

# Supreme Court to Decide Boundaries of Government Liability Under CERCLA

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The U.S. Supreme Court is set to decide whether one potentially responsible party (PRP) or liable party, in this case a government contractor, can initiate a lawsuit against another such party, in this case the United States, under § 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Oral argument takes place April 23, 2007, in *Atlantic Research Corp. v. United States*,<sup>1</sup> a case that will determine future boundaries of both government liability and private party actions under CERCLA.<sup>2</sup> The petition for *certiorari* was granted in January after three circuits ruled and split on the issue, following the Court's related December 2004 decision in *Cooper Industries Inc. v. Aviall Services, Inc.*<sup>3</sup> The Government's interpretation of the statute not only would prevent some parties who undertake voluntary remediation from seeking contribution or cost recovery, but also could have the effect of shielding the United States from liability for remediation at sites where it contributed to historical contamination.

CERCLA explicitly waives sovereign immunity, making the United States liable on the same terms as any other party.<sup>4</sup> At sites where the United States has liability as an owner, operator, or arranger, companies that incur costs for environmental remediation have in turn sued the United

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States for contribution.<sup>5</sup> The Government's liability may occur through government contracts, as may the liability of a government contractor. Government contractors in turn are frequently liable at sites where the Government is also liable, and are frequently subject to enforcement actions.<sup>6</sup> The commonly used term for a party that could be held liable is "PRP," though its usage has

been at issue in *Atlantic Research*.<sup>7</sup>

Companies that might seek relief against a government or private PRP under CERCLA were dealt a setback by the Supreme Court's decision in *Aviall*. The Court held in *Aviall* that a party that has not been sued under CERCLA § 106 or 107 could not sue any other party for contribution under § 113, which allows such suits "during or following" a civil action under § 106 or 107.<sup>8</sup> The Court declined to decide whether a company that is itself a PRP could sue under § 107 instead, as the majority of federal court decisions on this issue had consistently allowed<sup>9</sup> prior to the 1986 passage of the Superfund Amendments and Reauthorization Act (SARA),<sup>10</sup> which added § 113. On remand, the Northern District of Texas ruled, on August 8, 2006, that *Aviall* could not sue under § 107.

Section 107 (as interpreted by the courts) provides for full cost recovery and joint and several, retroactive liability (and allows for a six-year statute of limitations after initiation of a remedial action). Section 113(f)(1) provides proportional liability based on equitable factors (and allows for a three-year limitations period following a judgment), and § 113(f)(3)(B) creates a similar contribution right for parties that have resolved their liability by state or federal settlement. After SARA's addition of § 113, federal courts of appeals limited application of § 107 to suits by the Federal Government, states or Indian tribes, and "innocent parties." PRPs were limited to contribution under § 113, in pre-*Aviall* circuit cases that almost all followed some form of civil action, administrative settlement, or administrative order.<sup>11</sup>

## Circuit Split

After *Aviall* eliminated certain actions under § 113, some circuit courts had an opportunity to reevaluate their prior rul-

ings, and the law shifted. In September 2005, the Second Circuit issued *Consolidated Edison Co. of New York Inc. v. UGI Utilities, Inc.*,<sup>12</sup> holding that a potentially liable party can sue under § 107, based on that section's "plain language."<sup>13</sup> The court held that Con Edison, which had conducted remediation under a state "Voluntary Cleanup Agreement," did not meet requirements to sue under § 113(f)(3)(B), but permitted Con Edison to proceed instead under § 107. The plain-language reasoning of *Consolidated Edison* made the § 107 "cost recovery" remedy available to any party that has incurred "necessary costs of response" through its own cleanup activities. The Second Circuit issued a similar opinion in July 2006 in another case.<sup>14</sup>

The next circuit to rule was the Eighth Circuit in *Atlantic Research*, reaching a decision on August 11, 2006, in accord with the Second Circuit, allowing a "liable party" to sue under § 107 after a "voluntary" remediation. Atlantic worked on rocket motors under contracts with the U.S. Defense Department during the 1980s at a facility in Arkansas, and brought suit against the United States to recover a portion of its costs incurred in investigating and cleaning up the contamination.

