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**ELEVENTH CIRCUIT JOINS SWELLING TIDE OF RULINGS THAT
§ 113 CONTRIBUTION IS THE EXCLUSIVE CERCLA REMEDY AVAILABLE
TO PARTIES SUBJECT TO A CONSENT DECREE**

Solutia v. McWane, Inc.

The Eleventh Circuit recently followed a string of circuit court decisions¹ in determining that CERCLA § 113 is the exclusive method for a Potentially Responsible Party (PRP) engaging in a cleanup effort under a consent decree to seek CERCLA recovery from other parties.² The Ninth Circuit has yet to address this issue.

The case, *Solutia v. McWane, Inc.*, 2012 WL 695007 (11th Cir. March 6, 2012), arose from an EPA enforcement action against companies Solutia Inc. and Pharmacia Corporation that resulted in a Partial Consent Decree (PCD) in 2003. The PCD reserved the right of PRPs Solutia and Pharmacia to assert CERCLA contribution claims against other parties. Solutia and Pharmacia subsequently filed an action against various PRPs for both cost recovery under CERCLA § 107 and contribution under CERCLA § 113. Ultimately, many of those defendant PRPs settled their CERCLA liability in a separate, judicially approved, consent decree with the EPA. They then filed a motion for summary judgment against Solutia's and Pharmacia's §§ 107 and 113 claims. The District Court granted the settling defendants' motion on the § 113 claims, finding that the contribution protection afforded to settling parties bars such claims, but upheld the § 107 claims. On the defendants' motion for reconsideration, however, the District Court reversed itself and granted summary judgment against Solutia's and Pharmacia's § 107 claims. In doing so, the District Court relied on the United States Supreme Court's decisions in *Cooper Industries Inc. v. Aviall Inc. (Aviall)*, 543 U.S. 157 (2004), and *United States v. Atlantic Research Corp. (Atlantic Research)*, 551 U.S. 128 (2007), and various subsequent circuit court decisions.

In *Aviall*, the Supreme Court held that parties forced to reimburse a third party for cleanup costs, as mandated by a legal judgment or settlement pursuant to CERCLA, may only seek contribution for those reimbursed costs from other PRPs under § 113. The Supreme Court later

¹ See *Morrison Enter., LLC v. Dravo Corp.*, 638 F.3d 594, 604 (8th Cir. 2011); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010); *Niagra Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010)

² Though not cited in *Solutia*, the Sixth Circuit issued a similar ruling in *ITT Indus., Inc. v. BorgWarner, Inc.* 506 F.3d 452, 458 (6th Cir. 2007) ("To maintain vitality of § 113(f), however, [PRPs] who have been subject to a civil action pursuant to §§ 106 or 107 or who have entered into a judicially or administratively approved settlement must seek contribution under § 113(f)").



clarified in *Atlantic Research* that § 107 and § 113 provide PRPs with distinct, mutually exclusive, rights of action for recouping cleanup costs in CERCLA cases. There, the Court concluded that cleanup costs incurred voluntarily and directly by a party (even when that party is a PRP) are recoverable only under § 107, whereas a person forced to reimburse a third party for its cleanup efforts can only seek contribution under § 113. The Court, however, expressly left open the question of whether a PRP that incurs direct cleanup costs involuntarily pursuant to a consent decree can bring an action against other PRPs under § 107 or § 113. Importantly, CERCLA § 107 imposes joint and several liability while § 113 does not, and the two actions carry different statutes of limitations.

On appeal to the Eleventh Circuit, *Solutia* and *Pharmacia* argued that, in their situation, § 107 and § 113 were not mutually exclusive remedies. The Court disagreed, finding that this interpretation would eviscerate the structure of CERCLA's remedies by allowing a party subject to a consent decree to "repackage" its § 113 claim for contribution as a § 107 claim for cost recovery, thereby circumventing the associated statutes of limitations and thwarting the contribution protection offered by § 113 to parties who settle their liability with the EPA. The Eleventh Circuit thus joined its sister circuits in denying the availability of § 107 in cases where direct cleanup costs are incurred involuntarily as part of a consent decree.

The *Solutia* decision follows the evolving trend of securing the important contribution protection available to settling defendants under § 113. However, as a result, PRPs will need to balance the contribution protection they can receive from settling with the government, against the foreclosed opportunity to seek cost recovery from other PRPs under CERCLA § 107. This is particularly important given that other PRPs could receive contribution protection against § 113 claims, as the *Solutia* defendants did, by settling with the government. In that event, CERCLA plaintiffs that already have settled with the government would have no avenue for recovering response costs from those fellow PRPs under CERCLA.

For more information, please contact Jennifer Hartman King or Stephanie Alford of Cota Cole LLP's Environmental Practice Group.