AKIN GUMP STRAUSS HAUER & FELD LLP
Attorneys at Law

January 22, 2007

ENVIRONMENTAL ALERT

CERT GRANTED IN CERCLA CONTRIBUTION CASE

The Supreme Court granted certiorari from the 8th Circuit on January 19 in *United States v. Atlantic Research Corp*., which presents the issue of whether property owners can bring pre-enforcement contribution actions under Superfund Section 107(a). Oral argument is scheduled for the second half of April 2007. The government brief is due March 5, 2007. Amicus briefs in support of a right of contribution are due April 9, 2007.

United States v. Atlantic Research Corp. presents the question of whether Section 107(a) of Superfund gives potentially responsible parties (PRPs) the opportunity to seek contribution from other PRPs to clean up Superfund sites before the EPA commences any enforcement action against them. The circuit courts are split 3-1 on this issue, with the 2nd and 7th Circuits joining the 8th in holding that Section 107(a) grants an implied right of contribution to PRPs prior to an EPA enforcement action, and the 3rd Circuit holding that it does not.

The issue presented is of great importance to parties that currently own or seek to acquire and develop Superfund sites. Remediation of these "brownfield" sites can be so costly that, without a legal mechanism to share costs prior to EPA-intitiated cleanups, these properties remain abandoned until EPA turns its attention to them. But EPA has so many sites to attend to that it could be years before it seeks to compel cleanup at any given site. Allowing landowners and developers to sue other PRPs for contribution under Section 107(a) before EPA acts allows them to clean up idling property years earlier than they otherwise would. This is a win-win proposition: good for landowners and developers, who are able to reap the benefit from idling assets; good for localities, who are able to transform blighted brownfield areas into functioning space; and good for the environment, as ongoing underground leaks and other contamination can be capped off and remediated.

Atlantic Research presents a very similar issue to that decided by the Court two terms ago in *Cooper v. Aviall*, in which the Court held that Section 113(f) of Superfund does not grant PRPs the ability to bring contribution actions against other PRPs before they themselves are the subject of some sort of enforcement action.

Section 107(a) was in the contemplation of the Court as it reached its decision in *Cooper*. Section 107(a) imposes joint and several liability on defined classes of PRPs, but does not explicitly confer a contribution right. For the first several years after Superfund's enactment,

courts had been finding an implied right of contribution under that section. Congress added Section 113(f) in the Superfund Amendments and Reauthorization Act of 1986 to codify that right. Because its decision in *Cooper* concentrated on textual language specific to Section 113(f), the Court was mindful that after its decision landowners might turn back to Section 107(a) as a source of a pre-enforcement contribution right. But the majority specifically declined to decide whether Section 107(a) afforded PRPs such a right. Notably, Justices Ginsburg and Stevens dissented from that particular decision, and wrote separately to say that they would have reached and decided it in favor of granting a contribution right.

The plaintiffs in *Atlantic Research* did exactly as the Supreme Court anticipated, and turned to Section 107(a) after the Court closed off the Section 113(f) route while they were already in litigation. Taking advantage of the Court's pronouncement in *Cooper v. Aviall* that the two sections are "similar and somewhat overlapping," yet "clearly distinct," the 8th Circuit interpreted Section 107(a) as operating independently of Section 113(f), and interpreted that section as granting the right that the Supreme Court said Section 113(f) did not afford in *Cooper v. Aviall*.

Thus, this case presents a rare opportunity for industry, landowners, developers and localities to have their opinions heard for a second time within two years on nearly identical issues. In *Cooper v. Aviall*, three groups of corporations, one group of states and one group of trade associations filed five amicus briefs in support of the right of contribution. Though that effort was not successful, parties filing amicus briefs now are on more solid legal and textual footing in arguing that such a right should be afforded under Section 107(a). The policy implications are just as profound. And this time, there may be a key opportunity to move the Court in a new direction.

Justices Ginsburg and Stevens' dissent in *Cooper* would seem to provide Respondent's position with two solid votes. Given that the majority decided to defer the Section 107(a) question, it stands to reason that the seven justices in the majority were not in agreement on whether Section 107(a) provided such a right. Some of the five remaining justices from that majority may support a Section 107(a) pre-enforcement contribution right. And, of course, since *Cooper* was decided in the October 2004 term, two new justices have joined the Court who will be seeing the question for the first time.

Argument in *United States v. Atlantic Research Corp*. will be heard in April, as one of the last arguments of the October 2006 Term. As the schedule now stands, the solicitor general's topside brief will be due to the Court on March 5, and the Respondent's brief, along with any amicus briefs in support of the right of contribution, will be due on April 9. Based on past practice, however, we expect that the Court will allow the solicitor general's office to file its opening brief earlier than March 5 to afford itself more time for its reply brief. This, in turn, would move up the due date for amicus briefs in support of the Respondent's position by the same number of days.

CONTACT INFORMATION

If you have questions about this case, please contact:

Ambika Kuckreja
akuckreja@akingump.com
1.866 AKIN LAW

Austin Beijing Dallas Dubai Houston London Los Angeles Moscow
New York Philadelphia San Antonio San Francisco Silicon Valley Taipei Washington, D.C.