The Eighth Circuit adopted the reasoning of the Second Circuit in finding that the text of § 107 allowed one "liable party" to sue another, and expanding on that plain text reasoning, it relied on an alternative holding that § 107 provides an implied right to contribution. "Accordingly, we find that allowing Atlantic's claim for direct recovery under § 107 is entirely consistent with the text and purpose of CERCLA. . . . Alternatively, we are satisfied that a right to contribution may be fairly implied from the text."<sup>15</sup>

The next circuit to rule created a split among the circuits. In another case against the Government, DuPont sought contribution at fifteen facilities in several states, each contaminated and owned or operated by the United States during World War I, World War II, and/or the Korean War. On August 29, 2006, the Third Circuit held in a two-to-one opinion in *E. I. Du Pont De Nemours & Co. v. United States*<sup>16</sup> that, based on binding Third Circuit precedent and CERCLA legislative history,<sup>17</sup> DuPont could not sue under § 107. The decisions in *Consolidated Edison*, *Atlantic Research*, and *DuPont* were each appealed to the U.S. Supreme Court (Atlantic Research supported the Government's petition for review).<sup>18</sup> Deferring a decision on the other two cases, the Court granted *certiorari* in *Atlantic Research* on January 19.

In a fourth case, on January 17, 2007, the Seventh Circuit issued a decision siding with the Second and Eighth Circuits. In *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*,<sup>19</sup> the court allowed an Illinois municipal agency to sue the company to which it had leased land for fifty years. The Seventh Circuit clarified that it was not providing an "implied right of contribution," and that "Metropolitan Water's action under § 107 is characterized more appropriately as a

cost-recovery action than as a claim for contribution."<sup>20</sup>

## The Government's Liability

Government contractors incur millions of dollars each year in environmental liabilities that result, in whole or part, from contracts with, or work performed on behalf of, the Government. It should be no surprise that the PRP with the most significant share of responsibility at Superfund sites across the country is often the United States. In 2006, the GAO estimated the Government's long-term environmental liabilities at more than \$250 billion.<sup>21</sup> Where the United States owned or operated a war plant or Superfund site, where it owned polluting equipment, or where it contracted for the processing of hazardous material (among other scenarios), the Government is a PRP. Past CERCLA cases involving World War II-era government contracts have held the government liable for as much as 100 percent of remediation costs, as owner, operator, and/or arranger.<sup>22</sup>

In *Aviall*, the United States filed an *amicus* brief supporting Cooper Industries, while twenty-four states and a collection of industry groups all filed briefs supporting Aviall. According to Lockheed Martin's *amicus* brief supporting Aviall, the position of the United States was "an apparent effort to minimize its exposure under CERCLA."<sup>23</sup>

Under the rule espoused by Cooper and the United States, no PRP could sue the federal government for contribution unless the government first initiated an enforcement action against that PRP under [§] 106 or 107(a). The federal government thus would effectively be given the power to immunize itself against the enormous liabilities it faces in connection with sites that are currently being remediated on a voluntary basis.<sup>24</sup>

The rulings of the Second, Seventh, and Eighth Circuits would effectively prevent this outcome. But once again, under the United States' preferred result in *Atlantic Research*, in the absence of a civil action by the Federal Government, a state or an innocent party, or a state or federal settlement, no PRP at the site could initiate a lawsuit. In *Atlantic Research*, the Eighth Circuit reasoned that "[i]f we adopted the government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle," which would be an "absurd and unjust outcome."<sup>25</sup>

The United States has responded that "[t]here is no empirical basis for that concern."<sup>26</sup> But regardless of the motivation behind enforcement actions, current cases at similar sites are in limbo for precisely that reason. For instance, General Motors Corp. is suing the United States at fifteen sites where the United States is liable, and the existence of a prior civil action is now at issue.<sup>27</sup> The City of Rialto, California, was not allowed to sue the U.S. Defense Department in a district court decision appealed to the Ninth

Circuit,<sup>28</sup> while *Viacom, Inc.*, whose predecessor processed uranium for the Manhattan Project, was allowed to sue the United States under § 107 in the D.C. District Court.<sup>29</sup> The United States moved to dismiss each of these lawsuits, as it has other such suits at sites where it is a PRP, in cases where the availability of such claims may be determined ultimately by the ruling in *Atlantic Research*.

