CLIENT ALERT

Seventh Circuit Holds That CERCLA Does Not Preclude Section 107(a) Cost-Recovery Claims for Costs Incurred Pursuant to Administrative Orders on Consent

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In an amended opinion, a unanimous panel of the U.S. Court of Appeals for the Seventh Circuit declined to adopt the bright-line rule advanced by the U.S. Environmental Protection Agency (EPA) that parties to administrative orders on consent (AOC) with the EPA are limited to contribution actions under Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to the exclusion of cost-recovery actions under Section 107(a). The court held in *Bernstein v. Bankert* that the determinative factor is whether the AOC is structured to resolve liability upon execution or at some later time, such as upon completion of the work. It is only where the parties agree to resolve liability immediately that the potentially responsible party (PRP) is limited under CERCLA to a contribution action, and the question of whether liability is resolved upon execution of the AOC can only be determined on a case-by-case basis, by reference to the particular terms of the AOC. Nos. 11-1501, 1523, -- F.3d --, 2013 WL 3927712 (7th Cir. July 31, 2013).

Background

The *Bernstein* case arose as a result of pollutants left behind by a now-defunct industrial and commercial broker and recycler at three sites located north of Zionsville, Indiana. The plaintiffs were trustees of a cleanup fund created by several PRPs which incurred costs undertaking removal actions at one of those sites. The trust incurred costs under two AOCs with EPA, executed in 1999 and 2002, respectively. In each AOC, EPA agreed to a covenant not to sue the plaintiff trustees, effective upon the plaintiffs' completion of work to EPA's satisfaction.

The plaintiffs filed their CERCLA Section 107(a) cost-recovery claim when the defendants refused to pay into the cleanup trust. At the time, the plaintiffs had completed the work required by the 1999 AOC, but the work required under the 2002 AOC was ongoing. The defendants moved for summary judgment, arguing that the plaintiffs could only bring a contribution claim because they had, through the AOCs, "resolved [their] liability to the United States . . . for some or all of the costs of such action in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). Defendants further argued that because more than three years had passed since the AOCs had been signed, any contribution claim to recover costs incurred under the AOCs that might at one point have been cognizable was time-barred.

The district court agreed on both points, and granted defendants summary judgment. Plaintiffs appealed.

The Seventh Circuit's December 2012 Decision

On December 19, 2012, a unanimous panel of the Seventh Circuit partially reversed the district court's decision, holding in relevant part that the plaintiffs had a viable Section 107 claim for costs incurred under one, though not both, of the AOCs. *Bernstein v. Bankert*, 702 F.3d 964 (7th Cir. 2012). The court rejected a categorical rule about the implications of settling

with EPA through an AOC, and instead examined each AOC separately to determine whether Section 107 or 113 provided the appropriate cause of action and which statutory limitations period applied.

Both AOCs contained covenants not to sue that were conditioned on the plaintiffs' fulfillment of their cleanup obligations under the respective agreements. Because the work under the 1999 AOC had been completed, and EPA had formally approved the work on October 24, 2000, the plaintiffs' liability to the United States as to the work performed under that AOC had been resolved. Accordingly, the plaintiffs had only a contribution claim as to costs incurred under the 1999 AOC. That claim was time-barred, however, under the CERCLA limitations period. In contrast, because work under the 2002 AOC was ongoing and EPA had not yet issued a notice of approval, the court held that the plaintiffs had not resolved their liability to the United States under the 2002 AOC. Thus, as to costs incurred under the 2002 AOC, plaintiffs potentially had a cost-recovery action under Section 107(a). Moreover, because the removal actions under the two AOCs were "temporally discrete projects," the court held that they had to be analyzed separately for purposes of determining the appropriate cause of action and applicable statutory limitations period. Accordingly, reviewing the facts and issues related to the 2002 AOC independent of its analysis of the 1999 AOC, the court determined that the plaintiffs had a timely, justiciable cost-recovery claim for costs incurred under the 2002 AOC.

The Seventh Circuit's Amended Opinion

In what comes off as a reminder to litigators to be ever mindful of the adage "be careful what you wish for," the court used the defendants' request for rehearing to clarify and reaffirm its original opinion. First and foremost, it emphasized that whether and when a party resolves its liability is specific to the agreement in question, and must be resolved based on the specific terms of that agreement.

The court then rejected the defendants' arguments as to why the court should have found the plaintiffs limited to a contribution action. 2013 WL 3927712, at *12. The first argument – that the Supreme Court's decision in *United States v. Atlantic Research Corp*. held that "compelled" costs incurred pursuant to an AOC can only be recovered in a contribution action – was rejected as a misreading of that decision. Although a footnote in the Supreme Court's opinion suggested that a material distinction (for purposes of determining which claim could be brought) existed between voluntarily-incurred costs and compelled costs, the Seventh Circuit pointed out that the Supreme Court had merely stated that "'costs *incurred voluntarily* are recoverable *only* by way of [§ 9607(a)(4)(B)].'" *Id.* at *13 (quoting *United States v. Atl. Research Corp.* , 551 U.S. 128, 139 n.6 (2007) (emphasis added)). "That," the Seventh Circuit explained, "is not the same as saying that *only voluntarily incurred costs* are recoverable by way of § 9607(a)(4)(B). The latter implies the exclusion of costs of any other type; the former does not." *Id.* Thus, *Atlantic Research* did not automatically foreclose parties who incurred costs under an AOC from pursuing the recovery of those costs under Section 107.

A second argument – that AOCs as a rule resolve liability – was rejected as a misinterpretation of CERCLA. The court held that liability is resolved under Section 113(f)(3)(B) only "when the issue of liability is *decided*, in whole or in part, in a manner that carries with it at least some degree of certainty and finality." *Id.* at *15. Although the PRPs had "settled" with EPA by agreeing to perform certain actions in order to remedy certain environmental contamination, that agreement did not decide the issue of liability for that contamination. The 2002 AOC, for example, made this clear by including a disclaimer of the plaintiffs' liability, and also by conditioning the covenant not to sue on the plaintiffs' complete and satisfactory performance of the work. Accordingly, by the terms of the agreement, the resolution of liability would not occur until performance was complete and EPA had approved the work.

As for the third argument – that refusing to recognize a right of contribution until cleanup was complete would remove the incentive of PRPs to settle – the court was not persuaded, observing that "[a]s soon as the settling PRP incurs response costs consistent with the national contingency plan, and until liability is resolved, that settling PRP has access to a cost recovery action." Indeed, the court pointed out: "What's more, the cost recovery action is subject to a longer statute of limitations, making it arguably the preferable cost recovery vehicle for a PRP embarking on what might well be a decade-long cleanup effort, and thus actually creating a further positive incentive to settle." *Id.* In any event, to the extent that its decision would create any negative incentives, the court noted that EPA could structure its settlements in such a way as to resolve liability effective immediately upon execution.

Implications

The Seventh Circuit's decision in *Bernstein v. Bankert* is a significant addition to the evolving body of CERCLA case law, recognizing that how PRPs and EPA structure an AOC dictates the cause of action available to the settling PRP for recoupment of costs. The court made clear that the critical question is not whether the costs incurred are "compelled" or "voluntary" but, rather, whether and when the AOC resolves the settling PRP's liability as to the work covered by that particular AOC. Also important is the court's opinion that separate AOCs directed at discrete projects require separate cause-of-action and statute-of-limitations analyses.

To read a copy of the court's amended opinion, click here.

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