

Supreme Court Allows PRPs to Sue For Cost Recovery After Voluntary Cleanups

by Robert L. Graham, Gabrielle Sigel, Sarah M. Cane and Katherine Rahill

On June 11, 2007, in *United States v. Atlantic Research*, 551 U.S. ___, No. 06-562, slip op., the U.S. Supreme Court unanimously held that a potentially responsible party ("PRP") can bring a cost recovery action under Section 107(a) of the Superfund Law after voluntarily cleaning up a contaminated site, even when an action for contribution under Section 113(f) of the Superfund Law cannot be brought.

This long-awaited ruling provides welcome clarity to those parties who, prior to this decision, were reluctant to remediate contaminated sites, because they were concerned that they would be forced to bear the entire cost if they engaged in a voluntary cleanup. At the same time, however, the decision in *Atlantic Research* leaves several Superfund cost recovery questions unanswered. The most pressing open questions concern: 1) the impact of the decision on parties who settle their CERCLA liabilities; and 2) the avenues for recovery available to PRPs who perform remedial activities pursuant to a consent decree, administrative order, or settlement.

Background

Atlantic Research came before the Court on appeal from the U.S. Court of Appeals for the Eighth Circuit. The case involved an action by Atlantic Research Corporation ("ARC") to recover costs it incurred in voluntarily cleaning up a site on which it had previously retrofitted rocket motors for the United States.

In general, parties that have remediated contaminated properties have two options for recovering their costs under the Superfund Law (officially known as the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et. seq.*): an action for cost recovery under Section 107 and/or an action for contribution under Section 113. However, after the U.S. Supreme Court's decision three years ago in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004), private parties could no longer seek contribution under Section 113(f)(1) following a voluntary cleanup. In that decision, the Supreme Court narrowly construed

a PRP's right to seek contribution for the costs of cleanup under Section 113, ruling that parties can only seek contribution under Section 113(f)(1) after being sued in a "civil action" under Section 107(a) or Section 106 of the Superfund Law.

ARC sued the United States under Section 107, claiming that the United States was a PRP obligated to share in the costs of cleaning up the contamination resulting from retrofitting the rocket motors. In response, the United States argued that ARC was barred from bringing a Section 107 action because ARC was itself a PRP at the site. Rejecting the position of the United States, the Eighth Circuit held that ARC could recover its cleanup costs under Section 107(a). In a unanimous opinion written by Justice Thomas, the U.S. Supreme Court affirmed.

The Supreme Court's Plain Language Interpretation of the Statute

In *Atlantic Research*, the Supreme Court chiefly relied on the plain language of Section 107(a). The Court determined that the "any

other person” language in subparagraph (B) of Section 107(a)(4) means that any person [other than the persons listed in subparagraph (A), which include the United States, States, or Indian tribes], may bring an action under Section 107 for cost recovery. Rather than render Section 107(a)(4)(B) superfluous, the Court found that the “any other person” language clarifies that Section 107(a)(4)(B) merely excludes those persons enumerated in the language of 107(a)(4)(A), rather than barring suit for cost recovery by PRPs generally.

Distinguishing Between Sections 107 and 113

The seeming tension between Section 107(a) and Section 113(f) of the Superfund Law was another point of contention before the Court. In its brief and during oral argument, the United States argued that allowing a PRP which had voluntarily cleaned up a site to bring an action under Section 107(a) would have unintended consequences. The United States argued that, if allowed to proceed under Section 107(a), PRPs could (1) evade the shorter statute of limitations for certain contribution actions, (2) seek joint and several liability rather than be limited to the equitable apportionment allowed in contribution actions, and (3) avoid the settlement bar that protects parties settling their liabilities with the government from further claims in contribution.

The Supreme Court, however, found that the arguments of the United States lacked merit. The Court concluded that the United States had conflated the two distinct means for recovery under CERCLA. The Court distinguished

the types of remedies available under Section 107 and Section 113. The Court deemed Section 107 as the means for parties to recover cleanup costs incurred by that party for site cleanup. The Court deemed Section 113 to be the means by which parties could obtain contribution, not after they had incurred cleanup costs, but after they had paid someone else to settle or reimburse that other person’s costs. The critical distinction for the court was whether the PRP had incurred costs to accomplish a cleanup. Those who were pursued by or settled with EPA or a state were only entitled to contribution because the costs were not directly spent to clean up a site, but to reduce liability.