### Unilateral Administrative Orders

A related and important issue that was not addressed by the Supreme Court in *Aviall* was whether a Unilateral Administrative Order (UAO) issued by the U.S. Environmental Protection Agency constitutes a “civil action” entitling the recipient to sue for contribution. Under § 106, EPA can issue UAOs compelling any PRP to perform and pay for the entire cleanup of the site. EPA’s preference is to issue UAOs without resorting to court action. EPA UAOs carry civil penalties of \$32,500 per day of violation and additional punitive treble damages based on costs, but the United States does not always enforce these provisions against UAO recipients. Prior to *Aviall*, at least four circuits had held that a recipient of a UAO was limited to § 113, on the assumption that it had a contribution claim.<sup>30</sup>

If a UAO is not a civil action, and if PRPs could not sue under § 107, then the Government could issue UAOs to PRPs at sites where the United States is liable, while shielding itself from liability by declining to file suit or reach settlement. For instance, even after *Consolidated Edison*, the United States argued in the Eastern District of New York that a recipient of UAOs, which participated in the cleanup at a former wartime plant that processed tungsten during WWII and the Korean War under government contracts, could not sue the Government or other PRPs that had received (but disregarded) the UAOs.<sup>31</sup>

In a similar case, the United States moved to dismiss claims by Raytheon Aircraft Co. against the Government in a 2005 suit over a Kansas site where the Government was liable for contamination dating back to WWII, and the EPA had issued UAOs to Raytheon ordering it to perform the cleanup. Raytheon argued it was unconstitutional for the Government to issue such an order at a site where the United States itself was liable. In May 2006, the court found it did not have jurisdiction over the constitutional issues but decided that Raytheon had an implied right of contribution under § 107.<sup>32</sup>

The Chamber of Commerce intervened as an *amicus curiae* supporting Raytheon, and argued that the EPA’s practice of using UAOs at sites where the United States is a PRP undermines CERCLA’s waiver of sovereign immunity. The Chamber argued that, in light of the U.S. position that PRPs may not initiate suit under § 107, “[i]n combination with EPA’s practice of issuing UAOs to private parties for environmental contamination where the federal government is itself a PRP, these litigation positions ensure that private parties are saddled with billions of dollars of unearned liability

for which they have no meaningful recourse.”<sup>33</sup>

Perhaps avoiding the unfair impact its preferred result would have on recipients of UAOs that conduct cleanup, the United States did not discuss this issue in its brief filed on the merits in *Atlantic Research*.<sup>34</sup> The Supreme Court could nonetheless find that, even if UAOs do not constitute civil actions, UAO recipients may sue the Government or private PRPs under § 107 in an initial action, as may a party conducting a remediation characterized as “voluntary,”<sup>35</sup> such as *Aviall*, *Atlantic*, *Con Edison*, or *DuPont*.

### Key Issues for the Supreme Court

In its December 2004 decision in *Aviall*, the Supreme Court left open several issues for PRPs, including (1) whether a PRP can “recover costs” under § 107 (citing cases equating cost recovery with 100 percent indemnification), (2) whether a PRP has an “implied right of contribution,” and (3) whether liability under § 107 can be other than joint and several.<sup>36</sup> *Atlantic Research* covered these issues, holding alternatively in terms of both “cost recovery” and “implied rights.”<sup>37</sup>

### “Any Other Person”

The text of CERCLA § 107(a)(1)–(4) provides that the covered persons defined in each of four categories (known as PRPs) “shall be liable for—

- (A) 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;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; . . .<sup>38</sup>

