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A Growing Circuit Court Consensus: CERCLA Limits Recovery Options for Compelled Superfund Cleanup Costs

The US Court of Appeals for the Eleventh Circuit has joined a growing chorus of courts holding that parties who incur Superfund cleanup costs under a judicial consent decree or administrative consent order with a governmental entity are limited to pursuing a claim for contribution, and cannot assert a claim for cost recovery. The Eleventh Circuit thus becomes the latest court to address an issue left unresolved by the US Supreme Court when it last addressed the competing litigation vehicles set forth in the federal Superfund act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[1]

Five years ago the Supreme Court left the environmental world hanging on the question of whether Superfund costs incurred pursuant to a consent decree may be sought via the cost recovery provision of Section 107 of CERCLA, or must be sought via a claim for contribution under Section 113. While originally ducked by the US Supreme Court in footnote six of *Atlantic Research*,[2] multiple circuit courts since have limited such parties to using Section 113 as their exclusive remedy. And on March 6, the Eleventh Circuit followed suit. This issue is of particular significance to parties who are considering entering into judicial consent decrees or administrative consent orders that require clean-up of contaminated sites, as the decision to do so may limit their ability to seek recovery under Section 107 and to impose joint and several liability on other parties.

The Eleventh Circuit ruling upheld the Northern District of Alabama's holding in *Solutia* that a Section 113(f) contribution claim is the exclusive remedy for a potentially responsible party which incurs compelled cleanup costs pursuant to a judgment, consent decree or other settlement agreement giving rise to a cause of action under Section 113(f).[3] Under the premise that CERCLA must "be read as a whole,"[4] the Eleventh Circuit reasoned that allowing a party subject to a consent decree to "simply repackage its Section 113(f) claim for contribution as one for recovery under § 107(a)" would undermine the structure of CERCLA remedies.[5] Parties would be able to circumvent the different statutes of limitations that attach to Section 113(f) contribution claims and Section 107(a) recovery claims. And parties could thwart the contribution protection afforded to parties that settle their liability with US EPA. Finally, allowing a Section 107(a) claim by a party with contribution protection under a judicially approved settlement would allow for the imposition of joint and several liability on others who would be barred from asserting any Section 113(f) counterclaims. These factors would combine to destroy CERCLA's statutorily created settlement incentive. [6]

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[1] *Solutia et al v. McWane*, No. 10-15639 (11th Circ. March 6, 2012).
[2] *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007).
[3] *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1341-42 (N.D. Ala. 2010), *aff'd per curiam*, No. 10-15639 (11th Cir. March 6, 2012).
[4] *Solutia et al v. McWane*, No. 10-15639, at 11 (*quoting Atl. Research*, at 135).
[5] *Id.* at 11.
[6] *Id.* at 11-12.

Like the Eleventh Circuit, other federal courts addressing this issue have held that Section 107 is not an available remedy when a potentially responsible party is entitled to assert a contribution claim under Section 113 because it has entered into a judicial consent decree or administrative consent order with a governmental entity. In *Agere Systems*, the Third Circuit held that, because the plaintiff had entered into a judicially approved settlement with US EPA to resolve its significant liability and was thus immune to a Section 113 counterclaim from the defendant, it would be "perverse" to allow the plaintiff to recover all of its costs from the defendant under Section 107.[7] According to the Third Circuit, such a result is at odds with the primary goal of CERCLA to make polluters pay. The Second Circuit similarly held that where an administrative consent order with the state environmental agency settled the plaintiff's CERCLA liability so as to give rise to contribution rights under Section 113(f)(3)(B), "only [that subsection]," and not Section 107(a), "provide[d] the proper procedural mechanism for [the plaintiff's] claims."[8] The Eighth Circuit similarly held that Section 113(f) provides the "exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under §§ 106 or 107," including a consent decree.[9]

In the meantime, parties who are considering seeking costs under Section 107 should keep in mind that entering into a judicial consent decree or administrative order on consent that creates a cause of action under Section 113(f) may limit their ability to recover under Section 107 for at least those costs attributable to the judicial consent decree or administrative order on consent. Of course, the potential loss of a remedy under Section 107 must be balanced against the benefits to be gained under a judicial consent decree or administrative consent order such as contribution protection.

