

Environmental Law

State Consent Order Constitutes an Approved Settlement

Champion Laboratories is a seminal case for New Jersey

By Sheila A. Woolson

C*hampion Laboratories v. Metex Corp.*, 2008 WL 1808309 (D.N.J. 2008), is a seminal decision from the New Jersey District Court interpreting the right to sue under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") following the United States Supreme Court's decisions in *Cooper Industries Inc. v. Aviall Services Corp.*, 125 S. Ct. 577 (2004), and *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007). Specifically, the *Champion* court found a consent order entered with the New Jersey Department of Environmental Protection resolving state claims for natural resource damages constituted an approved settlement under CERCLA conferring the right to sue under Section 113(f)(3)(b).

The U.S. Supreme Court Refines Standing under Sections 107 and 113

In the *Aviall* decision, the U.S. Supreme Court held that an allegedly responsible party that undertakes a reme-

Woolson is a Member of the Labor and Employment and Litigation practices at Epstein Becker & Green in Newark.

diation, without having been subject to a CERCLA enforcement action under Sections 106 or 107, cannot sustain a contribution action under Section 113(f)(1). Three years later the court held, in *Atlantic Research*, that a potentially responsible party that voluntarily undertakes a remediation can seek to recover costs under Section 107. These two decisions ended the long split over whether a potentially responsible party's remedy was limited to suing for contribution under Section 113 or whether it could seek cost recovery under Section 107. However, parties negotiating settlements and consent orders even in cases involving only state law claims, must pay particular attention to the tenets of both cases.

In *Champion Laboratories, Inc. v. Metex Corp.*, the New Jersey District Court, on April 21, discussed the interplay between Sections 107 and 113 and claims for natural resource damages under New Jersey law. *Champion* acquired a facility in Edison as part of an acquisition another corporation after *Aviall* and *Atlantic Research*. That acquisition triggered New Jersey's Industrial Site Recovery Act ("ISRA"), N.J.S.A. 13:1K-6, requiring *Champion* to undertake an investigation of the facility. During the investigation, groundwater contamination was detected, and the New Jersey Department of Environmental Protection ("NJDEP") required *Champion* to monitor groundwater on and off-site.

Metex's property was separated

from the *Champion* site by one parcel. Concurrent with the *Champion* ISRA investigation, Metex independently triggered ISRA. Metex's groundwater investigation detected contamination. *Champion* claimed that its property was downgradient of the Metex site; therefore, the groundwater contamination on its property was caused by Metex. NJDEP claimed that there was insufficient data to support *Champion's* position, and required *Champion* to perform further investigation of the groundwater. After securing a court order granting it access to Metex's property and performing additional investigation, *Champion* requested NJDEP require no further action. When NJDEP refused *Champion's* request, *Champion* refused to perform further investigation or remediation at its property until Metex remediated its own property. NJDEP issued a Notice of Violation to *Champion*, directing it to install additional monitoring wells and threatening daily penalties of \$50,000 day for violations of the New Jersey Spill Compensation and Control Act ("Spill Act") and \$25,000 for ISRA.

Champion Sues Metex

Champion then filed suit against NJDEP, Metex and the adjacent property owner seeking cost recovery under Section 107. NJDEP was eventually dismissed from *Champion's* suit, and filed its own action in state court against *Champion* in 2006 for natural resource damages. That matter was resolved through a consent judgment that resolved all claims related to natural resource damages recoverable under the Spill Act, CERCLA and other state and federal laws. It also provided for CERCLA contribution protection for

natural resource damages.

In the interim, Champion's action against Metex continued. In 2004, Metex moved for and the court granted summary judgment dismissing Champion's CERCLA claims. Pursuant to *Aviall*, the court dismissed the Section 113 claim because Champion had not been subject to a CERCLA enforcement action. Based on Third Circuit precedent, the court dismissed Champion's 107 claim on the basis that Champion as a responsible party could not seek cost recovery.

However, in 2007, following the Supreme Court's *Atlantic Research* opinion, which reversed the law in the Third Circuit on whether potentially responsible parties could sustain cost recovery actions, the *Champion* court granted the parties leave to amend their pleadings. Thereafter, Champion and Metex crossmoved to dismiss various counts under the amended pleadings.

Metex sought to dismiss Champion's claims for contribution under Section 113(f) (1) and (f)(3)(B) on procedural and substantive grounds. The court found that the amendment was procedurally appropriate under its Order because the amendment related to the *Atlantic Research* decision, which "extensively examined and explained the interplay between Section 107(a) and section 113(f)."

Substantively, the court again dismissed Champion's claim under Section 131(f)(1) because Champion had not been subject to a CERCLA enforcement action, as had been previously ruled.

The Court Permits Reliance on Consent Order in a State Court Action to Support CERCLA Claims

The court, however, permitted Champion's claim for contribution under Section 113 (f)(3)(b) to survive. Section

113(f)(3)(b) permits a party that has settled its liability with the United States or a state for response costs through an administratively or judicially approved settlement to sue for other parties contribution. The court found that Champion could rely upon the Consent Order it had entered with NJDEP to seek contribution from Metex under Section 113(f)(3)(b).

Metex argued that the Consent Order Champion entered with NJDEP during the pendency of the Champion/Metex matter did not resolve CERCLA liability because it was limited to natural resource damage claims arising under state law. Metex argued that natural resource damages were not included in the definition of CERCLA response costs. The District Court disagreed.

The court relied upon the approach adopted by the Second Circuit in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005), in light of the *Aviall* decision, which was to determine the effect of the Consent Order by its language. In *UGI*, the consent order resolved only state law claims; therefore, the court found it did not provide a basis for bringing a contribution claim under CERCLA Section 113(f)(3)(b).

In contrast, the *Champion* court found that the consent order that Champion entered did include CERCLA liability.

The Consent Judgment defines 'natural resource damages' as including CERCLA liability:

All claims, arising from discharges at the [Champion] site that occurred prior to the effective date of this Consent Judgment and that recoverable by the Department as Natural Resource Damages under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq., ...the Comprehensive

Environmental Response Compensation and Liability Act, 42 U.S.C. 9601, et. seq.

The court further found persuasive the fact that the Consent Order "specifically provides CERCLA contribution protection." Thus, the court found that payment for the restoration of ground water was a response cost under CERCLA pursuant to the Consent Order and allowed Champion to sustain a CERCLA claim under Section 113(f)(3)(b).

The Interplay of *Aviall*, *Atlantic Research* and *Champion*

Champion makes clear that given the specificity of Sections 107 and 113, a party relying on an administratively or judicially approved consent order involving a state agency as a basis for seeking contribution under Section 113 must walk a fine line. While NJDEP's action against Champion did not constitute a CERCLA enforcement action under Section 106 or Section 107 sufficient to sustain a claim for contribution under Section 113(f)(1), the Consent Order that arose from the State court action did constitute an administratively or judicially approved settlement resolving CERCLA liability that supported a claim under Section 113(f)(3)(b) based solely on its text.

Although the underlying NRD action did not involve CERCLA, because the Consent Order specifically referenced CERCLA and included CERCLA contribution protection, the court held that it satisfied Section 113(f)(3)(b)'s requirements. Thus, *Champion* highlights the emphasis that courts place on the language of settlements and consent orders when addressing standing under CERCLA in light of the Supreme Court's decisions in *Aviall* and *Atlantic Research*. ■