The United States advocates that “any other person” means persons other than “all PRPs,” which have no express cause of action.<sup>39</sup> The Supreme Court may find that this clause means persons other than those in (a)(4)(A), not excluding other PRPs (as did the Eighth Circuit), or that it simply means persons other than any one individual PRP. The United States also argues that this language contains no implied right of contribution for PRPs, based on the common law of “traditional” contribution actions, or if there is an implied right, it is limited to the factual circumstance where a party has been sued or held liable following a lawsuit.<sup>40</sup>

Ten years before *Aviall*, in *Key Tronic Corp. v. United States*,<sup>41</sup> the Supreme Court interpreted § 107 to allow a PRP’s claim against the Air Force and other parties. The Court stated that § 107 “impliedly authorizes private parties to recover cleanup costs from other PRPs.”<sup>42</sup> In *Aviall*, this finding was characterized as dictum because the issue of *Key Tronic*’s status as a PRP had not been briefed before the Court.<sup>43</sup>

In the *Aviall* dissent, Justice Ginsburg (joined by Justice Stevens) stated her view that all nine members of the

Court had agreed in *Key Tronic* that § 107 was available to PRPs.<sup>44</sup> In *Key Tronic*, dissenting justices Scalia, Blackmun, and Thomas said there was an express remedy under § 107. In *Aviall*, writing for the majority, Thomas further characterized the majority opinion in *Key Tronic* as dicta, to the extent it assumed a private party suing under § 107 could be a PRP, and he also cast doubt on implied rights of contribution.<sup>45</sup> Thus, in *Atlantic Research*, an important issue is whether a PRP's cause of action under § 107 is express or implied, and whether it is properly characterized as "cost recovery" or "contribution."

Justice Stevens, who wrote the majority opinion in *Key Tronic*, and Justice Scalia in dissent, agreed that *Key Tronic*, a PRP, had a claim under § 107. They disagreed as to whether this claim was express or implied, but perhaps both were correct. Justice Stevens wrote "that § 107 imposes liability on A for costs incurred 'by any other person' implies—but does not expressly command—that A may have a claim for contribution against those treated as joint tortfeasors."<sup>46</sup> Justice Scalia (joined by Justices Blackmun and Thomas) wrote "[s]ection 107(a)(4)(B) states, as clearly as can be, that '[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person.' Surely to say that A shall be liable to B is the express creation of a right of action."<sup>47</sup>

The Supreme Court could now find that in these passages, A has the implied right, and B the express right, because B has incurred costs of response, and that B, like A, can be a PRP.<sup>48</sup> The Court may find that Justice Stevens' reference to joint tortfeasors acknowledged PRPs' implied rights but that the separate cause of action for "cost recovery" is also provided by the plain text of the statute to PRPs, and that the "cost recovery" cause of action may be characterized as "contribution" for some purposes.

### Structure of the Statute

Briefing to the Supreme Court and circuit courts has focused on not only the text of the statute, but the structure of all its sections, and the impact of the 1986 amendments. The United States argues that § 113(f) "delineates the exclusive circumstances under which one private PRP may bring suit against another under CERCLA."<sup>49</sup>

Section 113(f)(1) states first that contribution may be sought during or after a civil action, and the next sentence states that "[s]uch claims shall be brought in accordance with this section[.]" But "such claims" may be limited by the Supreme Court to the counterclaims, cross-claims, and third-party claims that follow an initial civil action. This interpretation would be consistent with the statutory text,<sup>50</sup> the Eighth Circuit's holding in *Atlantic Research*, and the outcome of the pre-*Aviall* circuit cases that limited PRPs to § 113 following a civil action. A key holding of *Atlantic Research* was that "liable parties which have been subject to § 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality."<sup>51</sup>

A key structural issue related to the argument of the United States concerns CERCLA's statutes of limitations, adopted in the 1986 amendments. Section 113(g)(2) provides a statute of limitations for "an initial action for recovery of the costs referred to in section [107]." Section 113(g)(3) provides a limitations period for "contribution." The Supreme Court may conclude that § 113(g)(3) does not displace the statute of limitations for "initial actions," regardless of whether those initial actions also could be characterized as "contribution." The Court could find, as have some circuit courts, that a PRP that files the first suit for recovery of costs has, by definition, the "initial action."<sup>52</sup> By this interpretation, a PRP that performs "voluntary" remediation and the recipient of an EPA order both could have the initial action.<sup>53</sup>