Chemical Company Agrees to Pay US$1.4 Million Civil Penalty to Settle TSCA Violations

On February 7 the US EPA announced that Dover Chemical Corporation agreed to pay a US$1.4 million civil penalty for violations of the Toxic Substances Control Act (TSCA). The agreement is embodied in a consent decree lodged with the United States District Court for the Northern District of Ohio and is subject to a 30-day comment period and approval by the federal court. The agreement settles claims by US EPA that the company failed to file premanufacture notices (PMNs) required under TSCA for chlorinated paraffins it was manufacturing at its Dover, Ohio and Hammond, Indiana facilities. The US$1.4 million penalty underscores US EPA's announced intent to use its existing TSCA authorities more aggressively and bring financially significant enforcement actions for violations of the statute.

In addition to the US$1.4 million penalty, Dover has agreed to (i) cease manufacturing short-chained chlorinated paraffins (SCCPs); and (ii) submit PMNs for any medium-chained or long-chained chlorinated paraffins (MCCPs or LCCPs) it intends to manufacture within 30 days of the effective date of the consent decree

US EPA's action against Dover had been in the works for more than two years and was foreshadowed in the agency's chemical action plan on chlorinated paraffins, which was issued on December 30, 2009. In the process of preparing that action plan, US EPA staff concluded that there were discrepancies between the data on chlorinated paraffins submitted to the agency under other statutes and the information contained on the TSCA Inventory. The action plan stated:

> EPA is addressing the discrepancy between the specific chlorinated paraffins companies are actually manufacturing or importing and those listed on the TSCA Inventory. Only some of the chlorinated paraffin fractions being manufactured or imported are on the TSCA Inventory. EPA intends to require companies to submit

[7] *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 60 F.3d 227-28 (3rd Cir. 2010).
[8] *Niagara Mohawk Power Corp. v. Chevron USA, Inc.*, 596 F.3d 112, 124 (2d Cir. 2010)
[9] *Morrison Enter., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011).

Pre-Manufacture Notices for the SCCPs, MCCPs, and LCCPs fractions that are not on the TSCA Inventory.

As the consent decree points out, US EPA issued a notice of violation to Dover on December 15, 2009.

US EPA's action against Dover illustrates the need for chemical manufacturers and importers to ensure that the information they have provided to US EPA about the chemicals they manufacture or import is complete and up to date. In light of EPA's increased focus on TSCA compliance, it is critical that the description of a company's chemical substances on the TSCA Inventory accurately reflect the chemicals they are manufacturing or importing, especially if those chemicals have been listed on the TSCA Inventory for a long time. Careful attention should especially be paid to the information that companies are submitting to US EPA under the agency's new Chemical Data Reporting (CDR) rule. The CDR rule requires companies to provide more comprehensive data on the chemical substances they manufacture or import than has been required in the past. As the *Dover* case shows, if a company is manufacturing or importing a chemical substance that appears to be different from what is listed on the TSCA Inventory, the company can face significant enforcement action from US EPA.

The *Dover* case also illustrates the different way that TSCA treats "new" and "existing" chemical substances. Under TSCA any chemical not listed on the TSCA Inventory is considered a "new chemical substance" for which a PMN must be filed with US EPA at least 90 days before a company begins producing it. Although chlorinated paraffins have been manufactured for decades and were "grandfathered" onto the TSCA Inventory when it was established in 1978, US EPA claimed that the specific chlorinated paraffins manufactured by Dover were different from those listed on the TSCA Inventory. Because of the differences, US EPA took the position that Dover's chlorinated paraffins were "new" chemical substances under TSCA and that Dover's failure to file PMNs for these "new" chemicals violated TSCA. In the public statement it issued about this matter, Dover explained that the "original substance descriptions . . . were often not well-defined and this problem apparently created confusion regarding the appropriate CAS number/substance descriptions to use in reporting CP manufacture."

In addition to underscoring the importance of ensuring that the information on the TSCA Inventory is complete and up to date, the *Dover* case demonstrates that chemical manufacturers and importers need to ensure that the data they submit to US EPA under other environmental statutes is consistent with the data they submit under TSCA. As US EPA's chemical action plan on chlorinated paraffins implies, the agency is increasingly reviewing and comparing these various data sets for consistency. If the data a company has submitted to US EPA under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Emergency Planning and Community Right to Know Act, or other law indicates that the company is manufacturing or importing a chemical substance that is not listed – or not accurately listed – on the TSCA Inventory, the agency may bring an enforcement action under TSCA.

