Solutia v. McWane: The Eleventh Circuit on CERCLA contribution

Mike Freeman and Patrick Runge

Mike Freeman is a partner in the Litigation Section, and Patrick Runge is an associate in the Environmental Section, of Balch & Bingham LLP's Birmingham, Alabama office.

Because the U.S. Environmental Protection Agency (EPA) lacks the resources to remediate the hundreds of Superfund sites across the country, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) encourages voluntary cleanup of such sites. CERCLA does this in two ways: section 107 "recovery claims," and section 113(f)(2) "contribution protection." In *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012), cert. denied, No. 12-89 (Oct. 9, 2012), the Eleventh Circuit determined that those statutory provisions clashed.

At the center of *Solutia* is a polychlorinated biphenyl (PCB) plant in Anniston, Alabama, owned and operated by Solutia, Inc., which is a spinoff of the former owner Pharmacia Corporation and its predecessors. The plant manufactured PCBs from 1929 to 1971, releasing this hazardous substance into the local environment. In 2000 and 2001, Solutia entered into two consent orders with EPA, agreeing to perform some PCB sampling and cleanup activities in Anniston and to reimburse EPA for others. In 2002, the United States filed a CERCLA section 107 action against Solutia in connection with the PCB contamination and also lead contamination. During the litigation, the parties submitted a consent decree to the court to settle EPA's claims. In it, both parties expressly reserved any rights—including any right to contribution—that each party may have had against third parties. *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1322 (N.D. Ala. 2010). Before the consent decree was entered, Solutia sued the owners and operators of

other industrial facilities (primarily foundries) in the Anniston area, seeking contribution under CERCLA section 113(f) and cost recovery under CERCLA section 107. *See id.* at 1323–24. The consent decree was subsequently approved, resolving the United States' action against Solutia. *Id.* at 1321.

Two years later, EPA entered into a separate administrative consent order with the foundry defendants. *Id*. at 1324. In exchange for reimbursement of EPA's remediation costs, among other things, EPA stipulated that the foundry defendants had met their obligations to EPA and were entitled to "contribution protection" from recovery claims. Armed with the consent order, the foundry defendants sought to stay the *Solutia* case, arguing that Solutia's claims were precluded by their consent decree with EPA. In response, Solutia moved to hold the government in contempt for violating its rights under its earlier consent decree with EPA. The court did not grant Solutia's motion but did suspend Solutia's obligations under its consent decree. *Id*. at 1326. In 2008, the district court granted summary judgment to the foundry defendants, concluding that Solutia's section 113(f) contribution claims were indeed precluded by the consent decree. *Id*. at 1326–27. The district court initially ruled that Solutia could still pursue cost recovery claims pursuant to section 107(a) but in 2010 it reversed itself, holding that "Congress intended § 113(f) contribution to serve as the exclusive remedy for a party to recoup its own costs incurred in performing a cleanup pursuant to a judgment, consent decree or settlement that gives rise to contribution rights under § 113(f)." *Id*. at 1342. The district court

concluded that where a private party seeks to recover costs that "arise out of a cleanup they performed pursuant to obligations under a consent decree or administrative settlement that would give rise to contribution rights under § 113(f)," it cannot pursue "those same costs" under a section 107(a) recovery claim. *Id*. at 1345–36.

On appeal, the Eleventh Circuit understood the issue as a dispute over the relationship between the cleanup recoupment provisions of section 107(a) and section 113(f). *Solutia*, 672 F.3d at 1235. The court explained that cleanup costs "incurred voluntarily and directly by a party are recoverable only under § 107(a)(4)(B), even if the claimant is not entirely innocent under CERCLA." *Id*. On the other hand, "if a person is forced to reim-

burse a third party for its cleanup efforts, as mandated by a legal judgment or settlement under CERCLA, then that person may only seek contribution for those reimbursement costs from other potentially liable parties under § 113(f).” *Id*. CERCLA “must be read as a whole” and the “structure of CERCLA remedies” would be “completely undermined” if a party subject to a consent decree “could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a).” *Id*.

By agreeing with its sister circuits, *see, e.g.*,*Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *Morrison Enter., LLC v. Dravo Corp.*, 638 F.3d 594, 604 (8th Cir. 2011), that denial of the section 107(a) remedy under these circumstances is necessary “[t]o ensure the continued vitality of the precise and limited right to contribution,” the Eleventh Circuit strengthened potentially responsible parties’ (PRPs’) incentive to settle with EPA. *Id*. at 1237. Conversely, the decision may create a disincentive for voluntary cleanup efforts since a PRP will be limited to contribution actions if eventually it settles with EPA in a consent judgment that compels it to do the same remedial work that it had initially undertaken on a voluntary basis. The court did not address recovery of voluntary expenditures incurred *before* settlement. On July 19, 2012, Solutia and Pharmacia Corp. filed a petition for certiorari with the U.S. Supreme Court, *Solutia Inc. v. McWane, Inc.*, No. 12-89, which the Court denied on October 9, 2012.