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Robert H. Abrams

Florida A&M University College of Law, robert.abrams@famu.edu

Amy Kullenberg

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When "Responsible Parties" Clean Up Voluntarily, Can They Use Superfund to Get Some of Their Cleanup Costs Back?

by Robert H. Abrams and Amy Kullenberg

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Robert "Bo" Abrams is a professor of law at Florida A & M University, College of Law in Orlando, Fla. He is an elected member of the American Law Institute and co-author of a leading environmental law casebook. He can be reached at (407) 254-4001 or rha@aa-design.com. Amy Kullenberg is a member of the Class of 2005 at Wayne State University Law School.

This case turns on a nuanced interpretive issue involving § 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, aka Superfund). Superfund's main liability section, § 107, allows (among other things) private parties who have cleaned up sites to sue "potentially responsible parties" (PRPs) to recover cleanup costs incurred *consistent* with the cleanup standards established by the United States Environmental Protection Agency (EPA). Section 113(f) of Superfund expressly authorizes PRPs who have paid all or a disproportionately large amount of cleanup costs to sue other PRPs to contribute to these payments. Textually, § 113(f) is not the epitome of unambiguous drafting. Some language suggests that to use the section a PRP must first have been subject to a suit or a cleanup proceeding initiated by EPA. Other

language in § 113(f) seems to allow the suit without a prior EPA action, especially when read in conjunction with the scope of liability created by CERCLA § 107. Courts around the nation have been struggling with this issue for more than a decade.

ISSUE

Can a responsible party bring an action for contribution under § 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act in the absence of a prior or pending federal civil action brought under that statute?

FACTS

Cooper Industries, Inc., a firm that owned and operated several aircraft engine maintenance facilities in Texas, in 1981 sold the facilities to Aviall Services, Inc. Aviall continued to operate those facilities and, beginning in 1984 and for about a decade thereafter, performed an environmental cleanup of improperly disposed hazardous substances

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COOPER INDUSTRIES, INC. v.
AVIALL SERVICES, INC.
DOCKET NO. 02-1192

ARGUMENT DATE:
OCTOBER 6, 2004
FROM: THE FIFTH CIRCUIT

Case at a Glance

This case involves a dispute over environmental cleanup costs incurred at four aircraft engine maintenance facilities in Texas. A successor property owner, Aviall Services, Inc., is seeking to recover an equitable share of its cleanup costs from the property's prior owner, Cooper Industries, Inc. The parties disagree as to whether Aviall can use Superfund for this purpose even though it cleaned up its property voluntarily, after consultations with Texas state officials, without first litigating the issue with the United States Environmental Protection Agency.





that cost roughly \$5 million. Aviall contacted Texas authorities about the matter and, under threat of state administrative order, cleaned up the property in a manner satisfactory to the Texas authorities. Aviall did not contact the United States Environmental Protection Agency (EPA). In 1995 and 1996, Aviall sold those facilities but retained responsibility for the environmental conditions. In 1997, Aviall filed a lawsuit in the United States District Court for the Northern District of Texas against Cooper to recover the cleanup costs it had expended. The suit lodged claims on several grounds, including two distinct federal claims based on Comprehensive Environmental Response, Compensation and Liability Act, and additional state law claims.

The first Superfund claim arose under § 107(a)(2), with Aviall proceeding as a person who had cleaned up consistent with federal standards and now sought to recover those costs from Cooper Industries as an owner of the facility at the time hazardous substances were released. The second claim arose under § 113(f) and sought contribution as a party that had been itself partially responsible for the release but had paid more than its appropriate share of the cost of cleanup. Early in the litigation, Aviall amended its complaint regarding the two federal claims and merged them into a single claim in accordance with the prevailing Fifth Circuit precedent that interprets a claim of this nature as arising jointly under §§ 107 and 113(f). See *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (2000). At that point, Cooper sought and obtained summary judgment on the unified claim, which was accompanied by dismissal of the state law claims on the grounds that the court would decline to exercise its supplemental

jurisdiction now that no federal claims remained present. In 2001, a divided panel of the United States Circuit Court for the Fifth Circuit affirmed the ruling; however, after an *en banc* hearing in 2002, a divided Fifth Circuit reversed and the Supreme Court granted certiorari.

CASE ANALYSIS

This is a case of statutory interpretation. The difficult language appears in CERCLA, § 113(f), which states:

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or section [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 section [106] of this title or section [107] of this title.

It does not take a great deal of legal sophistication to see that the first and last sentences of § 113(f)(1) can be read to express radically different views about the necessity of a § 106 or § 107 action as a prerequisite to recovery under § 113(f). The Petitioners in this case stress the point that the first sentence is the one creating the express federal remedy—a contribution action in federal court—and that that sentence, therefore, defines the entire permissible scope of the cause of action. The inescapable thrust of the arguments of Petitioners, and of the United States on their behalf, is that the text of the first line, which reads, “may seek contribution during or following any civil action under section [106] of this title or section [107(a)] of this title” really

means that parties “may only seek contribution . . . during or following any civil action under section [106] of this title or section [107(a)] of this title.” See, e.g., Brief of United States, Statement of Argument. Petitioners then go beyond textualism to try to show that their proffered interpretation is consistent with the larger scheme of CERCLA.

