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U.S. v. Atlantic Research Corp.: Is the Sky Falling On Environmental Cost Recovery Actions?

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The U.S. Supreme Court heard oral arguments April 23 in *United States v. Atlantic Research Corp.*, No. 06-562. This case is at the center of the hotly debated area of cost recovery under the federal Superfund law, also known as the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601. Parties nationwide are anxiously awaiting the high court's ruling, which will have significant ramifications for environmental cleanups and parties' ability to recover some of the costs of those cleanups.

The Present State of CERCLA Cost Recovery

Since 1986, when Congress amended CERCLA through the Superfund Amendments and Reauthorization Act, parties that cleaned up property looked to three provisions of CERCLA as the potential means for recovering some or all of the associated costs from other parties: Section 107(a)(1)-(4)(B) (cost recovery actions), Section 113(f)(1) (allowing for a responsible party to seek contribution from other parties) and Section 113(f)(3) (allowing for a responsible party to seek contribution when it has settled its liability with a state or the federal government).

Before 2004 most jurisdictions required potentially responsible parties to bring actions solely under Section 113(f).[1] The thought that Section 113(f) was the only basis for PRPs' cost recovery began to shift in 2004 after the Supreme Court's decision in *Cooper Industries Inc. v. Aviall Services Corp.*[2] In *Aviall* the court held that, based on a strict reading of CERCLA's language, Section 113(f)(1) "authorizes contribution claims only 'during or following' a civil action under Section 106 or Section 107(a)."[3] As a result, a private party that voluntarily cleans up a contaminated site, but that has not been sued by a federal or state government in a CERCLA enforcement action, is precluded from recovering costs via a contribution action under Section 113(f)(1).

Aviall changed the rules for the participants in cost recovery proceedings. Since *Aviall* parties seeking to pay only their fair share for cleanups have struggled with the ramifications of that decision on all three cost recovery options under CERCLA. One central concern is whether a party that is responsible for the cost of cleaning up property contaminated by hazardous substances — but that does not satisfy the requirements for bringing a contribution action under Section 113(f) — may bring an action against another PRP under Section 107 of CERCLA. In January of this year the Supreme Court granted *certiorari* in *Atlantic Research* to answer that precise question.

The Case Below: The 8th Circuit Allows Section 107 Actions

The *Atlantic Research* case is before the high court on appeal from the U.S. Court of Appeals for the 8th Circuit's decision in *Atlantic Research Corp. v. United States*.[4] Atlantic Research Corp. seeks to recover its costs of voluntarily cleaning up a former industrial park where it retrofitted rocket motors during the early 1980s under contract with the U.S. Department of Defense. Originally, ARC brought claims against the government for cost recovery under Section 107 and for contribution under Section 113(f)(1).

However, as happened in many cases after *Aviall*, ARC dropped its Section 113(f)(1) claim because the company had not been the subject of any enforcement action requiring it to perform the cleanup. The Defense Department subsequently filed a motion to dismiss ARC's remaining claim under Section 107, which it said did

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not allow a PRP such as ARC to bring an action for cost recovery against another PRP. The trial court granted the government's motion, finding that a party that had contaminated a site could not sue under Section 107.

The 8th Circuit reversed and held that ARC could pursue an action against the Defense Department under Section 107, despite the company's status as a PRP. In doing so, the court took the step of finding that the 8th Circuit's pre-*Aviall* precedent, which had restricted a PRP's cost recovery rights to a Section 113 contribution action,[5] needed to be revisited.

The appeals court relied on the language of Section 107 and CERCLA's policy of encouraging prompt cleanups. In addition, the court took into account the unique position of the U.S. government as the party against whom recovery was sought. Because the government, in its sole discretion, may opt not to pursue an enforcement action, after *Aviall*, it could insulate itself from cost recovery liability, leaving parties like ARC without recourse. By finding that ARC could pursue its Section 107 claim, the 8th Circuit gave parties that cleaned up sites in the absence of an enforcement action a means for recovering their costs.

The Parties' Debate: Statutory Language and The Effect on Settlements

At the center of the parties' debate in this case is whether the relevant language of Section 107 allows a PRP to bring an action for cost recovery. Section 107 provides, in part, that parties potentially responsible for contamination at a site shall be liable for:

(A) All costs of removal or remedial action incurred by the U.S. government or a state or an Indian tribe not inconsistent with the national contingency plan;

(B) Any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.[6]

The specific language at issue is found in subsection (B). The parties' briefs before the Supreme Court focused squarely on the interpretation of this provision. The government argued that the second "other" in subsection (B) works to exclude PRPs from those entities who can recover costs. ARC argued that the second "other" should be read solely to differentiate between the governmental parties referred to in subsection (A) and any other party who had incurred cleanup costs. In making these arguments, both parties relied on Section 107's statutory language and legislative history and on Superfund policy, generally.

