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High court rules, but who will clean up?

A recent decision by the United States Supreme Court could have a significant impact on determining who is responsible for cleaning up contaminated sites. This decision will affect how property owners and waste generators respond to regulatory enforcement actions and could also have an impact on how environmental liabilities are dealt with in real estate transactions.

The Superfund Law, 42 U.S.C. § 9601 et. seq. provides that owners of real property are strictly liable for the costs of cleaning up hazardous substances disposed of or released at the property. This liability can exceed the value of the property and is the main reason that purchasers engage in environmental due diligence. The Superfund Law has two distinct liability provisions, § 107, which has been interpreted to impose strict joint and several liability for response costs, and § 113, which provides for contribution claims. The relationship between these two provisions was the primary subject of the Supreme Court's decision in United States v. Atlantic Research Corp., 127 S. Ct. 2331 (2007)

Atlantic Research remediated a site at which it had been a tenant and brought an action against the United States, the owner of the property, for response costs or contribution. The action was initially dismissed because a claim for response costs under §107 of the Superfund Law could not be brought by party who could be held responsible for the clean up and a suit for contribution under §113 of the Superfund Law could only be brought by someone who had been a defendant in a Superfund action or who had settled their liability with the government. This was an accurate depiction of the pre-existing law and meant that a person who cleaned up the site as a "volunteer" could not recoup its costs.

The Supreme Court allowed the Atlantic Research suit to go forward, redefining who may bring an action for response costs. Prior courts had limited who may sue bring a suit for response costs under § 107 to the government and innocent parties, reasoning that if a responsible party could sue under §107, there would be no need for the contribution provisions of §113. The Supreme Court in a prior decision, Cooper v Aviall Services Inc., 543 U.S. 157 (2006), had determined that a volunteer could not bring a contribution claim. Thus, to permit the suit to go forward, the Supreme Court needed to redefine the relationship between §§ 107 and 113.

The Supreme Court held that whether one can bring a claim under §107 (and potentially collect all of its response costs) or under §113 for contribution (and collect an equitable share of costs) depends on whether one cleaned up the site or merely funded someone else's clean-up. One who cleaned up the site could bring a §107 claim and potentially recover all response costs. On the other hand, a party that funds a clean up by someone else, is limited to a contribution action.

The Court expressly left open the issue of how future courts should treat the case in which the claimant was not a volunteer and remediated the site. This person would seem to have a choice of whether to bring a claim under either provision, but the Court expressed some doubt

about whether a person who has a contribution claim should also be permitted to bring a section 107 claim for response costs. How that “overlap” case works out may have important impacts on how property owners behave. For example, some may opt to remediate as volunteers (precisely what put one at greatest risk under the prior law) to maintain their section 107 claim, while others may continue to avoid being a volunteer to make sure that they have some opportunity to recover costs. This remains a developing area and one should make sure that environmental decisions are based on the latest case law.

By Aaron Gershonowitz. Mr. Gershonowitz is a partner at Forchelli, Curto, Crowe, Deegan, Schwartz, Mineo and Cohn in Mineola. Mr. Gershonowitz has authored a more detailed examination of the impacts of the Atlantic Research decision, which has been accepted for publication by the Duke Environmental Law and Policy Forum and is expected to be published in the Fall.