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Rhode Island Cleans Up Problematic Superfund Precedent That Undermined Federal Settlements

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The U.S. District Court for the District of Rhode Island has vacated its 2010 summary judgment decision in Ashland Inc. v. GAR Electroforming, 729 F. Supp. 2d 526 (D.R.I. 2010), just days after receiving an amicus memorandum by the United States in support of a motion to vacate filed by United Technologies Corporation (UTC).

In doing so, the court nullified a significant post-U.S. v. Atlantic Research Corporation interpretation of the right to bring Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 107 cost-recovery claims (42 U.S.C. § 9607) and bolstered the United States' attempt to strengthen statutory contribution protection for parties that have settled their liability with the United States under Section 113 of CERCLA (42 U.S.C. § 9613(f)(2)).

Contribution protection in past and future Superfund settlements had been thrown into question by the *Ashland* decision which, building upon *Atlantic Research*, held that the bar from bringing a Section 113 contribution claim against a settling party did not prohibit a Section 107 claim.

What made the *Ashland* decision unique, however, is that the Section 107 claimant, Ashland, had previously been adjudged liable on a prior contribution claim addressing contamination at the same site in an action brought by one of the parties against whom Ashland sought Section 107 cost recovery, UTC.

The United States, through UTC, had sought to vacate the nearly two-and-a-half-year-old summary judgment opinion that it described to be one of "national precedent and import."^[1] The thrust of the government's position was that it was necessary to vacate the *Ashland* decision in order to maintain "critical" protections for "parties who have stepped forward to settle with the government to remediate hazardous waste sites."

The U.S. further reasoned that Ashland, which did not have standing to bring a Section 113 claim, should not be permitted to use a Section 107 claim to "circumvent the protection from claims intended by the United States in its [Superfund] settlement[s] and as intended by Congress in enacting Section 113(f)(2)." (Id. at 15.)

Legal and Procedural Background

Atlantic Research

The seminal U.S. Supreme Court decision in *United States v. Atlantic Research*, 551 U.S. 128 (2007) held that the plain terms of §107(a)(4)(B) allow a potentially responsible party (PRP) to recover costs from other PRPs, provided that the PRP voluntarily "incurred its own cost of response." *Atlantic Research*, 551 U.S. at 139.

A PRP that reimburses response costs paid by other parties or that pays money to satisfy a settlement agreement or a court judgment has not voluntarily incurred response costs, and may only pursue a Section 113(f)(1) contribution claim. *Id.* at 139-141.

The distinction between a Section 107 cost-recovery action and a Section 113 contribution claim is significant because Section 107 provides for joint and several liability, unless the defendant can provide a reasonable basis for a finding that the harm is divisible, while Section 113 calls for an equitable apportionment of liability for response costs where the plaintiff bears the burden of establishing the equitable allocation of costs.

The burden of proof has, in practical terms, therefore been shifted under such a scenario. In complex Superfund sites where the contamination may constitute a "witches brew" of constituents, and no reasonable basis for apportionment exists, the possibility of joint and several liability is a serious concern.

In terms of an impact on future Superfund settlements, the *Atlantic Research* court was dismissive of the idea that its decision created a "loophole" that would discourage settlement. It reasoned that the contribution bar of Section 113 still provided significant protections to settling parties, that a district court would likely account for the settlement in equitable allocation proceedings triggered by contribution counterclaims, and that settlement still offered the benefit of providing finality in resolving liability. *Id.* at 140-141.

The Ashland Decision

The *Ashland* decision, which was decided post-*Atlantic Research*, unsettled the assumptions made by the *Atlantic Research* court regarding the impact of its decision on Superfund litigation. The procedural history underlying the *Ashland* decision presented the anomalous situation, in which Ashland initiated a Section 107 cost-recovery action for costs it incurred in investigating and remediating groundwater, even though it had previously been sued by UTC for contribution under Section 113(f), was adjudged partially liable for contaminating the Davis site, and was allocated a share of responsibility for UTC's future soil cleanup costs. *United States v. Davis*, 31 F. Supp. 2d 45 (D.R.I. 1998).

Moreover, Ashland sought recovery against UTC, among other parties, which had already settled its liability with the United States and reportedly spent millions remediating contaminated soil at the Davis site.

Ashland, having voluntarily incurred groundwater cleanup costs at the Davis site (at the request of the U.S. Environmental Protection Agency), argued that it had standing to bring a Section 107 cost-recovery action and to impose joint and several liability, including on UTC, and that UTC's contribution protection under Section 113 was not a bar to Ashland's Section 107 claim.

Ashland relied on *Atlantic Research* to assert that it could pursue a direct Section 107 recovery claim for joint and several liability. *Ashland*, 729 F. Supp. 2d at 539. The district court agreed and granted summary judgment to Ashland on these threshold procedural issues.

The district court also found that the prior allocation between the parties, established in the original Section 113 action brought by UTC, was inapplicable because of the different character and proof burdens between 107 and 113 claims. *Id.* at 547-548.

If *Atlantic Research* created a loophole, it seems that the circumstances of the *Ashland* decision exploited it. Many have noted the perverse consequences and disincentives to settlement generated by the *Ashland* decision: A party that settled with the government that was supposedly protected from contribution claims and had a judgment against nonsettling PRPs, might still be vulnerable to cost-recovery actions from nonsettling parties, PRPs or others, and might have to bear the burden of proving why it should not be held jointly and severally liable. For these reasons, the United States sought to vacate the *Ashland* decision.

U.S. Filing

In its filing in support of vacating the *Ashland* decision, the U.S. argued two major points: (1) the contribution protection issue addressed by the district court was moot because of a 2011 settlement resolving *Ashland's* claims, and (2) the government had a compelling interest in the decision being vacated to ensure its CERCLA enforcement and settlement efforts were not hindered.

On the second point, the U.S. underscored its compelling interest in vacating "precedent that may impair its enforcement efforts" particularly when the government has not had the opportunity to fully litigate and attempt to safeguard its position. (U.S. Memorandum at 13.) Of vital concern to the United States was the precedential impact of the *Ashland* decision on CERCLA's contribution protection provisions. *Id.* Parties that might enter into settlements in order to secure protection from response costs claims from other PRPs could be less inclined to settle, causing the government to "have to spend additional limited public dollars itself on cleanup or litigating to achieve settlements, which will slow cleanup efforts and contravene Congress' intent." (*Id.* at 16.)

Future Considerations

In an order short on elaboration, the district court vacated the *Ashland* decision following its review of the U.S. memorandum and pursuant to its authority under Rule 54(b) of the Federal Rules of Civil Procedure. (Doc. 148.) While the district court has, for now, wiped the slate clean of the precedent the government called "strongly contrary to congressional intent," the rationale of the now-vacated *Ashland* decision remains a source for provocative arguments likely to be made in such future litigation.

The impact of the erosion of contribution protection occasioned by *Atlantic Research*, and enhanced by the rationale of the now-vacated *Ashland* decision, has also yet to be determined.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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