaningless (since any rational PRP would seek to recover its costs through Section 107, due to the broader scope of its liability and more generous statute of limitations). In the process, many courts had essentially read the "during or following any civil action" limitation in Section 113(f)(1) out of the statute, allowing PRPs to maintain contribution actions even if they had not yet been sued themselves or entered into a settle-

ments that satisfied all of the substantive and procedural requirements of a CERCLA settlement. These circumstances were, in fact, quite common, as parties frequently agreed to perform cleanups short of litigation, and many of these settlements did not meet the technical requirements of a CERCLA settlement (particularly those with state agencies).

#### **COOPER INDUS., INC. V. AVIALL SERVICES, INC. :**

This began to change late in 2004, when the Supreme Court issued its decision in *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), adopting a literal reading of the statute limiting Section 113 contribution claims to those situations where the plaintiff PRP had itself first been sued under Section 107 or formally settled its CERCLA liability pursuant to a judicially approved consent decree or certain administrative settlements outlined in the statute. This holding potentially left many PRPs -- those who had incurred significant cleanup costs without either of these triggering events -- without any ability to seek recovery from

other PRPs, since, as noted above, the lower courts had almost universally held that PRPs could not maintain an action under Section 107.

#### **DILEMMA LED MANY CIRCUIT COURTS TO RECONSIDER PRIOR HOLDINGS :**

This dilemma led many circuit courts to reconsider their prior holdings limiting PRPs to Section 113(f) claims, ultimately leading to the Supreme Court's 2007 decision in *Atlantic Research*. In that case, again relying on the plain language of the statute, the Court held that a PRP who voluntarily incurs its own cleanup costs (as opposed to reimbursing another party) could maintain a claim under Section 107(a). In doing so, the Court generally sought to distinguish between claims for contribution (i.e., a claim by a "PRP who pays money to satisfy a settlement agreement or a court judgment...") and direct cost recovery claims (i.e., claims by a party who directly incurs its own cleanup costs).

However, the facts of the case involved a party who had "voluntarily" incurred its own



response costs -- it had not itself been sued under Section 107 or formally settled its CERCLA liability with the government -- and the holding of *Atlantic Research* is limited to a party in that situation. With respect to a party who incurs its own cleanup costs during or following a Section 107(a) action, or following an administrative or judicially approved CERCLA settlement (again, a very common scenario), the Court declined to "decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both."

Lower courts are now struggling to answer that remaining question, the answer to which will have a great impact on many aspects of CERCLA litigation. Among the most significant implications, however, is the impact on settlement. Until there is a definitive answer to



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this question, parties contemplating settlement with the government in a situation where significant cleanup costs have been or will be incurred by another PRP must now think carefully about the ramifications of such settlement in light of this uncertainty. Specifically, if a PRP who incurs its own cleanup costs (whether voluntarily or not) is deemed to have a direct cost recovery claim under Section 107(a), rather than a contribution claim under Section 113(f), it is highly questionable whether a previously settling PRP will enjoy protection against a subsequent claim by such a PRP, since, by its express terms, CERCLA only prohibits "claims for contribution" against parties who have settled with the government. Thus, having settled, a PRP may find itself defending a separate Section 107 suit by another PRP who may have incurred millions of dollars in cleanup costs and understandably will be eager to seek others to share those costs.

This risk theoretically presents itself to any party contemplating settlement with the government at a PRP-funded cleanup site, but is particularly problematic for *de minimis* parties. Despite the fact that EPA has acknowledged this dilemma, it continues the common practice of trying to reach *de minimis* cash out settlements separately from cleanup settlements with major parties, while generally refusing to negotiate the terms of its standard *de minimis* consent decree (including insisting on a 100% settlement premium which was previously justified, in large part, by the finality offered by the grant of contribution protection). This essentially leaves *de minimis* parties with a "take it or leave it" proposition, without the guarantee of finality that previously applied to such settlements.

There are solutions to these problems, including collective negotiations through *de minimis* PRP groups. Moreover, even in light of this uncertainty, it may still be in a small PRP's best interest to accept these imperfect settlement terms. However, for parties that have entered into similar settlements in the past and facing settlements related to new sites, they should be mindful of this potentially serious limitation in the terms of future settlements and consult with a qualified attorney prior to entering into any CERCLA settlement.

If you have questions regarding this Alert or other environmental law issues contact Charles D. Grieco at 716.843.3844 or cgrieco@jaeckle.com.

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