

Contribution Confusion: The Supreme Court Is Set To Decide When A CERCLA Contribution Claim Can Be Made

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Does CERCLA § 113(f) allow a potentially responsible party ("PRP") to seek contribution for environmental cleanup costs when the government has not taken any enforcement pursuant to CERCLA §§106 or 107(a)? Until recently, the unanimous view of the federal courts was yes. However, one recent decision calls this conclusion into doubt, and the United States Supreme Court has granted *certiorari* to decide the issue.

CERCLA Background

CERCLA imposes joint and several liability upon PRPs for the clean up of hazardous substances released into the environment. This liability scheme is based upon the often cited principle that "the polluter pays."

As originally enacted, CERCLA contained no explicit provision allowing recovery through contribution. Federal courts recognized that a joint and several liability scheme requires a correlating ability for PRPs to reallocate liability. The result was the creation of a federal common law right of contribution to resolve claims between PRPs. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 n.7 (1994).

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA). SARA included what is now §113(f) — an express provision giving PRPs the "explicit right to sue" for contribution. Section 113(f) provides, in pertinent part: "Any person may seek contribution from any other person who is liable or potentially liable under [§107(a)] of this title, during or following any civil action under [§106 or §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 [§106 or §107(a)] of this title." 42 U.S.C. § 9613(f) (emphasis added). This new contribution provision codified a second principle embodied in CERCLA — the sharing of financial responsibility among PRPs whose actions created the hazardous conditions in the first place.

Contribution Without Prior Government Action

While the first sentence of §113(f) suggests that a contribution action may not be commenced without prior government action, the last sentence has long been understood to permit a claim for contribution even in the absence of prior federal government enforcement.

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Indeed, after SARA and prior to 1992, no less than six federal circuit courts of appeal had ruled on CERCLA claims for contribution where no action had been brought under §§ 106 or 107. See *Aviall Services, Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 688 n.21 (5th Cir. 2002).

In November 2002, the Fifth Circuit confirmed the prevailing view that CERCLA contribution actions may proceed without prior federal government action. In *Aviall*, plaintiff Aviall purchased property from defendant Cooper. After receiving a corrective action directive from State environmental regulators, Aviall remediated the property. To recover its response costs, Aviall sued Cooper pursuant to CERCLA § 113(f). In the district court and initially on appeal to the Fifth Circuit, Aviall's claim was dismissed as procedurally defective because no prior CERCLA action had been commenced against Aviall.

However, upon rehearing of the appeal *en banc*, the Fifth Circuit held that CERCLA §113(f) permits a contribution claim "at whatever time in the cleanup process the party, seeking contribution, decides to pursue it," irrespective of whether an initial action pursuant to CERCLA §§106 or 107(a) has been initiated by the government. *Aviall*, 312 F.3d at 686. While acknowledging the limitations of the first sentence of § 113, the court concluded that the last sentence clearly preserved a PRPs ability to seek contribution even "in the absence of a section 106 or section 107(a) action." *Id.* at 681. The court reasoned that any other reading "create[s] substantial obstacles to achieving the purposes of CERCLA," by violating the principle that the polluter pays, reducing the potential for the reallocation of cleanup costs among PRPs, and discouraging voluntary cleanups. *Id.* at 689-90.

A Lone Voice

In contradiction to existing case law, Judge William Martini of the United States District Court for the District of New Jersey ruled in December 2003 that a PRP may not initiate a CERCLA §113 contribution action unless EPA first commences a §107 action or issues a § 106 unilateral administrative order to the claimant. See *E.I. DuPont De Nemours & Co. v. United States*, 297 F. Supp.2d



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740 (D.N.J. 2003).

During World War II, DuPont operated a chemical plant owned by the United States Department of Defense ("DOD"). DuPont's operations contaminated the property. When DuPont began remediating the contamination, it sued the DOD pursuant to CERCLA § 113(f) to recover a portion of its costs. Although DOD admitted that it was liable under CERCLA § 107(a), DOD argued that because DuPont had not been sued by EPA pursuant to CERCLA § 107(a) and was not subject to a unilateral order pursuant to CERCLA § 106, it could not be liable to DuPont in contribution under CERCLA § 113(f).

