Ohio Court Weighs In on CERCLA Contribution/Cost Recovery Debate

February 14, 2013

Full text of the court's opinion

On February 8, 2013, the U.S. District Court for the Southern District of Ohio issued its decision in Hobart Corporation v. Waste Management of Ohio, Inc., Case No. 3:10-cv-195 (J. Rice), holding that a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 107 cost recovery action is not available if plaintiffs had a CERCLA 113 contribution action. The Ohio federal court followed the emerging line of appellate court decisions in this area. See, e.g., Morrison Enterprises, LLC v. Dravo Corp., 638 F.3d 594 (8th Cir. 2011); Niagara Mohawk Power Corp. v. Chevron USA, Inc., 596 F.3d 112 (2d. Cir. 2010); Solutia, Inc. v. McWane, Inc., 672 F.3d 1230 (11th Cir. 2012); and Bernstein v. Bankert, 2012 WL6601218 (7th Cir. 2012).

In Hobart Corporation, plaintiffs and the U.S. EPA entered into an Administrative Settlement Agreement and Order on Consent (ASAOC) regarding an investigation and study of a former landfill site known as the South Dayton Dump. The ASAOC, which became effective on August 15, 2006, requires plaintiffs to conduct a remedial investigation and feasibility study (RI/FS) for the site. On May 24, 2010, plaintiffs filed suit against numerous potentially responsible parties (PRPs), including The Dayton Power & Light Company (DP&L), asserting four causes of action related to the RI/FS: 1) cost recovery under CERCLA §107(a); 2) contribution under CERCLA §113(f)(3)(B); 3) unjust enrichment; and 4) declaratory judgment.

In response, defendant DP&L filed a motion to dismiss arguing, among other things, that the CERCLA 113 contribution claim was barred by the applicable three-year statute of limitations. In 2011, the court agreed and dismissed plaintiffs' CERCLA 113 contribution claim and unjust enrichment claim (on other grounds). In 2012, DP&L moved for summary judgment on the remaining CERCLA 107 cost recovery claim, arguing that a PRP that had a CERCLA 113 contribution claim could not also bring a CERCLA 107 cost recovery claim because the claims are mutually exclusive.

The dichotomy and interrelationship between a CERCLA contribution claim and cost recovery claim have been the subject of considerable debate and litigation for the past five years since the U.S. Supreme Court's decision in United States v. Atlantic Research Corp., 551 U.S. 128 (2007), wherein the Court explained that CERCLA 107 and 113 provide two clearly distinct remedies. The Court, however, acknowledged a possible overlap between the remedies and left open the question of whether a PRP, which is compelled to pay response costs pursuant to a consent decree following a suit under §§106 or 107(a), may recover those costs under a §107(a) cost recovery action, a §113 contribution action or both.

As noted in the Hobart Corporation decision, appellate courts that have subsequently considered this question have unanimously held that PRPs that are compelled to pay response costs pursuant to an administrative settlement or a consent decree are limited to a contribution action under §113(f). As summarized by the court in Hobart Corporation:

> The salient question is whether a party has resolved its liability to the government "for some or all of a response action or 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). If the party has resolved its liability in

> such a fashion and seeks to recoup response costs from other PRPs, a contribution claim under §113(f)(3)(B) is the only possible avenue of recovery. A cost recovery action under §107(a) is not available.

The court then turned to the issue of whether the ASAOC in question constitutes an "administrative settlement" for purposes of §113(f)(3)(B). If so, then a contribution action under §113(f) was the exclusive remedy available to plaintiffs.

In evaluating the ASAOC, the court focused on the precise language of the agreement, which was negotiated between the plaintiff PRPs and the U.S. EPA. Section XXIII of the ASAOC, which is titled "Contribution," provides in relevant part as follows:

> 96. a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. §9613(f)(2), and that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, and Future Response Costs.
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> b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. §9113(f)(3)(B) [sic.], pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, and Future Response Costs.

The court noted that plaintiffs cannot escape the unambiguous language of paragraph 96b, wherein they expressly agreed that as of the effective date (August 15, 2006), they resolved their liability to the United States for the cost of the RI/FS and agreed that the ASAOC was an "administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA."

The court also noted in footnote 6 that the ASAOC was modeled after the U.S. EPA's August 3, 2005, joint memorandum entitled "Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)," which was issued by the U.S. EPA in response to the Supreme Court's decision in Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004), to ensure that these administrative settlement agreements were afforded contribution protection.

In summary, the Hobart Corporation decision follows all other appellate court decisions in this area, holding that if a PRP had a CERCLA §113(f) contribution claim, it does not also have a CERCLA §107(a) cost recovery claim. Courts will review the exact language of the administrative settlement agreement to determine whether the PRP resolved some or all of its liability to the government in the administrative settlement agreement. If so, the PRP has a contribution action but no cost recovery against other PRPs.

Bricker & Eckler LLP represented The Dayton Power & Light Company in the Hobart Corporation case. If you have any questions regarding this case or any other CERCLA matters, please contact counsel of record, Frank L. Merrill or Drew Campbell .

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