WILL CHANGES TO THE SUPREME COURT MEAN CHANGES TO CERCLA'S JOINT AND SEVERAL LIABILITY REGIME?

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I. Introduction

On April 7, 2017, the U.S. Senate confirmed Neil Gorsuch to the Supreme Court, filling the vacancy left by Justice Antonin Scalia. Justice Gorsuch is widely considered to be an "ardent textualist." *See* Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSblog, http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch. Some commentators have speculated that President Trump will have the opportunity to nominate at least one additional Justice, likely someone with views similar to Justice Gorsuch, in the next four years. *See* Peter Baker, *Picking One Justice, Trump Has Eye on Choosing a Second*, N.Y. Times, Jan. 31, 2017, https://www.nytimes.com/2017/01/31/us/politics/trump-supreme-court-neil-gorsuch.html. This article explores how the appointment of Justice Gorsuch and another conservative judge to the Supreme Court may affect joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

II. Joint and Several Liability Under CERCLA

As a threshold matter, there is no statutory language in CERCLA that expressly imposes joint and several liability. Nevertheless, beginning with *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), joint and several liability has been repeatedly imposed in CERCLA cases. While the U.S. Supreme Court has described *Chem-Dyne* as the "seminal opinion" on whether CERCLA imposes joint and several liability, the Supreme Court has never squarely considered the issue itself. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613–14 (2009).

In *Chem-Dyne*, the district court found that CERCLA's definition of "liable," which incorporates provisions of the Clean Water Act, was ambiguous, and therefore CERCLA's legislative history should be consulted to discern whether CERCLA liability is several only or joint and several. 572 F. Supp. at 805–08. The *Congressional Record* showed that the phrase "joint and several liability" was deleted from earlier drafts of CERCLA. *Id.* at 807. Although the district court acknowledged that "when Congress deletes certain language it 'strongly militates against a judgment that Congress intended a result that it expressly declined to enact'" (*id.* at 807–08 (internal citations omitted)), the district court held that the deletion of references to joint and several liability throughout CERCLA meant that defendants *may*, rather than *shall*, be held jointly and several liable in accordance with common law.

III. The Supreme Court's Recent Statutory Interpretations

If the Supreme Court, with Justice Gorsuch and perhaps another appointee similar to Justice Gorsuch serving as Justices, squarely evaluated the issue of whether CERCLA imposes joint and several liability, the Court might be receptive to the argument that CERCLA does not incorporate joint and several liability. Unlike the *Chem-Dyne* court's reliance on CERCLA's legislative history, recent CERCLA and other decisions of the Supreme Court stress the importance of relying on a statute's text.

A. Supreme Court CERCLA Cases

Four recent CERCLA cases before the Supreme Court—*Cooper Industries, Inc. v. Aviall Servs.*, *United States v. Atlantic Research Corp.*, *United States v. Burlington N. & Santa Fe Ry. Co.*, and *CTS Corp. v. Waldburger*—demonstrate the Court's preference to resolve cases by relying on CERCLA's statutory text.

In *Cooper*, the Court held a party who has not been sued under Sections 106 or 107 of CERCLA cannot assert a contribution claim under Section 113(f)

(1) because that provision of CERCLA "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a)[.]" 543 U.S. 157, 160, 168 (2004). Though both parties made arguments regarding how their position advanced CERCLA's purposes, the Court found that "[g]iven the clear meaning of the text, there [was] no need . . . to consult the purpose of CERCLA at all." *Id.* at 167. In *Atlantic Research*, the Court again turned to CERCLA's text in holding that potentially responsible parties (PRPs) can assert cost recovery claims under Section 107 and are not limited to asserting contribution claims under Section 113. 551 U.S. 128, 136 (2007). As the Court explained, "the plain language . . . authorizes cost-recovery actions by any private party, including PRPs." *Id.* In *Burlington Northern*, the Court interpreted the scope of arranger liability under Section 107. 556 U.S. at 610. Because CERCLA does not specifically define what it means to "arrange for" disposal of a hazardous substance, the Court looked to the term's "ordinary meaning" in holding that, "under the plain language of the statute, an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance." *Id.* at 611. The Court also determined whether the percentage of remediation costs the district court assigned to defendants was reasonably apportioned. *Id.* at 619. Notably, the particular issue before the Court was *not* whether the district court properly applied joint and several liability before conducting an apportionment, as "[n]either the parties nor the lower courts dispute[d] the principles that govern apportionment in CERCLA cases." *Id.* at 615. Finally, in *Waldburger*, the Court relied on CERCLA's text to resolve whether a state statute of repose is preempted by CERCLA. 134 S. Ct. 2175, 2185 (2014). After noting that CERCLA uses the term "statute of limitations" and not "statute of repose" in 42 U.S.C. § 9658, and that statutes of limitations and statutes of repose are distinct concepts, the Court held that "the natural reading of [Section 158's] text is that statutes of repose are excluded" from CERCLA's preemption bar. *Id.* at 2185–86, 2188.

