

U.S. Supreme Court to Address Superfund Cost Recovery Controversy

by Gabrielle Sigel

On January 19, 2007, the U.S. Supreme Court decided to review the question of whether a private party, who is a potentially responsible party ("PRP") under the Superfund ("CERCLA") liability scheme, may sue other PRPs for cost recovery under CERCLA Section 107(a), even when the plaintiff has not been sued or otherwise resolved its environmental liability with the government. This question has been the most hotly contested issue in Superfund litigation since the Supreme Court's 2004 decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157. The Supreme Court's review of the Eighth Circuit's decision in *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Circuit 2006), likely will resolve a split of opinion among the circuits of the Court of Appeals and among district courts. The appeal of *Atlantic Research*, which likely will be briefed and argued this term, will be watched closely by all parties affected by the Superfund process, including developers, lenders, insurers, current

CERCLA litigants, and all those involved in "voluntary" cleanups.

The controversy now before the Supreme Court stems from its decision in *Cooper* that a PRP may not bring an action for contribution under CERCLA Section 113(f) unless that PRP was the subject of a "civil action" under CERCLA Section 106 or 107(a). Thus, absent a lawsuit or an enforcement action having been brought against a PRP, a PRP could not use CERCLA Section 113(f) to recover costs in contribution from other PRPs. While recognizing that Sections 106 and 107 are distinct causes of action, the Supreme Court majority in *Cooper* expressly declined to address whether Section 107(a) provided PRPs an alternative method for recovery of response costs resulting from voluntary cleanups. Two dissenting Justices opined that the Court should rule that Section 107(a) allowed that alternative remedy.

Since the Supreme Court's decision in *Cooper*, four federal appellate courts and more than a

dozen district courts have issued conflicting decisions on this issue of law. Less than three years after the *Cooper* decision, this precise issue is back before the Supreme Court.

Atlantic, the Eighth Circuit case in which the Supreme Court will address a PRP's rights to CERCLA cost recovery under Section 107, also presents the interesting issue of a PRP's rights to recover costs against a powerful PRP – the United States. *Atlantic's* CERCLA liability is due to its work retrofitting rockets for the United States. *Atlantic* voluntarily remediated resulting contamination and sought to recover a portion of its costs from the government. After the *Cooper* decision, *Atlantic* could no longer sue for contribution under § 113(f), and the United States moved to dismiss *Atlantic's* Section 107(a) cost recovery claim. In its decision, the Eighth Circuit agreed with the reasoning of the Second Circuit in *Consolidated Edison Co. v. UGI Utilities, Inc.*, 423 F.3d 90 (2005).

The Eighth Circuit held that CERCLA's language and policy of encouraging prompt cleanup granted Atlantic a Section 107(a) claim for "direct recovery" of a portion of its response costs or, in the alternative, an "implied right" to contribution. The court also noted the inequity of the United States' position – because the United States could control whether a civil action was brought against Atlantic, under the government's position, the United States could shield itself from liability by refusing to bring such

an action and, thus, preclude a traditional contribution action under Section 113 or any action under Section 107(a).

The Supreme Court's decision in *Atlantic* could resolve fundamental questions under the Superfund law – who has the right to recover response costs, when, and under what circumstances. If the Supreme Court sides with the United States, scores of PRPs who have advanced funds "voluntarily" to clean up contaminated sites may be left

without a CERCLA remedy to recover a portion of those costs from other PRPs. Others who are contemplating starting such voluntary activity may first insist that federal or other authorities bring an enforcement or cost recovery action against them in order to create contribution rights under Section 113(f). We can expect that parties involved in the Superfund process will delay decision-making until the Supreme Court's decision is issued later this year.

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