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## Declaratory Judgments and Superfund Eyed by 2nd Circuit

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On Dec. 19, the 2nd U.S. Circuit Court of Appeals took on the confusing question of declaratory judgments under the federal Superfund statute, the Comprehensive Environmental Response, Compensation and Liability Act. CERCLA addresses contaminated sites, that is, sites onto which or from which there has been a "release" of a "hazardous substance." As the Supreme Court said most recently in *Burlington Northern and Santa Fe Railway v. United States*, the statute has twin purposes: "to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."

CERCLA casts a fairly wide liability net. Section 107(a) defines "responsible persons" to include the familiar four classes: current owners and operators; owners and operators at the time of "disposal" of a "hazardous substance"; "arrangers" for treatment or disposal of a hazardous substance (often called "generators"); and transporters for treatment or disposal of a hazardous substance who participate in selecting the receiving facility. The United States may pursue any of these to recover an order to "abate" the threat posed by a release of hazardous substances under Section 106. Under Section 107, the United States, a state and other persons in certain circumstances may pursue recovery of costs that they have expended. Under Section 113, parties that incur costs or reimburse the government may pursue contribution against other responsible parties.

Because Superfund matters drag on, litigation may arise before all the cleanup work is done and all the costs are expended. So, current litigation may address issues pertinent to who pays for future work that cannot even be predicted at the time of the current judgment. That is how the question of declaratory judgments arises.

*New York v. Solvent Chemical Co.*, the 2nd Circuit case, considered the third-party claims of Solvent Chemical. In 1997, Solvent Chemical entered into a consent decree with New York to begin a cleanup. Under Section 113(g)(3)(B), Solvent Chemical had three years to commence any contribution action to recover the costs of the work it had committed to do. Solvent Chemical brought contribution claims against two other responsible parties, and the district court awarded Solvent Chemical a money judgment on certain costs Solvent Chemical had already incurred. The court declined to grant Solvent Chemical a declaration as to the liability of the contribution defendants, primarily because the court could not allocate future costs among the three responsible parties without knowing what the future cleanup would be.

The 2nd Circuit reversed.

It reasoned that none of the uncertainties enumerated by the district court would affect the conclusion that the two contribution defendants bore liability under the statute for all parts of the site, including parts not yet cleaned up and work not yet done. The equitable allocation of responsibility for future work might differ from the one used by the district court for work already done, but the district court could address that difference in a future proceeding. By denying the declaratory judgment, however, the district court effectively precluded future recovery because the limitations period for a new contribution action ran in 2000 (three years after the consent decree). Accordingly, denying the declaration on the basis cited by the district court amounted to an abuse of discretion.

That does not mean that a declaratory judgment is appropriate in every CERCLA case, however. Careful litigators should be alive to the statutory and practical difficulties posed by the statute.

The declaration in *Solvent Chemical* addressed only the liability of the contribution defendants for subsequent work at the site, not their shares. So, *Solvent Chemical* would require additional litigation to determine those shares and to recover in contribution. In this circumstance, but for the limitations period problem, the declaration does not do much more than would application of conventional issue preclusion. Accordingly, one always has to consider whether the declaratory judgment game is worth the candle.

CERCLA itself contains only one provision addressing declaratory judgments. Section 113(g)(2) — the statute of limitations for "an initial action for recovery of the costs referred to in" Section 107 — requires the district court to "enter a declaratory judgment on liability for response costs or [natural resource] damages that will be binding on any subsequent action or actions to recover further response costs or [natural resource] damages." The government typically brings these "initial actions" under Section 107; private claims under Section 107 must meet the often inapplicable criteria enunciated in 2007 by the Supreme Court in *Atlantic Research Corp. v. United States*. When the U.S. government or a state sues in order to avoid the running of the limitations period but before completion of all work on all aspects of a site, the government faces the prospect of sequential actions for recovery of costs. The declaratory judgment eases that burden.

Notice that Section 113(g)(2) does not by its terms apply to any claim other than a claim under Section 107. It does not, for example, necessarily apply in a contribution case among responsible parties, the situation faced in *Solvent Chemical*. While as the 2nd Circuit observed, some decisions seem to apply Section 113(g)(2) in the contribution context, those decisions may be wrongly decided. There is no mandatory declaration in a contribution case. There is no mandatory declaration even on contribution third-party claims and cross-claims in that "initial action" under Section 107.

There is also no mandatory declaration in a subsequent action for recovery of costs. Most CERCLA cases settle; indeed, many CERCLA complaints are filed by the United States merely for the purpose of entering a consent decree. The model consent decree used by the EPA and the Department of Justice does not include a declaration of liability governing subsequent actions, but instead includes a waiver of the defense of claim-splitting. When the subsequent action arises, Section 113(g)(2) does not apply, and there is no mandatory declaration that would cover the third and following case.

Section 113(g)(2) does not state whether an action is "initial" when brought against a given defendant for the first time, or with respect to a given site for the first time. The U.S. government may sue Defendant A in

2011 and settle, and then may sue Defendant B in 2012. The result of *US v. Defendant B* ought to include a mandatory declaration, but one might argue that *U.S. v. Defendant A* was the "initial action."

The court may issue a declaration not covered by Section 113(g)(2) under the Declaratory Judgment Act, but only when the lawsuit presents a "case of actual controversy" within the court's jurisdiction. Indeed, the 2nd Circuit relied on the Declaratory Judgment Act in *Solvent Chemical*. U.S. Supreme Court Justice Antonin Scalia's 2007 opinion in *MedImmune Inc. v. Genentech Inc.*, described a "case of actual controversy" as a "dispute [that is] 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that [is] 'real and substantial' and 'admi[ts] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"

Many cost recovery and contribution cases will present those sorts of justiciable controversies. However, some may not. One who seeks a declaratory judgment must be prepared to demonstrate that the declaration of liability would really mean something. That is, in a contribution action seeking a declaration of liability or allocation for future costs, the plaintiff may have to show that future work or future costs will actually arise and that resolution of the parties' dispute would make some difference.

In any case, a declaratory judgment governing future work or future costs requires a showing that the legal and factual issues will be similar across the entire area and time covered by the declaration. For example, Party X may concede liability for soil contamination, but not the groundwater plume. A declaration of liability based on soil facts should not, ordinarily, cover groundwater. Alternatively, in a contribution lawsuit brought at the conclusion of the remedial investigation/feasibility study but before selection of a remedy, a defendant may correctly argue that the allocation of costs ought to depend on the remedy selected. If the cost of the remedy depends on the volume of material present (a landfill cap or excavation of contaminated soil), then one set of equitable factors might govern. However, if the cost of the remedy depends on the nature of the material (treatment of solvents, but not metals, for example), then another set of factors might govern. If the allocation depends on the relative fault of the parties, then only one set of factors might matter.

In any case not governed by Section 113(g)(2), a declaration is discretionary. In the Supreme Court's 1962 words from *Public Affairs Assocs. Inc. v. Fickover*, the Declaratory Judgment Act is an "authorization, not a command." That discretion may be abused, as in *Solvent Chemical*, but the district court has some latitude.

Finally, consider Section 106, the provision allowing the United States to pursue an action "to secure such relief as may be necessary to abate [a] danger or threat" to the public health or welfare from a release. Most consider this an authorization for injunctive relief. In at least one case, the United States has, instead, issued a unilateral administrative order and then pursued a declaration of liability to implement the order. If that is a new enforcement tactic, there is more to come. •

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