1994

Attorneys' Fees Are Costly, But Are They a Recoverable Cost of Environmental Cleanup Under Superfund?

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

Attorneys' Fees Are Costly, But Are They a Recoverable Cost of Environmental Cleanup Under Superfund?

by Robert H. Abrams

Key Tronic Corporation
v.
United States
(Docket No. 93-376)

Argument Date: March 29, 1994
From: The Ninth Circuit

ISSUE

Do Sections 107(a) and 101(25) of the Comprehensive Environmental Response, Compensation, and Liability Act, popularly known as Superfund, authorize a private party who cleans up environmental contamination to recover its attorneys' fees as part of the costs of cleanup?

FACTS

The Colbert Landfill (the "Landfill"), located in eastern Washington State, is operated by Spokane County, Washington. During the 1970s, Key Tronic Corporation (Key Tronic) along with several other entities, including the United States Air Force, disposed of liquid chemicals at the Landfill. In 1980, state testing of nearby drinking water wells found significant contamination that was traced to hazardous materials leaking from the Landfill. Together with Spokane County, Key Tronic retained consultants and incurred other costs in taking measures to provide alternate water supplies and begin the process of site remediation.

Key Tronic also took steps to identify other potentially responsible parties ("PRPs"); that is, to identify additional parties who are liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for cleaning up the Landfill. The United States Air Force was one of the parties uncovered by Key Tronic's efforts. Concurrently, Key Tronic retained legal counsel and a consultant to work with the United States Environmental Protection Agency (the "EPA") and Washington state officials in developing a remedial plan for the Landfill and reducing it to a consent decree. That decree was entered, setting forth the agreed-upon remedy and extinguishing Key Tronic's further liability in exchange for a sizeable payment of $4.2 million.

With other PRPs identified at the Landfill, the EPA began negotiations with them regarding settlement of their liability. The Air Force agreed to pay the EPA $1.45 million to extinguish its liability for implementing the remedy selected in the consent decree.

Key Tronic, in the meantime, sought to shift its loss at the Landfill to the other PRPs, including the Air Force. In October 1989, Key Tronic filed suit against the Air Force, seeking awards for two separate items. First, Key Tronic sued for the $1.2 million it spent before its settlement with the EPA. This type of action is usually referred to as "private cost recovery" and is authorized by Section 107(a)(4)(B) of CERCLA. Second, Key Tronic sought to recover some or all of the $4.2 million it had paid to the EPA. This type of action is usually referred to as "contribution" and is authorized by Section 113(f) of CERCLA. Because the Air Force had settled separately with the EPA and obtained "contribution protection" as authorized by CERCLA, that portion of Key Tronic's suit was dismissed early on.

Turning to Key Tronic's $1.2 million cost recovery claim, the United States District Court for the Eastern District of Washington ruled that, as a matter of law, Key Tronic was entitled to recover. The Air Force and Key Tronic then negotiated an agreement quantifying the liability of the Air Force. This agreement had two components: $185,000 to reimburse Key Tronic for costs incurred for well contamination studies and provision of alternate water supplies to affected well

Case at a Glance

The Federal Comprehensive Environmental Response, Compensation, and Liability Act, better known as Superfund, encourages private parties to clean up sites of environmental contamination. Among the incentives given to those parties is a right to sue other potentially responsible parties for cleanup costs, including the cost of "enforcement activities" associated with cleanup. At issue in *Key Tronic* is whether a party that took immediate steps to clean up a contaminated site can recover attorneys' fees and investigative costs, as well as its more conventional cleanup costs, from other responsible parties.

Robert Abrams is professor of law at Wayne State University School of Law, 468 West Ferry Mall, Detroit, MI 48202, (313) 577-3930, and co-author of a leading environmental law casebook, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY.

users, and $155,000 for (1) prelitigation costs and attorneys' fees incurred identifying additional PRPs, (2) prelitigation costs and attorneys' fees incurred working on the consent decree, (3) attorneys' fees incurred in prosecuting the cost recovery action, and (4) prejudgment interest on the expected claims.

The district court ruled in favor of Key Tronic, holding that all of the items were recoverable in a CERCLA cost recovery action. 766 F.Supp 865 (E.D. Wash. 1991). The Air Force appealed the holding only insofar as it related to prelitigation costs and attorneys' fees, and the Ninth Circuit Court of Appeals reversed. 984 F.2d 1025 (1993).