US EPA has been signaling its focus on increased TSCA implementation and enforcement for some time. US EPA Administrator Lisa Jackson has made "assuring the safety of chemicals" a top priority. In addition to preparing chemical action plans and pursuing new rulemakings, the agency is stepping up its TSCA enforcement activity, including devoting more resources to TSCA enforcement, inspecting more facilities, and seeking and reviewing more data on chemicals. Moreover, based on the *Dover* case, as part of its increased enforcement efforts, US EPA intends to seek significant financial penalties for violations of TSCA, in addition to any injunctive relief it requires.

More information on US EPA's penalty settlement with Dover Chemical Corporation can be found on US EPA's website.

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Complying With US EPA's New Chemical Data Reporting Rule

Between February 1, 2012 and June 30, 2012, all sources covered by US EPA's new Chemical Data Reporting (CDR) rule must submit their initial CDR data. This rule, which was finalized in August 2011, applies to a wide array of chemical manufacturers and importers, as well as certain processors and users of chemical substances including:

- Organic and inorganic chemical manufacturers and importers;
- Petrochemical manufacturers, petroleum refineries;
- Paint and coatings manufacturers;
- Pigment and dye manufacturers;
- Alkalies and chlorine manufacturers;
- Ink manufacturers;
- Fertilizer manufacturers;
- Paper and cardboard manufacturers;
- Iron and steel mills;
- Nonferrous metals smelters;
- Foundries;
- Electronic component and semiconductor manufacturers;
- Printed-circuit manufacturers;
- Utilities and electric power generators and
- Other users, manufacturers, importers and processors of chemical substances.

WHAT MUST BE REPORTED UNDER THE NEW CDR RULE?

The new CDR rule makes a number of changes to the data reporting that was required under US EPA's old Inventory Update Reporting (IUR) rule. Some of the more significant provisions of the new CDR are:

Production Volume Information

For the current 2012 reporting period, a manufacturer (including importer) of chemical substances must report production volume data (which includes the amount domestically manufactured plus imported volumes) for each chemical substance where 25,000 lbs. or more of the chemical was manufactured or imported *at any single site* during 2011. In other words, production volume data must be provided for each chemical at each site where the chemical is manufactured at or above the 25,000 lbs. threshold. On the other hand, if a company does not manufacture 25,000 lbs. of the chemical at any single site it is not required to provide data on the chemical.

During the 2012 reporting period, production volume must be reported for *both* 2010 and 2011. US EPA is requiring data for both 2010 and 2011 because there was a delay in finalizing the new CDR. For the next reporting period (i.e., 2016) and beyond, reporting will be required if the production volume of a chemical substance meets or exceeds 25,000 lbs. in *any single calendar year since the last principal reporting year* (i.e., since 2011). This is in contrast to the old IUR, which required reporting only if the production volume met or exceeded the threshold in the year immediately prior to the reporting period. Moreover, in future reporting periods (i.e., 2016 and beyond), production volume

must be reported for *each year since the last principal reporting year* (i.e., since 2011). This is also in contrast to the old IUR, which required data only for the year immediately before the reporting period.

Processing and Use Information

The new CDR substantially changes the threshold for reporting process and use information on chemicals. For the current 2012 reporting period, the new CDR requires a manufacturer or importer to report processing and use information for any chemical substance it manufactured (including imported) in the amount of 100,000 lbs. or more at a site during 2011. This is a significant decrease from the 300,000 lbs. threshold in the old IUR rule. In subsequent reporting periods, the reporting threshold for processing and use information will be lowered even further to 25,000 lbs., the same threshold as for reporting production volume information.

Under the CDR, processing and use information now must be reported if it is *"known to or reasonably ascertainable by"* the reporting entity. This broader new requirement replaces the "readily obtainable" reporting standard that had been included in the most recent version of the IUR rule. And the new CDR requires different processing and use information to be provided depending on whether industrial, consumer or commercial processes and uses are involved.

For industrial processes and uses, the information that must be submitted includes:

- The type of industrial processing or use operation(s) at each site that receives a reportable chemical substance;
- The applicable industrial sector code for each processing and use operation;
- The manner in which the chemical substance is used;
- The estimated percentage of the total production volume of the chemical substance(s) associated with each combination of industrial processing and use operation;
- Industrial sector and industrial function;
- The number of sites at which each reportable chemical substance is processed or used; and
- An estimate of the number of workers reasonably likely to be exposed to the chemical substances.