CERCLA's settlement provisions are another key structural issue. As adopted in the 1986 amendments, CERCLA §§ 113(f)(2), 122(g)(5), and 122(h)(4) provide immunity to settling parties. In these provisions, CERCLA encourages settlement by providing protection to settling parties against "contribution claims," without referring to either § 107 or 113. The United States has argued that a PRP could evade this protection by suing a settling party under § 107. But the Court could find that a claim under § 107, if brought by a PRP, still can be characterized as a claim for "contribution," subject to the immunity provisions of CERCLA, thereby preserving its structure.<sup>54</sup>

A third key structural issue is the shifting burden of proof and fairness of joint and several liability. Any defendant subject to the § 107 cost recovery action would have a counterclaim under § 113 for contribution, so the Court may find, as did the Eighth Circuit, that the result, in the end, would be fair and equitable, and consistent with the structure of the statute.

In the first Supreme Court case following passage of SARA, the Court recognized that in CERCLA, "Congress sought to [allow] private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties."<sup>55</sup> Upon its closer examination of CERCLA and SARA, the Court could ultimately ratify its earlier observation.

### Little Alternative for Contractors

The United States suggested to the Supreme Court that "to the extent that private PRPs in cases involving federal PRPs are government contractors (as is often the case), they may be able to recover some or all of their cleanup costs directly from the government under the terms of their contracts."<sup>56</sup> Although CERCLA claims must be brought in the district courts, a handful of purely contractual actions concerning CERCLA costs have been brought in the U.S. Court of Federal Claims (CFC) under the Tucker Act and the Contract Disputes Act, involving WWII-era contracts that included specific indemnifications and certain cost re-

imbursement features. The solicitor general cited the 2004 case of a WWII-era contractor winning indemnification in the Federal Circuit under its contract, after losing its novel lawsuit in the CFC.<sup>57</sup> But this remedy is the rare exception. Similar decisions under a government contract may be limited to one other case thus far.<sup>58</sup> Contractual claims have not been brought in the CFC in typical cases where the Government and its contractors were both liable under CERCLA. This alternative is not available under most government contracts, and cannot replace CERCLA's apportionment of responsibility based on equitable factors, between all PRPs—including the United States.

## Conclusion

The Supreme Court may decide that a company that cleans up a site where the United States (or another party) is also responsible for contamination, and liable under CERCLA, has a cause of action to seek response costs or a fair share of contribution from the Government or any other PRP for remediation of the site. That outcome could balance the role of the Government as enforcement authority and liable party, while remaining consistent with the text, structure, waiver of sovereign immunity, and history and purpose of the statute. The Supreme Court should affirm *Atlantic Research*. PL

## Endnotes

1. 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3236 (U.S. Jan. 19, 2007) (No. 06-562).

2. 42 U.S.C. § 9601 *et seq.*

3. 543 U.S. 157 (2004).

4. 42 U.S.C. § 9620.

5. *See, e.g., Foster v. United States*, 922 F. Supp. 663 (D.D.C. 1996).

6. *See, e.g., Chris M. Amantea & Stephen C. Jones, The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585 (1994) (noting enforcement actions targeting government contractors).

7. The circuit courts in *Atlantic Research* and *Consolidated Edison* avoided the term PRP because of the implications of the term to a party that has not been held liable. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006). The term was employed in *Aviall* and is used in this article for convenience.

8. 42 U.S.C. §§ 9606, 9607, 9613.

9. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986) (section 107(a) “expressly creates a private cause of action for damages,” in that case between PRPs). The pre-SARA cases, their factual circumstances, and their reasoning are an important issue in *Atlantic Research*.

10. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613.

11. *Aviall* cited eight such circuit cases, all of which involved a prior civil or administrative action, with the exception of the Ninth Circuit case, *Pinal Creek Group v. Neumont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997). After *Aviall*, most district court decisions in the Ninth Circuit made § 107 available to PRPs and reconciled that position with *Pinal Creek*, and the Ninth Circuit now has appeals pending on the issue.