After *Atlantic Research*: Open Questions

The Court’s decision in *Atlantic Research* leaves several key questions open for further consideration. How will these statutory provisions work in conjunction with each other in a single lawsuit? How does this decision affect the viability of the Section 113(f)(2) settlement bar? How does the Court’s language regarding the differences between a Section 107(a) claim and a Section 113(f) claim impact parties’ tendencies to bring both claims under both provisions?

Impact on the Settlement Bar

The United States argued in *Atlantic Research* that allowing suits under Section 107(a) after voluntary cleanups will undermine the ability to achieve settlement with PRPs. The Supreme Court was not impressed by this argument. According to the

Court, allowing PRPs to bring Section 107(a) claims will have only a minimal impact on whether parties ultimately decide to settle with the government.

The Supreme Court’s lack of concern is likely well-founded. Although it is true that, after *Atlantic Research*, PRPs may bring Section 107(a) claims against other PRPs that have negotiated settlements with the government, this should not meaningfully deter settlements. Rather, to achieve fairness in cost allocations among PRPs, settling PRPs will still be entitled to bring Section 113(f) claims against the non-settling PRPs. In a real world scenario, as the court noted, equitable factors will still play a key role in evaluating the importance of any prior settlements with the government. In fact, it is likely that, even though they may bring a Section 107(a) claim, non-settling parties will factor in the expense of litigation along with the likelihood of having to defend a Section 113 claim prior to bringing claims against parties that have settled with the government. In addition, as recognized by the Supreme Court, settling with the government inherently brings liable parties the resolution of the government’s action against them, no small benefit indeed. Although it may not be as formidable as it was prior to the *Atlantic Research* decision, the settlement bar is still an incentive to settle with the government.

Intersection Between Section 107(a) and Section 113(f)

The Supreme Court acknowledged in footnote 6 of the *Atlantic Research* opinion that there may be some overlap between Section 107(a) claims and Section 113(f)

claims. However, the Court declined to address how parties and courts should address that overlap. For example, it is unclear what type of action would be appropriate if a party incurs response costs pursuant to a government consent decree, administrative order, or a settlement. Following *Aviall*, such parties may have believed that they were limited solely to a Section 113 action and then only if they had been subject to a Section 106 or 107 “civil action”. Now, after *Atlantic Research*, parties must reassess their options and reconsider whether and to what extent both Section 107(a) and Section 113(f) claims are available. PRPs are likely to be more interested in pursuing Section 107 claims because of the opportunity to impose joint and several liability,

although the Court only “assumed” but did not decide that Section 107 imposed joint and several liability.

Going forward, we can anticipate that parties will likely bring claims under both provisions of the Superfund Law, to maximize the likelihood of obtaining the broadest possible remedy. Bringing claims under both provisions increases the possibility that the defending party will file a motion to dismiss or for summary judgment, arguing that one or the other provision is an inappropriate basis for recovery. We can, therefore, expect future judicial clarification on the scope of Superfund claims available to a party subject to a consent decree, administrative order, or settlement.

Conclusion

The rules of the road for Superfund cost recovery and

contribution have now been clarified, in light of the Supreme Court’s decision in *Atlantic Research*. Private parties who voluntarily remediate contaminated sites can now (after *Atlantic Research*) bring cost recovery actions under Section 107(a) of the Superfund Law, even though (after *Aviall*) they are not entitled to bring contribution actions under Section 113(f). Although the Supreme Court grounded its analyses in *Atlantic Research* and in *Aviall* on the plain language of the Superfund statute, the Court’s most recent decision in *Atlantic Research* appears to serve one of the Superfund law’s primary purposes—encouraging private parties to clean up contaminated sites, rather⁷⁷ than waiting until they are forced to do so by the government.

For more information, please contact the following Jenner & Block attorneys:

Robert L. Graham, Partner
Tel: 312 923-2785
Email: rgraham@jenner.com

Gabrielle Sigel, Partner
Tel: 312 923-2758
Email: gsigel@jenner.com