B. Recent Supreme Court Statutory Interpretation Cases

Several recent Supreme Court cases, though they do not involve CERCLA, further adhere to text-based statutory construction that could lead to changes in the interpretation of CERCLA's joint and several liability regime. The Court recently reaffirmed its commitment to answering questions by referencing the text of the statute at issue. In *Life Techs. Corp. v. Promega Corp.*, 2017 WL 685531 (U.S. Feb. 22, 2017), the Court "look[ed] first to the text of the statute" to determine the meaning of the term at issue, and based its analysis on the ordinary meaning of the term and the statute's structure. *Id.* at *5. The Court employed a similar approach in *Nichols v. U.S.*, 136 S. Ct. 1113 (2016), basing its unanimous decision on the "plain text" of the relevant statute. *Id.* at 1118. In rejecting the respondent's arguments, the Court noted that "[w]hat the [respondent] asks is not a construction of a statute, but, in effect, an enlargement of it by the court . . . [t]o supply omissions." *Id.* In *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015), the Court relied on a literal reading of the statutory phrase at issue to reject petitioner's argument that it should be interpreted more expansively, emphasizing that "the statute itself" did not support petitioner's position. *Id.* at 1763. Finally, the Court has held that a statute always must be given "its fairest reading," and lower courts' interpretations of statutes are not dispositive. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015).

IV. A Gorsuch Supreme Court (and Beyond)

Despite widespread acceptance of, or acquiescence to, an interpretation of CERCLA § 107 that imposes joint and several liability, a review of Justice Gorsuch's opinions from his tenure on the Tenth Circuit Court of Appeals suggests that he would interpret CERCLA § 107 through a more thorough engagement with the statutory text.

Justice Gorsuch's opinions consistently emphasize that "[w]here the statutory language is plain . . .

that language controls as written, without regard to titles or judicial perceptions (or possible inadvertent misperceptions) of legislative purpose." *United States v. Hernandez*, 655 F.3d 1193, 1197 (10th Cir. 2011); *see also Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 830 F.3d 1219, 1220 (10th Cir. 2016) ("'When a statute is as clear as a glass slipper and fits without strain,' it is our job merely to put it on the foot where it belongs") (citation omitted); *Genova v. Banner Health*, 734 F.3d 1095, 1099 (10th Cir. 2013) ("[I]t is Congress's plain directions, not our personal policy preferences, that control."). In order to stay true to legislative intent as expressed by the statutory text, Justice Gorsuch seems to favor the ordinary, dictionary meaning of undefined statutory terms. *See In re Dawes*, 652 F.3d 1236, 1239 (10th Cir. 2011) (citing *Black's Law Dictionary* for the meaning of "incur"); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1307 (10th Cir. 2012) (citing *Webster's Third New International Dictionary* and the *Oxford English Dictionary*).

Justice Gorsuch has shown some willingness to corroborate his interpretation of statutory provisions by referencing legal norms or the common law, but neither trumps statutory text. *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1155 (10th Cir. 2010) ("[W]hen a legal concept like this 'is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'") (internal citations omitted); *Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2013) ("Congress has chosen to invoke the concept of an accounting. That concept has a long known and particular meaning in background trust law."); *In re Woolsey*, 696 F.3d 1266, 1274 (10th Cir. 2012) ("[W]hen it comes to interpreting statutes the [Supreme] Court itself has repeatedly instructed that pre-enactment practice is relevant only 'to the interpretation of an ambiguous text' and holds no sway when the statutory language is clear.") (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012)).