12. 423 F.3d 90 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (Apr. 14, 2006) (05-1323).

13. The Second Circuit did not overrule its prior precedent to the contrary, but carefully confined that case to its own facts. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

14. *Schaefer v. Town of Victor*, 457 F.3d 188 (2d Cir. 2006).

15. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006).

16. 460 F.3d 515 (3d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3296 (U.S. Nov. 21, 2006) (No. 06-726). The chief judge of the Federal Circuit sat by designation, siding with the majority.

17. In agreement with the Third Circuit reasoning, the United States now argues that the legislative history, in particular that of SARA, indicates Congress did not intend to “promote unsupervised cleanups at the expense of government-supervised cleanups pursuant to settlement or suit.” Brief for the United States at 39, *Atlantic Research Corp. v. United States* (No. 06-562) (U.S. Mar. 1, 2007). But the Court may find that Congress did not intend to eliminate or discourage such voluntary, “unsupervised” cleanups.

18. Although disagreeing on the merits, *Atlantic Research* agreed the Court should hear its case. It argued in its brief that it had a claim for declaratory judgment under § 107, triggering its own rights under § 113. *Atlantic Research Corporation's Brief in Support of Government's Petition for Writ of Certiorari at 1-2, Atlantic Research* (No. 06-562) (U.S. Jan. 2, 2007).

19. 473 F.3d 824 (7th Cir. 2007).

20. *Id.* at 836 n.17.

21. GOVERNMENT ACCOUNTABILITY OFFICE, ENVIRONMENTAL LIABILITIES; LONG-TERM FISCAL PLANNING HAMPERED BY CONTROL WEAKNESSES AND UNCERTAINTIES IN THE FEDERAL GOVERNMENT'S ESTIMATES, GAO-06-427 (Mar. 2006) (estimating \$249 billion in liability in fiscal year 2004, and \$259.8 billion as of fiscal year 2005).

22. *See Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002) (WWII production of synthetic rubber; Government held 100 percent liable); *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) (WWII production of aviation fuel; Government liable as arranger); *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (WWII production of high-tenacity rayon; Government liable as owner, operator, and arranger).

23. Brief of Lockheed Martin Corp. as *Amicus Curiae* in Support of Respondent at 26, *Cooper Indus. Inc. v. Aviall Servs., Inc.* (No. 02-1192).

24. *Id.* at 7.

25. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 837 (8th Cir. 2006).

26. *Petition for Writ of Certiorari at 23 n.10, Atlantic Research* (No. 06-562) (U.S. Oct. 24, 2006). *See also* Brief for the United States at 44-46 (arguing it would be “improbable” for EPA to forgo enforcement actions in cases involving federal PRPs, and that it would be “hypothetical and implausible” for the Federal Government to try to prevent private parties from suing it in this manner).

27. *Gen. Motors Corp. v. United States*, No. 01-CV-2201, 2005 WL 548266 (D.N.J. Mar. 2, 2005).

28. *City of Rialto v. U.S. Dep't of Defense*, No. 04-00079, 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 16, 2005).

29. *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3 (D.D.C. 2005).

30. *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 527 (8th Cir. 2003); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 346 (6th Cir. 1998); *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192 (10th Cir. 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 762 (7th Cir. 1994). In *Atlantic Research*, the Eighth Circuit found that *Dico* was undermined by *Aviall*. 459 F.3d at 830.

31. *United States Motion to Dismiss, TDY Holdings, LLC & TDY Indus., Inc. v. United States et al.*, No. CV-00-6545 (E.D.N.Y. Feb. 10, 2006).

32. *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Ka. 2006).

33. Brief of *Amicus Curiae* Chamber of Commerce of the United States of America, *Raytheon Aircraft Co.* (No. 05-2328) (D. Kan. Feb. 24, 2006). The Chamber also argued the UAO power, without appropriate judicial review, is an unconstitutional deprivation of property.