Respondents hotly contest that reading, both in regard to its fidelity to the text and in regard to its consistency with the statute as a whole. Their central textual arguments attack the transformation of the permissive “may” into a restrictive “may only.” This line of argument was a central point in the *en banc* decision of the Fifth Circuit in favor of Aviall. Respondents argue further that the savings clause in the last sentence of § 113(f) couldn’t be clearer in demonstrating that a prior § 106 or § 107 civil action is not a prerequisite to recovery. This argument gains considerable extra traction in the real-world practices surrounding the operation of CERCLA. Section 106 allows EPA the power to file a civil action to enforce its administrative orders, but the parties receiving them comply with most such orders and many do not result in the filing of civil actions that would reduce the agreement to a consent decree. There has never been any doubt (or legal challenge) to the right of a recipient of a § 106 order who complies and expends cleanup costs in that context to seek a § 113(f) contribution.

For Respondents, the more subtle problem is to find a useful meaning for the “during or after” language of the first sentence of § 113(f). They are impelled to argue that the contested language in the first sentence is simply permissive—§ 113(f) suits “may” be brought at those times, as well as at any other time. That being the case, and in light of the



broad savings language of the last sentence, the interpretive issue for them is to explain why the “during or after” language is in the first sentence at all. Here they are running into a somewhat dubious presumption that may impute too much rationality to the legislative process: a frequently invoked canon of statutory interpretation is that every word chosen by the legislature must be given meaning.

SIGNIFICANCE

To repeat, this is a case of statutory interpretation. Moreover, it is not a case in which the different possible interpretations carry great prospective consequences in the overall operation of CERCLA. On a practical, pragmatic level, however, the case has a small marginal impact on several aspects of Superfund’s operation. A victory by Aviall allowing its § 113(f) suit to go forward would very slightly increase the attractiveness of voluntary cleanups. But at this time, a whole host of other incentives to undertake such actions have been put in place under other legislation, such as the Brownfields Revitalization Act. A decision for Cooper would force Aviall to seek to recover from Cooper under state-law theories and would have the indirect consequence of increasing the bargaining power of EPA in its dealings with PRPs who are in a position to undertake voluntary cleanups. It could also unsettle the law of CERCLA § 106 cases in which no civil action is filed. That is important inasmuch as many cases that do involve EPA do not result in a civil filing. If Cooper prevails in this case, parties thinking about voluntary cleanups but need the benefits of CERCLA § 113(f) to spread a portion of the cost to other PRPs will be forced first to negotiate a consent decree with EPA that is lodged with the court as part of a “civil action” under § 106 or § 107. This gives

EPA leverage, but it is far from clear that EPA any longer wants to become involved in many of these cases. The end result, whichever way it goes, can be altered by Congress in a quick flick of the legislative pen, and the topic is not one that will raise much of a cry on either side of the aisle or any other evident political divide.

The case has a little bit more significance as an example of the philosophical debate about textualism in statutory interpretation. Cooper Industries, with William Bradford Reynolds as lead counsel, claims that its textual reading is more true to the text than the textual argument urged by Aviall Services that won acceptance by the *en banc* majority of the Fifth Circuit. That view has just recently gained the support of the Bush II Administration, which has altered the position taken previously by EPA throughout the nearly two decades since the passage of § 113(f). Viewed with that context in mind, the case might play a role in a larger debate about textualism and provide the Supreme Court with an opportunity to come down on the side of greater literalism. Oddly, if Cooper wins, the victory’s federalism consequences (empowering EPA and injecting it as a necessary player in what are increasingly becoming state-private party negotiated settlements) seem to be at cross purposes with the normal federalism desires of this Administration and its ideological partners.

A more significant aspect of the case inheres in the mere fact that the Supreme Court is going to decide the issue. Clearing up the ambiguity will prevent more litigation of an issue that has soaked up significant amounts of judicial time and litigant dollars in tens, if not hundreds of cases over the years. Superfund has been harshly criticized for its high

transaction costs, and every decision that ends litigation that does not advance the merits is salutary. This too, however, is somewhat ironic because the timing of the decision—coming after Superfund is well past its zenith—minimizes its importance. State-supervised voluntary cleanups at contaminated sites are now the principal rubric under which cleanups at unremediated sites are being proposed. EPA, with most of the worst sites now moving along in the remedial process, has become almost quiescent in relation to using Superfund at additional sites. Thus, to decide this case now rather than 15 years ago is almost beside the point because so few significant cases involving the behaviors that are influenced by this decision are still taking place.

ATTORNEYS FOR THE PARTIES

For Cooper Industries, Inc. (Wm. Bradford Reynolds, Howry, Simon, Arnold & White, L.L.P. (202) 783-0800)

For Aviall Services, Inc. (Richard O. Faulk, Gardere Wynne Sewell, LLP (214) 999-3000)

AMICUS BRIEFS

In Support of Cooper Industries, Inc.

United States (Theodore B. Olson, Solicitor General (202) 514-2217)

In Support of Aviall Services, Inc.

Atlantic Richfield Company et al. (Joel M. Gross (202) 942-5000)
Conocophillips Co. et al. (Richard P. Bress (202) 637-2200)
Lockheed Martin Corporation (Miguel A. Estrada (202) 955-8500)
States of New York et al. (Caitlin Joan Halligan (212) 416-8016)
Superfund Settlements Project et al. (Michael W. Steinberg (202) 739-5141)