JENNER&BLOCK

Environmental, Energy and
Natural Resources Law Practice

Land, Air and Water News

January 29, 2007

Seventh Circuit Previews Supreme Court Superfund Recovery Debate

by Gabrielle Sigel

On January 17, 2007, the U.S. Court of Appeals for the Seventh Circuit joined the "*Cooper v. Aviall* debate" in the federal courts regarding the scope of a private party's rights to recover some portion of its Superfund (CERCLA) cleanup costs from other potentially responsible parties ("PRPs"). In *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, No. 05-3299, 2007 WL 102979 (7th Cir. Jan. 17, 2007) ("*MWRD*"), the Seventh Circuit held that MWRD, a PRP who had voluntarily engaged in clean-up activities, had a right to recover costs from other PRPs under CERCLA Section 107(a), even though MWRD did not have a right to recover costs in contribution under CERCLA Section 113(f). The Seventh Circuit's decision was issued two days before the U.S. Supreme Court agreed to review the Eighth Circuit's similar decision to allow a PRP to bring a Section 107(a) cost recovery action. *Atlantic Research Corp. v. United States*, 459 F.3d 827, (8th Cir. 2006) *cert. granted*, 2007 WL 124673 (U.S. Jan. 19, 2007) (No. 05-562). This issue affects any party who is or may be engaged in site clean-up. The cost recovery issue also impacts state and local governments, who rely on a PRP's ability to obtain partial cost recovery as an incentive for a PRP to undertake remediation "voluntarily," *i.e.*, without requiring the government to bring an enforcement action.

Since the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), lower federal courts, at both the trial and appellate level, have been struggling with the issue of a PRP's right to recover response costs from other PRPs under CERCLA. Prior to the *Cooper* decision, a PRP, who by definition has some liability at a site, typically sought contribution for clean-up costs from other PRPs under CERCLA Section 113(f). In *Cooper*, the Supreme Court held that a PRP could seek contribution from other PRPs under CERCLA Section 113(f) only if that PRP was the subject of a civil action under CERCLA Sections 106 or 107. The Supreme Court majority expressly declined to decide whether a PRP had a right to recover its costs under CERCLA Section 107(a). As a result of the Supreme Court's decision to avoid this issue, PRPs who had engaged in "voluntary" cleanups have been litigating hard to preserve a right to recover their costs under Section 107(a). Prior to the Seventh Circuit's decision in *MWRD*, the Second and Eighth Circuits of the Court of Appeals recognized a cost recovery right under Section 107(a), the Third Circuit did not, and more than a dozen district courts had conflicting positions on the issue.

MWRD presents the situation of a PRP – MWRD – whose alleged role was solely that of a property owner who played no active part in the property's contamination. In the past, the Seventh Circuit likely would have granted MWRD the right to obtain Section 107(a) recovery because it would have characterized

MWRD as an "innocent landowner" – an exception the Seventh Circuit created to deal with the limitations of Section 113(f) recovery. *See, e.g., Rumpke of Indiana, Inc. v. Cummings Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). In *MWRD*, however, the Seventh Circuit noted that the *Cooper* decision had changed the legal landscape and that it was no longer necessary to use the "innocent landowner" exception. Instead, the Seventh Circuit analyzed statutory language and CERCLA's policy to hold that, under Section 107(a), a PRP voluntarily incurring response costs has a right to cost recovery from other PRPs.

Key to the Seventh Circuit's decision was the language of Section 107(a)(4)(B). That provision states that a PRP is liable for "any other necessary costs of response incurred by any *other person* consistent with the national contingency plan" (emphasis added). The court held that "other person" who incurred costs for which a PRP is liable could include an "other" PRP. Because PRPs are liable for the costs of "other persons," MWRD – a "person" who had incurred response costs – had a right to sue under Section 107(a) to recover those costs.

Although the United States was not a party to the MWRD's suit, the federal government became involved. Prior to issuing its opinion, the Seventh Circuit sought and obtained an *amicus curiae* brief from the U.S. EPA. EPA argued that "other person" in Section 107(a)(4)(B) means a person other than a PRP, and urged the Seventh Circuit to reject a Section 107(a) cost recovery right for PRPs. The Seventh Circuit rejected EPA's position and found that the use of the term "other person" in Section 107(a) was meant to distinguish a private party from government agencies, whom the Seventh Circuit found have a relaxed burden of proof for cost recovery under CERCLA's liability scheme.

The Seventh Circuit, like its colleagues in the Second and Eighth Circuits, stated that it was interested in protecting CERCLA's "twin aims of encouraging expeditious, voluntary cleanups while holding responsible parties accountable for the response costs that their past activities induced." (Slip Op. at 25.) Thus, in the Seventh Circuit, a PRP who is engaged in a voluntary clean-up and who has not been the subject of a government enforcement action, is entitled to recover costs under Section 107(a).

Although the Seventh Circuit's decision helps frame the debate, it is not the final word. The U.S. Supreme Court's decision to address the Eighth Circuit's decision in *Atlantic* will result in further clarification of a PRP's rights. In the meantime, the Seventh Circuit's opinion presents an enlightening preview of the likely arguments before the High Court later this year.

For more information, please contact the following Jenner & Block attorney:

Gabrielle Sigel, Partner
Tel: 312 923-2758
Email: gsigel@jenner.com