34. Brief for the United States, *Atlantic Research Corp. v. United States* (No. 06-562) (U.S. Mar. 1, 2007).

35. This description has been used where remediation is conducted in the absence of a civil action or UAO, even though so-called volunteers are usually acting to preempt enforcement by federal or state authorities.

36. *Cooper Indus. Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166-71 (2004).

37. *Consolidated Edison* and *Metropolitan Water* may have limited their holdings to cost recovery, while *DuPont* rejected both concepts.

38. 42 U.S.C. § 9607(a)(4)(A)-(B) (emphasis added). CERCLA defines "person" broadly to include individuals, corporations, and governments, among others. The National Contingency Plan governing cleanup procedures is codified at 40 C.F.R. pt. 300.

39. Brief for the United States at 15-21, and n.10, *Atlantic Research Corp. v. United States* (No. 06-562) (U.S. Mar. 1, 2007).

40. *Id.* at 23-26. The United States makes various arguments based on the legislative history, which is sure to be debated. The 1980 and 1985 legislative history includes references to both "traditional and evolving principles of common law" and "federal common law." In *Aviall*, the Court found that based on the text and structure of the statute, there was no need to rely on the legislative history. *Aviall*, 543 U.S. at 167.

41. 511 U.S. 809 (1994).

42. *Id.* at 818.

43. *Cooper Indus. Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

44. *Id.* at 172-73 (Ginsburg, J., dissenting) ("[N]o justice expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.").

45. *Id.* at 170.

46. *Key Tronic Corp. v. United States*, 511 U.S. 809, 818, n.11 (1994).

47. *Id.* at 822 (Scalia, J., dissenting).

48. Thus, "in the event the private-action plaintiff itself is potentially 'liable' to the EPA for response costs, and thus is akin to a joint 'tortfeasor,' section 9607(a)(4)(B) serves as the pre-enforcement analog to the 'impleader' contribution action permitted under sec-

tion 9613(f)." *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir. 1993).

49. Brief for the United States at 26, *Atlantic Research Corp. v. United States* (No. 06-562) (U.S. Mar. 1, 2007).

50. The legislative history indicates that § 113 "contemplates that if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may be brought in such an action. . . . This provision allows all counterclaims, cross-claims and third-party actions to be dealt with in a single action if the court is so inclined." H.R. REP. NO. 99-253(I) at 79, 80 (1985), as reprinted in 1986 U.S.C.C.A.N. 2835, 2861-62.

51. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 836-37 (8th Cir. 2006).

52. In *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192 (10th Cir. 1997), and *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 924-925 (5th Cir. 2000), the courts allowed contribution actions (under § 113) as "initial actions" under the six-year statute of limitations.

53. In *Sun Co.*, the plaintiff had received a UAO.

54. E.g., "While it may be true that the plaintiff's claim is an action for response costs, it is a claim for contribution from the defendants for response costs." *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp. 1132, 1139 (D.R.I. 1992) (preventing suit against settling party under § 107). If the PRP plaintiff itself first settles with the Government in a court decree or administrative settlement, the PRP may be limited to § 113(f)(1) or 113(f)(3)(B).

55. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989), overruled on other grounds.

56. Brief for the United States at 45 n.20, *Atlantic Research Corp. v. United States* (No. 06-562) (U.S. Mar. 1, 2007).

57. The United States cited *E.I. DuPont De Nemours & Co., Inc. v. United States*, 365 F.3d 1367 (Fed. Cir. 2004) (indemnification for operation of WWII munitions plant survived termination of the agreement).

58. *Ford Motor Co. v. United States*, 378 F.3d 1314 (Fed. Cir. 2004) (also reversing the CFC, allowing reimbursement for remediation of a WWII bomber manufacturing plant in Willow Run, Michigan). Both *DuPont* and *Ford* had cost-plus-fixed-fee contracts, which contained certain reimbursement provisions less common after WWII. Upon completion of the WWII contracts, releases executed by the contractor contained exceptions for unknown third-party claims. In these cases, the plaintiffs were able to overcome, among other procedural hurdles, the Anti-Deficiency Act, which bars open-ended indemnifications by the Government, with the 1944 Contract Settlement Act, which validated the provisions at issue.