In addition to the statutory-interpretation argument, the government made a policy argument. It argued that allowing a responsible party to bring an action for cost recovery under Section 107 would remove the incentive for PRPs to settle with the government, contrary to congressional intent, because parties could freely bring cost recovery actions under Section 107 without needing to meet the requirements of Section 113(f)(1) or 113(f)(3).

Moreover, the government said, allowing a Section 107 action would nullify the settlement bar in Section 113(f)(2), which provides immunity from contribution actions to parties that settle with the government. The government argued that the settlement bar would not protect settlers from a Section 107 action, thus, making the bar meaningless. In its response, ARC dismissed the United States' arguments, arguing that there are numerous incentives to settle with the government, including the settlement bar and the less stringent cost recovery requirements for those entities that settle with the government.

The Supreme Court's Questions: Falling Sky And Counting Acorns[7]

The Supreme Court's decision in *Aviall* flipped cost recovery jurisprudence on its ear. As a result, the court's response to oral argument in *Atlantic Research* was eagerly anticipated because it offered the first glimpse of the potential future of PRPs' cost recovery rights.

The members of the court have changed since the *Aviall* decision: Chief Justice William Rehnquist passed away and was replaced by John Roberts; Justice Sandra Day O'Connor resigned and was replaced by Samuel Alito. Chief Justice Rehnquist and Justice O'Connor both joined in the majority opinion in *Aviall*, which was written by Justice Clarence Thomas and also was joined by Justices Antonin Scalia, Anthony Kennedy, David Souter and Stephen Breyer. Justice Ruth Bader Ginsburg wrote the dissent in that case, joined by Justice John Paul Stevens. (Notably, in *Aviall* Justice Ginsburg had urged the court to confront the Section 107 problem that now is before the court in *Atlantic Research*.[8])

Chief Justice Roberts and Justices Souter, Ginsburg and Breyer were the most active participants in the *Atlantic Research* oral argument. Repeatedly, the justices who raised questions during the oral argument seemed skeptical of the government's arguments on both the reading of the statutory language and the CERCLA policy. While the government argued that a plain reading of the language of Section 107 excluded PRPs from bringing suit, several justices appeared unconvinced by this argument.

For example, Chief Justice Roberts said the "most natural reading" seemed to be that the second "other" in subsection (B) was intended to differentiate between governmental entities and everyone else, in line with ARC's interpretation. Justice Scalia suggested that the word "any" before the phrase "other person" might indicate an intent to make the parties eligible to sue under subsection (B) as broad as possible.

In addition, Justice Souter, as well as Chief Justice Roberts and Justice Alito, pressed the government's attorney to define precisely those non-governmental parties who, in the government's view, would be permitted to bring an action for cost recovery under Section 107 and how such an action would work. Several justices seemed not persuaded by the government's response.

In addition to the statutory interpretation question, the justices pressed the government on other issues, including a line of questioning by Justice Souter on the United States' ability to insulate itself from suit. However, the issue that took center stage during the argument was settlements, principally whether allowing a PRP to bring an action under Section 107 would eliminate the incentives for that party to settle with the government.

According to the government, Congress showed a clear intent to encourage settlement by providing both a contribution remedy under Section 113(f)(3) for a party that settled with the government and a settlement bar under Section 113(f)(2), protecting a party that settled with the government from contribution actions, not Section 107 actions. If a PRP were allowed to bring a Section 107 action, the government argued, a party would have no incentive to settle in order to gain a right to sue under Section 113(f)(3) or to obtain protection under the settlement bar in Section 113(f)(2).

Justice Ginsburg questioned the government on the strength of its assertion that Section 113(f)(3) provides an incentive to settle, noting that the states, in their *amicus* brief, argued that the settlement process is burdensome and that it was unclear if a settlement with a state, rather than the federal government, would trigger a Section 113(f)(3) contribution action.

The government position that appeared to resonate most with the justices was the concern that a PRP's Section 107 action could weaken the Section 113(f)(2) settlement bar. A few justices suggested proposals to both sides' lawyers regarding how to reconcile Section 107 and the Section 113(f)(2) settlement bar. In particular, Justice Roberts said the PRP's Section 107 action could be seen as a contribution action and, as a result, fall within the settlement bar.

Justice Ginsburg suggested that, even if a Section 107 action were not called a "contribution action," the court could look at the statute as a whole and harmonize the provisions of CERCLA such that the Section 113(f)(2) settlement bar would apply to Section 107 actions as well. ARC's attorney, while noting that the settlement bar was not an issue in its case, suggested that Section 107 actions could be brought against Section 113(f)(2) settlers, but that the courts would equitably account for the settlement when allocating costs.