To the extent Justice Gorsuch turns to legislative history at all, his opinions evidence that this approach is highly disfavored, as it improperly "elevat[es] legislative history above express textual direction." *Iliev v. Holder*, 613 F.3d 1019, 1024 (10th Cir. 2010). And, as Justice Gorsuch pointed out in *Lexington*, legislative history is "a guessing game both sides can almost always play . . . trying to discern the textually unexpressed intentions of (or really attribute such intentions to) a legislative body composed of scores or often hundreds of individuals is a notoriously doubtful business—and precisely never enough to trump the unambiguous text a majority of legislators actually adopted." *Lexington Ins. Co.*, 830 F.3d at 1221. Consequently, legislative history is used by Justice Gorsuch, if at all, to reinforce his textual interpretation of a statute. *See*, *e.g.*, *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1183 (10th Cir. 2011) ("Beyond language of [the statute] itself, beyond its statutory references and history, lies the realm of legislative history. And any effort to venture so far would only serve to corroborate" the interpretation already reached.).

V. Will Joint and Several Liability Under CERCLA Survive a New Supreme Court?

Justice Gorsuch's approach to statutory interpretation suggests that he would hold that CERCLA does not impose joint and several liability. While CERCLA defines "liable" as the same standard applied under Section 311 of the Clean Water Act, 42 U.S.C. § 9601(32), that section of the Clean Water Act does not reference joint and several liability at all. 33 U.S.C. § 1321. Nor does the dictionary definition of "liability"—"the quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment"—indicate that the scope of liability should be anything other than several. *Black's Law Dictionary* (10th ed. 2014). Further, Justice Gorsuch would likely reject *Chem-Dyne*'s reliance on CERCLA's legislative history to support joint and several liability, as doing so would undermine the statute's text. Given the

absence of any reference to joint and several liability in CERCLA, it seems likely that Justice Gorsuch would conclude that no such requirement exists.

To further support this interpretation, Justice Gorsuch might look to other provisions of CERCLA. For instance, CERCLA's establishment of the "Superfund" to provide a source of funds for the federal government to finance cleanup efforts is arguably inconsistent with joint and several liability. 26 U.S.C. § 9507; *see also Chem-Dyne*, 572 F. Supp. at 806 (noting opponents of the bill recognized the unfairness of coupling joint and several liability with the establishment of such a fund). Simply put, if the purpose of the Superfund is to actually use tax revenues to investigate and remediate contaminated sites, that purpose is severely undermined (and the Superfund is significantly underutilized) if liability is joint and several under Section 107. Similarly, interpreting the scope of liability under Section 107 as joint and several is at odds with the provisions of Section 122 that require the U.S. Environmental Protection Agency (EPA) to prepare guidelines for a nonbinding allocation of responsibility and engage in such allocations when it would expedite settlements. 42 U.S.C. § 9622(e)(3). EPA rarely performs nonbinding allocations of responsibility, perhaps due to the expansive reading of Section 107 liability, and as a result Section 122(e)(3) is one of the most underutilized provisions of CERCLA. It is unclear what purpose is served by having EPA engage in allocations if CERCLA liability is joint and several. Moreover, Congress could have made joint and several liability under Section 107 explicit in the 1986 amendments to CERCLA, as it did with the right to contribution, but Congress chose not to do so. *See Cooper Indus., Inc.*, 543 U.S. at 162 (explaining that although CERCLA did not mention the word "contribution," such a right arose either impliedly from provisions of the statute or as a matter of federal common law until Congress amended CERCLA to provide an express cause of action for contribution).

VI. Conclusion

The appointment of Justice Gorsuch and another similarly minded jurist could provide an opportunity to challenge the imposition of joint and several liability under CERCLA. CERCLA does not expressly provide for joint and several liability and, as Justice Gorsuch and other jurists have repeatedly explained, the language of the statute must control and restrain any exercise of statutory interpretation.

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