The district court agreed with DOD, and rejected DuPont's claim for contribution. The court, relying primarily upon the common law definition of "contribution," reasoned that a right of contribution exists only in favor of a tort-feasor who is sued by an aggrieved party and who "has discharged the entire claim for the harm by paying more than his equitable share of the common liability." *DuPont*, 297 F. Supp.2d at 746.

In applying this rationale to the CERCLA context, the court held that a claim in contribution against another PRP may only be brought when the government has taken enforcement action against the claimant pursuant to CERCLA §§106 or 107(a). According to the court, it is action by EPA, and not the CERCLA statute itself, that creates the necessary common liability. The court further reasoned that the purpose of the last sentence of § 113 — the so-called savings clause — is merely "to clarify that a contribution action brought following a settlement under the aegis of Section 113(f)(3) should not be held to be procedurally insufficient because of an absence of a prior action brought pursuant to CERCLA Sections 106 or 107."

In ruling as it did, the court explained that other possible interpretations of CERCLA §113 (including *Aviall's* more liberal interpretation of the savings clause) were foreclosed by the Third Circuit's prior decision in *In re Reading Co.*, 115 F.3d 1111 (3rd Cir. 1997).

Take A Ride On The Reading Railroad

In *Reading*, the Third Circuit was

asked to determine whether a CERCLA §113(f) contribution action by one railroad (Conrail) against another (Reading) could be maintained if Reading did not share a common liability to EPA. All of Reading's liability to EPA had been discharged as a result of its emergence from bankruptcy. Because of the discharge, the Court held that Reading was not "liable or potentially liable" under § 107(a) to EPA. As a result, Reading and Conrail did not share a common liability to EPA, and Conrail's claim for contribution under CERCLA § 113(f) failed as a matter of law. *In re Reading*, 115 F.3d at 1126.

By its terms, the decision in *Reading* merely reinforces the principle that a contribution defendant must be "liable or potentially liable" under § 107(a). However, it does not stand for (as Judge Martini suggests in *DuPont*), nor support, the proposition that an initial action by EPA is required in order to maintain an action for contribution under CERCLA § 113(f).

In *DuPont*, DOD admitted that it was a "potentially liable" party under the enumerated statutory elements contained in § 107(a). Under any rational reading of *Reading*, that should be enough to maintain an action for contribution. The Court in *DuPont*, however, interpreted *Reading* to require an initial action by EPA. This is a strained and narrow reading of *Reading*, and it results in an outcome that is contrary to the principles of CERCLA. In *DuPont*, the polluter did not pay, and cleanup costs were not equitably allocated.

Conclusion

Remediating contaminated property is a costly undertaking. When most companies decide to incur such costs, it is done with the understanding that they have the right to file a claim for contribution against other PRPs. This understanding is based on two decades of decisional and statutory law that have upheld the twin principles of CERCLA: (1) the polluter pays, and (2) each polluter pays its "fair share" of the cleanup costs. The decision in *DuPont* advances an extremely narrow interpretation of CERCLA § 113 that is at war with these guiding principals. Indeed, in February 2004, the Ninth Circuit agreed with the *Aviall en banc* decision, and rejected the more narrow reading advanced in the *DuPont* decision. See *Western Properties Serv. Corp. v. Shell Oil Co.*, No. 01-55676, 2004 WL 259174 (9th Cir. February 13, 2004).

Any decision by the United States Supreme Court limiting a private party's ability to recover cleanup costs will alter the longtime understanding of CERCLA PRPs, discourage voluntary cleanups by private parties, and require EPA to devote more of its limited resources to enforcement at a time when federal resources are in scant supply. Such a result is unnecessary, unwarranted and will result in further inequity in the Superfund program and the slower cleanup of our country's hazardous waste sites.

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