BACKGROUND AND SIGNIFICANCE

Above all else this is a case of statutory interpretation with the key question being whether CERCLA Section 107 authorizes an award of attorneys' fees and other litigation-related expenses as part of recoverable response costs. The long-established American Rule is that, win or lose, each side bears its own attorneys' fees. There are exceptions to the rule, some grounded in equity and others created by statute. Here, CERCLA is claimed as the source of a statutory exception in cost recovery actions because Section 101(25) defines recoverable response costs to include the costs of "enforcement activity."

The legal issue is a close one that has divided the federal circuit courts. In the instant case, the Ninth Circuit ruled against the recoverability of fees and litigation costs in private party actions. In *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993), and *General Electric Co. v. Litton Indus. Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), the Sixth and Eighth Circuits took the opposite view. The Tenth Circuit, in *FMC Corp. v. Aero Indus., Inc.*, 988 F.2d 842 (10th Cir. 1993), has adopted an intermediate view that would allow some of the attorneys' fees contested in this case to be recovered. There are also district court decisions on both sides of the issue. That various courts have differed on the issue is not surprising as there are well-reasoned legal arguments on both sides.

Key Tronic stresses CERCLA policy favoring cost spreading among PRPs and the role of private cost recovery actions in achieving that goal. To encourage private parties to step forward and help solve the problems at Superfund sites, Congress established the private cost recovery action so that the active private parties could recoup a fair portion of their expenditures from fellow PRPs. Denying recovery would undermine the incentive established by Congress by making the transaction costs of cost recovery a deadweight loss for cooperative parties who acted to start immediate site cleanup.

Key Tronic also makes an argument based on the amended text of the statute. In particular, the 1986 Superfund Amendment and Reauthorization Act added language to CERCLA Section 101(25) that defined "response" (as in the phrase "response costs") to "include enforcement activities related thereto." Key Tronic, relying on that added language, claims that beyond its original efforts at the Landfill, its efforts at identifying PRPs, its efforts at working out a remedial design, and the legal and consulting costs associated with those efforts are all part of its response costs because they are within the scope of the response itself, or are associated enforcement activities.

The Air Force seeks to have the Ninth Circuit affirmed by arguing that cost shifting is a narrow exception to the American Rule and requires explicit statutory authorization, not merely convenient policy arguments. Were that not the case, the exceptions would begin to swallow the rule. In virtually all remedial statutes that grant a right of recovery to an injured party, a policy argument favoring cost shifting as furthering legislative intent is available. As to the textual argument made in this case, the Air Force counters that Congress knows how to draft explicit fee-shifting language and has done so in several other parts of Superfund but not in this part.

Consistent with its straightforward appearance, this is a case of modest significance. Even though the dollar amounts for cost recovery attorneys' fees in any given case can be large, the role of attorneys' fees in the mix of incentives to cooperate may not that great. There are other incentives to cooperate, not the least of which are the ability to influence the remedy selected and controlling the cost of implementing the agreed-upon remedy. Moreover, whatever the decision in the case, it need not do violence to Congress' desires regarding private cost recovery actions. The issue is one of statutory interpretation. If Congress is displeased with the result reached by the Supreme Court, Congress can amend the statute.

ARGUMENTS

For Key Tronic Corporation *(Counsel of Record: James R. Moore; Perkins Coie, 1201 Third Avenue, Seattle, WA 98101-3099; (206) 583-8888):*

1. CERCLA's policy of encouraging private party initiative warrants the recovery of attorneys' fees and the other costs of response in Section 107 cost recovery actions.
2. CERCLA Section 101(25), when it defines "response" to include "enforcement activities related thereto," authorizes recovery of attorneys' fees in Section 107 cost recovery actions.

For the United States *(Counsel of Record: Drew S. Days, III, Solicitor General, Department of Justice, Washington, DC 20530; (202) 514-2217):*

1. The well-established American Rule is that parties must bear their own attorneys' fees and that exceptions to the rule are rare.
2. Congressional authorization of attorneys' fee shifting, when it is done, is accomplished through explicit terms unlike those appearing in CERCLA Section 101(25).