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Cost Recovery

SCOTUS Denies Review of Superfund Ruling On When PRPs May Pursue Cost Recovery

The U.S. Supreme Court Jan. 27 declined to consider whether a party's entry into a Superfund consent decree triggers its right to bring a contribution action (*Bankert v. Bernstein*, U.S., No. 13-568, *cert. denied* 1/27/14).

The Supreme Court's denial of certiorari lets stand a Seventh Circuit ruling that an administrative order by consent did not release the trustees of a contaminated site in Indiana from liability because removal actions are still ongoing.

The Seventh Circuit found that the trustees properly brought a cost recovery action against other potentially responsible parties rather than one for contribution, which would have been barred by the statute of limitations.

''The effect of the denial of cert. is to lock in our defeat of [the government's] argument that simply by entering into an AOC a company has 'resolved its liability' to the United States regardless of what the AOC says,'' counsel for the trustees Norman W. Bernstein of N.W. Bernstein & Associates LLC in Rye Brook, N.Y., told Bloomberg BNA in a Jan. 28 e-mail.

''In [the government's] theory, that resolution of liability means that a PRP has a right of contribution and thus has no right to bring a CERCLA 107(a) cost recovery action,'' he said.

Counsel for the petitioners told Bloomberg BNA they were disappointed that the court declined to settle what they view as a split between the Sixth and Seventh Circuits on the meaning of the phrase '' resolved its liability to the United States'' in the statute.

''We view the Seventh Circuit's opinion as a threat to Congress' intent to enable the government to get environmental contamination cleaned up without the use of government funds by involving PRPs in the clean-up effort,'' Peter G. Syregelas of Pretzel & Stouffer in Chicago said in a Jan. 28 e-mail.

To Encourage Settlement, Deter 'Free Riders.' ''The argument we made that the Seventh Circuit accepted is that if the AOC does not provide a covenant not to sue until EPA issues a certificate of completion, and in fact the work is ongoing and not complete, there is no resolution of liability,'' Bernstein said. ''Since there is no resolution of liability, there is no right to bring a contribution action and thus there is a right to bring a CERCLA 107(a) cost recovery action—which is exactly the form of action we brought.''

The Bankerts' preferred reading of the statute would bar settling companies from recovering their response costs from those who refuse to settle under CERCLA § 107(a), Bernstein's firm said in a statement on its website.

''The practical consequence of our win is to encourage settlement and deter 'free riders'—including free riding by federal polluters,'' the statement said.

Decision 'Handcuffs' EPA. Syregelas expressed concern over the potential effects of the Seventh Circuit's ruling.

The opinion means that existing administrative settlements between the EPA and PRPs are ''worthless because settling PRPs who believed they obtained contribution protection really did not and can be sued (and their settlements effectively nullified) for contribution,'' he said.

The ruling that contribution rights are not triggered until after a cleanup is complete undoes ''the basic quid pro quo of buying peace and avoiding litigation expenses,'' he said. ''The Seventh Circuit's opinion handcuffs the Government into entering into AOCs that declare that all liability is resolved even before work has been done if the Government hopes to induce PRPs into actually entering into an administrative settlement.''

The decision ''effectively nullifies Congress' relatively short limitations periods which it deemed appropriate under CERCLA,'' he said.

When Is Settling PRP's Liability Resolved? In its original December 2012 opinion, the Seventh Circuit held the Bankert family responsible as former owners for response costs incurred by trustees of the site, but found that the trustees' claims for contribution for cleanup costs were time-barred (28 TXLR 13, 1/3/13). A plaintiff entitled to a contribution action may not also bring a cost recovery action for the same cleanup costs, the court said.

On rehearing, the Seventh Circuit amended its ruling to clarify that the trustees properly sued the former owners under the law's cost recovery provision because the trustees' settlement with the EPA didn't limit them to contribution claims (29 TXLR 24, 1/2/14). Because the settlement provided that the EPA would not release the trustees from liability until removal actions—still ongoing at the time—were completed, the trustees were not yet limited to a contribution action, the court said.

The Bankerts asked the Supreme Court to review the Seventh Circuit's decision in order to resolve the split it allegedly created with the Sixth Circuit over the meaning of the phrase ''resolved its liability to the United States'' in the statute (28 TXLR 1253, 11/14/13).

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The trustees urged the court not to grant the certiorari petition, arguing that the EPA has modified its model consent order to provide that the covenant not to sue is effective when the order is signed, making this case of limited precedential value (29 TXLR 24, 1/2/14).

Bernstein and Frederick DeVaney Emhardt of Plews Shadley Racher & Braun in Indianapolis represented the trustees.

Syregelas and Robert M. Chemers, also of Pretzel & Stouffer in Chicago, represented the Bankerts.

BY PERRY COOPER

To contact the reporter on this story: Perry Cooper in Washington at pcooper@bna.com

To contact the editor responsible for this story: Peter Hayes at phayes@bna.com

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