For consumer and commercial uses of chemical substances, the rule requires that *the data for consumer and commercial uses be separated, with the use being identified as either consumer or commercial*. Under the old IUR, commercial and consumer data would be reported in the aggregate.

Within each consumer and commercial product category, entities submitting data must determine whether any amount of each reportable chemical substance manufactured (or imported) by the entity is present in or on any consumer *products intended for use by children age 14 or under*, regardless of the concentration of the chemical substance in or on the product. Entities submitting data also must estimate the percentage of the submitter's site's total production volume of the reportable chemical substance associated with each consumer and commercial product category. When a chemical substance is used in a commercial product, the CDR rule requires that the number of commercial workers reasonably likely to be exposed to the subject chemical substance be reported.

Other Technical Data

In addition to the basic production volume information, the new CDR requires manufacturers (including importers) to report more detailed data than ever before on the chemical substances they manufacture or import, as well as report the data in different ways, including:

- More detailed information on the name and address of the parent company;
- The name of a technical contact for the data being reported;

- The current Chemical Abstracts (CA) Index Name used to list the chemical substance on the TSCA Inventory, as part of the chemical identity;
- The volume of a manufactured (including imported) chemical substance used at the reporting site;
- Whether an imported chemical substance is physically present at the reporting site; and
- The volume of each chemical directly exported and not domestically processed or used.

Reporting for Chemicals Subject to TSCA Rules or Orders

For the present 2012 reporting period, the new CDR does not change the reporting requirements for specific chemical substances that are the subject of particular rules and/or orders under the TSCA. As under the old IUR, data on these chemical substances must be submitted under the CDR if they are manufactured or imported in volumes of 25,000 lbs. or more at any single site. This is the same reporting threshold as previously existed. For the 2016 reporting period and beyond, however, the CDR lowers the reporting threshold for these chemicals to 2,500 lbs.

Reporting Byproducts

The definition of "manufacture" in the CDR rule includes the "extraction, for commercial purposes, of a component chemical substance from a previously existing chemical substance or complex combination of substances." Under this rule, byproducts of the manufacture, processing, use or disposal of another chemical substance or mixture for a commercial purpose are considered both "manufactured" and "manufactured for a commercial purpose" and are subject to CDR reporting.

Manufacturers (and importers) must report whether a chemical substance, such as a byproduct, is to be recycled, remanufactured, reprocessed or reused. Companies must indicate whether the chemical substance, which otherwise would be disposed of as a waste, is being removed from the waste stream and has a "commercial purpose." Information about whether a manufactured chemical substance, such as a byproduct, is to be recycled, remanufactured, reprocessed or reused must be reported in addition to any required information associated with any chemical substances manufactured from the byproduct.

Confidential Business Information Claims

The new CDR rule also makes some significant changes with regard to the submissions of data claimed to be confidential. Under the CDR, a reporting entity must provide upfront substantiation for any data claimed as Confidential Business Information (CBI) under TSCA, including chemical identity, company and site information, and processing and use data. US EPA will disallow confidentiality claims if it does not believe that the CBI claim has been adequately substantiated. Each CBI claim also must be asserted and substantiated individually, and US EPA will disallow generalized CBI claims. Moreover, the agency will disallow CBI claims for processing and use data if the data is simply identified as not ''known to or reasonably ascertainable'' without further substantiation.

Electronic Reporting Now Required

In a major shift in the reporting procedure, the new CDR requires that all data now must be reported to US EPA electronically. The CDR requires companies to use US EPA's web-based reporting tool (e-CDRweb) to submit CDR reports through the Internet to US EPA's Central Data Exchange (CDX). Paper submissions are no longer accepted.

Shorter Time Between Reporting Periods

Finally, in addition to changing the number of years for which data must be reported, the new CDR also decreases the time between reporting periods. Subsequent to 2012, reporting under the CDR will occur every four years, instead of every five years as was the case under the old IUR. The next

CDR reporting will occur in 2016, and the reporting period will begin on June 1 and end September 30 of that year and each reporting period thereafter.

More information about the new CDR, including additional technical reporting requirements and changes made by the new rule, can be found at 76 Federal Register 50816-50879 (August 16, 2011) and on US EPA's website.

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