Analyzing the government's policy argument concerning settlement, Justice Breyer revealed his apparent skepticism when he asked the government to explain why the "sky would fall" if PRPs have a Section 107 action. Justice Breyer then pressed the government to explain the relative worthiness of its position by requiring the government attorney to reduce the parties' arguments to "acorns," examining the strength of each party's arguments by comparing the "acorns" that each could accumulate. Despite the government's attempt to show how the "sky would fall" and how it had more and better "acorns" than ARC did, Justice Breyer appeared to be unconvinced.

Although several justices seemed critical of the government's position, the tone of the oral argument does not guarantee a case's outcome. Moreover, even if the court decides in favor of a Section 107 action for PRPs, it is unclear whether the court will, like in *Aviall*, provide a narrowly tailored opinion, finding that Section 107 allows a PRP to bring a cost recovery action, but requiring lower courts to wrestle with the problems of implementation, such as the meaning of the settlement bar in such an action. Many practitioners may hope that the court follows Justice Ginsburg's suggestion and elaborates how CERCLA cost recovery works as a whole, explaining provisions under both Sections 107 and 113(f).

In the Wake of Oral Argument: How Could the Court's Decision Affect Cost Recovery?

If the Supreme Court decides in favor of ARC, parties that voluntarily clean up property will have a means for recovering their costs under Section 107. Regardless of the scope of the court's decision, there likely will be a host of new issues associated with cost recovery. Chief among those could be the effect of the Section 113(f)(2) settlement bar in a Section 107 action and what types of agreements qualify as "settlements" under that bar.

If the court adopts the government's position that Section 107 forbids cost recovery actions by PRPs, PRPs (and state governments with voluntary cleanup programs) will be forced to rely solely on Section 113(f) contribution actions or develop alternative approaches to the cost recovery problem. Because

Sections 113(f)(1) and (2) require that a party in a contribution action either be the subject of a government enforcement action or have settled its liability with a state or the federal government, a party that engages in a cleanup on a voluntary basis is without recourse under Section 113(f).

To obtain cost recovery, "voluntary PRPs" may have the option of pursuing an action under a state law equivalent of CERCLA[9] or a state law action for contribution based on common law. However, such options may be limited where courts in the relevant jurisdiction have either followed federal precedent on cost recovery or prohibited cost recovery where recovery is not available under CERCLA.[10]

Beyond these options, if the Supreme Court reverses the 8th Circuit, both public and private entities with an interest in cleaning up contaminated property will need to become inventive to encourage voluntary cleanups. Some options might include arranging for voluntary cleanups by companies that buy land as innocent purchasers that may then, under the government's theory, still be able to sue for cost recovery under Section 107. States, which would see their voluntary cleanup programs threatened, may decide to put more resources into enforcement, enabling private parties to qualify for cost recovery under Section 113. Another response to a government victory in *Atlantic Research* would likely be intensive lobbying efforts in Congress by states and others who want current voluntary efforts, and, therefore, PRPs' cost recovery, to continue.

The court's decision in *Atlantic Research* will decide whether the sky falls on the government's attempt to limit cost recovery under CERCLA. Even if the government's position is rejected, litigation on the scope of parties' cost recovery rights will likely continue for years to come.

Notes

[1] *See, e.g., Bedford Affiliates v. Sills,* 156 F.3d 416 (2d Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.,* 142 F.3d 769 (4th Cir. 1998); *United States v. Colo. & E. R.R. Co.,* 50 F.3d 1530 (10th Cir. 1995).

[2] *Cooper Indus. Inc. v. Aviall Servs. Inc.,* 543 U.S. 157 (2004).

[3] *Id.* at 168.

[4] 459 F.3d 827 (8th Cir. 2006).

[5] *Dico Inc. v. Amoco Oil Inc.*, 340 F.3d 525 (8th Cir. 2003).

[6] 42 U.S.C. § 9607(a)(1)-(4) (emphasis added).

[7] The parties were represented in oral argument by Thomas Hungar on behalf of the government, Owen Armstrong on behalf of ARC, and Jay Geck on behalf of 38 states, the District of Columbia and Puerto Rico as *amici*.

[8] Justice Ginsburg dissented on this issue. *Aviall*, 543 U.S. at 171-174.

[9] Examples of state CERCLA equivalents allowing cost recovery or contribution include Michigan's Natural Resources and Environmental Protection Act, Mich. Comp. Laws § 324.101; Georgia's Hazardous Site Response Act, Ga. Code § 12-8-90; New Jersey's Spill Compensation and Control Act, N.J. Stat. § 58:10-23.11; Texas' Solid Waste Disposal Act, Tex. Health & Safety Code § 361.001; and California's Hazardous Substance Account Act, Cal. Health & Safety Code § 25300.

[10] *See, e.g., Hicks Family L.P. v. First Nat'l Bank of Howell*, No. 268400, 2006 WL 2818514 (Mich. Ct. App. Oct. 3, 2006) (applying *Aviall* interpretation of CERCLA to similarly worded provision in Michigan's CERCLA equivalent).

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