Environmental Client Advisory

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# The Rights of Potentially Responsible Parties Under CERCLA

## EXECUTIVE SUMMARY

Recently, the United States Supreme Court clarified the rights of potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). Past court decisions had created uncertainty surrounding PRP rights; specifically, whether a PRP could sue other PRPs for cost recovery following the cleanup of a contaminated site. As a result, most PRPs stopped voluntarily cleaning up contaminated sites. *United States v. Atlantic Research Corp.* puts much of the uncertainty to rest with its central holding that PRPs may, in fact, seek cost recovery from other PRPs for costs incurred during voluntary cleanups.

## INTRODUCTION

On June 11, 2007, the United States Supreme Court ruled in the matter of *United States v. Atlantic Research Corp.*, 551 U.S. ___, No. 06-562, slip op. (2007). The decision clarifies the cost recovery rights of PRPs under CERCLA—rights left largely unresolved under the Court's 2004 ruling in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

In a unanimous decision by Justice Thomas, the Court held that the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs. *See Atlantic Research*, 551 U.S. at 11. By all accounts, *Atlantic Research* will lead to an increase in voluntarily clean ups by PRPs as well as an increase in CERCLA litigation over the merits of CERCLA claims as opposed to litigation over the types of claims available under the statute.

## PRP RIGHTS UNDER CERCLA

PRP rights under CERCLA are discussed primarily in two provisions: § 107 and § 113. Specifically, § 107 defines four categories of PRPs and makes them liable for, among other things:

1. all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]

2. any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

§ 107(a)(4)(A)-(B). These rights are generally referred to as "cost recovery" rights.

Meanwhile, § 113(f), enacted as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), authorizes one PRP to sue another for contribution during or following any civil action under § 106 or § 107(a).[1] *See Atlantic Research*, 551 U.S. at *2. The intersection of these two statutory provisions has been at the heart of

[1] Section 113(f)(3)(B) also permits private parties to seek contribution from any person not a party to the settlement after they have settled their liability with the Government.

the uncertainty surrounding PRP rights under CERCLA.

### (A) *COOPER INDUSTRIES v. AVIALL*

At issue in *Aviall*, was whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. *See Aviall*, 543 U.S. at 160. The Court held that § 113(f) only permits contribution claims "during or following" a civil action initiated under §§ 106 or 107(a). The decision expressly left open the question of whether a private party may pursue an action under § 107(a) or whether § 113(f) provides the exclusive cause of action available to PRPs. *See Atlantic Research*, 551 U.S. at *3; *Aviall*, 543 U.S. at 169-71.

The holding in *Aviall* injected significant uncertainty into CERCLA litigation and proceedings. Foremost, because it was uncertain whether § 107(a) provided any avenue for companies to recover costs incurred from a cleanup, those companies or PRPs that had not been sued or been the subject of an enforcement action essentially stopped voluntarily cleaning up contaminated sites. *Aviall* also effectively immunized the federal government from CERCLA liability at sites where it was a PRP.

### (B) *UNITED STATES v. ATLANTIC RESEARCH*

*Atlantic Research* has settled much of the uncertainty created by *Aviall*. The primary dispute in *Atlantic Research* surrounded the meaning of "any other person" in § 107(a)(4)(B). The Government argued that "any other person" refers to any person not defined as a PRP in §§ 107(a)(1)-(4) (e.g. owners/operators, arrangers, transporters). Under this interpretation, § 107(a)(4)(B) would not permit a private party to recover costs from other PRPs (including the federal government); only from other private parties that did not qualify as PRPs.

Starting with the maxim that statutes must be read as a whole, Justice Thomas applied a plain meaning statutory analysis in deciding that § 107(a)(4)(B) permits a private party to seek cost recovery in a direct action against another PRP. The Court stated that § 107(a)(4)(B) could "be understood only with reference to subparagraph (A)" and not with reference to §§ 107(a)(1)-(4) (which define PRP categories), as the Government argued. *Atlantic Research*, 551 U.S. at *5-6. Thus, "any other person" means any person other than the three "persons" defined in subparagraph (A) (U.S. Government, State, or Tribe). By this reading, "the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs." *Id.* To support its holding, the Court cited the similar structure of subparagraphs (A) and (B). The Court also reasoned that the Government's interpretation would "reduce the number of potential plaintiffs to almost zero, rendering § 107(a)(4)(B) a dead letter." *Atlantic Research*, 551 U.S. at *7.

In perhaps the most helpful portion of the opinion, the Court discussed the interplay between § 107(a) and § 113(f).[2]

[2] Much of the discussion centers around addressing the Government's concerns that allowing parties to recover costs under § 107(a) will essentially allow parties to pick and choose

Justice Thomas reiterated that these two sections provide two "clearly distinct" remedies. *See Aviall*, 543 U.S. at 163 n.3. In particular, § 107(a) provides a right to *cost recovery* in certain *circumstances*, and § 113(f) provides a right to contribution in other circumstances. *See Id*, at 163.

The right to *contribution* under § 113(f) is contingent upon an inequitable distribution of common liability among liable parties. For example, the costs of reimbursement to another person under a legal judgment or settlement are actions sounding in contribution and are only recoverable under § 113(f). *See Atlantic Research*, 551 U.S. at *10 n. 6. Thus, to proceed under § 113(f) for contribution, there must be at least one liable third party.

Conversely, a party may seek *cost recovery* under § 107(a) without establishing the liability (or lack thereof) of a third party. *See Atlantic Research*, 551 U.S. at *9. To do so a PRP must have "incurred" the costs in cleaning up a site. Notably, "when a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response . . . rather, it reimburses other parties for costs that those parties incurred." *Atlantic Research*, 551 U.S. at *9. The Court, in its discussion, draws a clear line between reimbursements associated with a legal judgment or settlement (the province of § 113(f)) and incurred cleanup costs (the province of § 107(a)).

The Court also addressed the nature of the remedies in § 107(a) and § 113(f) and the potential for overlap, which it does not entirely discount. It states "a PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a)" because "a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim." *Atlantic Research*, 551 U.S. at *10. The Court assumes, without deciding, that § 107(a) provides for joint and several liability. This discussion of § 113(f) counterclaims emphasizes that, while these sections may overlap in some circumstances, a PRP defending a § 107(a) cost recovery suit, in virtually all cases, should feel compelled to bring a § 113(f) counterclaim for contribution.

Finally, the Court discusses the settlement bar found under § 113(f)(2), which prohibits a § 113(f) contribution claim against a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement. Even though the "settlement bar" does not preclude a § 107(a) cost recovery claim, which potentially creates a loophole, the Court reasons that such a loophole is inconsequential given the ability to file a § 113(f) counterclaim (discussed above) and the fact a district court applying rules of equity would consider any previous settlement in apportioning liability. *See Atlantic Research*, 551 U.S. at *11.

## DISCUSSION

*Atlantic Research*, by recognizing a cost recovery action against other PRPs under § 107(a), will likely increase voluntary cleanups at contaminated sites. Under *Aviall*, parties were hesitant in, if not outright opposed to, performing voluntary cleanups where government involvement (a civil action under §§ 106 or 107 or settlement under § 113(f)) was required before contribution could be considered. The end result of *Atlantic Research* is that PRPs may

between § 107(a) and § 113(f), thereby, in many cases, avoiding the shorter statute of limitations (3 years vs. 6 years) under § 113(f).

now perform voluntary cleanups at contaminated sites, and bring a cost-recovery action under § 107(a) against other liable parties, including the federal government (where applicable).

*Atlantic Research* also goes a long way toward clarifying which costs are recoverable under §§ 107 and 113. The Court draws a distinction between contribution, available only under § 113, and cost recovery, available only under § 107(a). In distinguishing the two types of costs, the Court clearly states that cost recovery actions under § 107(a) must seek to recover costs incurred while cleaning up a site. Specifically, recoverable 107(a) costs do not include those paid under a settlement agreement or court judgment to reimburse another party for clean-up costs incurred by it. Typical recoverable costs under § 107(a) would be associated with Remedial Investigation/Feasibility Studies (RI/FS), Focused Feasibility Studies (FFS), and actual removal or remediation actions. *Atlantic Research* makes clear that to recover costs paid to another party under a settlement agreement or judicial order in excess of a PRP's proportionate share of liability, a party must bring a contribution action under § 113.

Concern still remains over § 113(f) contribution protection. Under § 113(f)(2), parties that have settled claims with the government and resolved their liability are insulated from subsequent contribution claims regarding matters addressed in the settlement. However, as Justice Thomas notes, this section of CERCLA does not protect against future parties bringing a § 107(a) cost recovery action against already "settled" PRPs. The Court addressed this issue, and was content that should a future cleanup provoke a § 107(a) claim against a party insulated from contribution under § 113(f), the "settled" party's ability to bring a § 113(f) counterclaim will protect that party because any court will consider the previous settlement in apportioning liability. While in theory, such a maneuver is possible, it is unlikely a contribution counterclaim will fully protect "settled" parties. In particular, liability under a § 107(a) cost recovery suit is joint and several, whereas liability under a § 113(f) contribution suit is equitably apportioned. A court considering equitable factors easily could look past the settlement terms and re-apportion liability as it sees fit.

*Atlantic Research* has alleviated much of the lingering uncertainty regarding PRP rights under CERCLA. The result will likely be an increase in PRP voluntary cleanups at contaminated sites. However, there remains some outstanding uncertainty regarding early settlement under § 113. Kelley Drye environmental attorneys can advise clients on all aspects of CERCLA, including strategic decisions and PRP rights related to contaminated sites.

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