



Supreme Court Decides that Liable Parties Can Seek Cost Recovery Under Section 107 of CERCLA

The Supreme Court this morning issued its decision in the *Atlantic Research* case addressing whether persons themselves liable under CERCLA can sue other liable parties under the cost recovery provision of Section 107 of CERCLA. The Court unanimously held that they can, in a short and direct opinion authored by Justice Thomas, who had also authored the opinion in the prequel case two years ago of *Cooper Industries v. Aviall Services, Inc.* The Court did, however, leave a few issues open for further development in the lower courts, the most significant of which will be the implications of the opinion for the contribution protection afforded to those who settle with the government.

In *Aviall*, the Court had ruled that the contribution provisions of Section 113(f) of CERCLA could only be utilized by persons who had settled with or been sued by the government. Persons who performed voluntary cleanups or who were issued administrative orders compelling cleanups could not sue under Section 113(f). The *Aviall* Court left open whether such persons could sue under the cost recovery provision of Section 107(a)(4)(B), and the *Atlantic Research* Court has now resolved that issue in the affirmative.

The opinion first focuses on the statutory language of Section 107, which provides that specified categories of liable parties are liable for (A) response costs incurred by the United States, a State, or a Tribe “not inconsistent with the national contingency plan,” and (B) “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” The issue was: to whom did the phrase “any other person” refer? Most lower courts, and the overwhelming number of interested persons who filed amicus briefs in the Supreme Court (including many corporations, trade associations, 40 states, cities, environmental groups, and former EPA officials), argued that “any other person” in (B) naturally means anyone other than the United States, a State, or a Tribe as listed in (A). However, the United States argued that “any other person” meant anyone not themselves within the categories of liable parties specified earlier in Section 107. The Supreme Court read this language

JUNE 2007

Washington, DC
+1 202.942.5000

New York
+1 212.715.1000

London
+44 (0)20 7786 6100

Brussels
+32 (0)2 517 6600

Los Angeles
+1 213.243.4000

San Francisco
+1 415.356.3000

Northern Virginia
+1 703.720.7000

Denver
+1 303.863.1000

This summary is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

arnoldporter.com

the way almost everyone else has for the past 25-plus years, explaining that “it is natural to read the phrase ‘any other person’ by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase ‘any other person’ therefore means any person other than those three.” In contrast, the United States’ interpretation “makes little textual sense.”

The Court then addressed the United States’ arguments about how allowing PRPs to sue under Section 107 could create tension with the Section 113 contribution remedy. First, it rejected the notion that since there was a specific contribution remedy in Section 113, it would make no sense to view Section 107 as also creating a claim for PRPs. It made clear that the two remedies were “distinct.” For example, a “PRP that pays money to satisfy a settlement agreement or a court judgment may pursue §113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under §107(a).”

But while distinct, the two remedies had the potential to overlap in the case of someone who, by court order or settlement, was required to implement a remedy. Such a person would appear to have both a Section 113 contribution claim and

a Section 107 claim. The Court left open whether they could pursue both: “We do not decide whether these compelled costs of response are recoverable under §113(f), §107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of §107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under §113(f). Thus, at a minimum, neither remedy swallows the other. . . .”

How a party with overlapping remedies would need to pursue its claims is important for several reasons. First, Sections 107 and 113 have different statutes of limitations. Second, Section 107 liability has generally been held by the lower courts to be joint and several. Justice Thomas noted that the Court was assuming without deciding that Section 107 liability was joint and several. Section 113, in contrast, provides for an equitable apportionment remedy. Can a PRP that performed a cleanup seek joint and several liability under Section 107? The Court noted that even it can, such a claim can be parried by a contribution counterclaim under Section 113, and in the end the courts would get to the right place—an equitable allocation.

The final area of tension discussed by the Court relates to the Section 113(f)(2) contribution protection

provision under which a party that settles with the government is protected from contribution claims from other PRPs for “matters addressed in the settlement.” The Court addressed whether a non-settling PRP compelled to perform work could circumvent contribution protection by suing a settling PRP under Section 107.

The Court’s one-paragraph discussion of this issue will likely be the most fertile ground for further litigation. The Court implicitly held that Section 107 claims by PRPs are not subject to the explicit contribution protection provision of Section 113(f). The Court, though, was not concerned that this would discourage settlement—for three reasons. First, a settler later sued under Section 107 could file a contribution counterclaim, and a “district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus.” Second, in cases where the non-settlers only reimburse government costs, they would not have a Section 107 claim. And, third, “settlement carries the inherent benefit of finally resolving liability as to the United States or a State.”

The bottom line appears to be that, for now, settlers with the government face a greater risk of being sued by non-settlers who are later required to perform cleanup work. It will be

interesting to see whether the lower courts develop any rules that shape or confine the litigation in this area. If not, and if a settler sued under Section 107 is required to develop a fact-specific showing that it should not be held liable, some of the benefit of contribution protection will be undermined. On the other hand, if the courts adopt a more broadly applicable rule—such as that a party that has settled with the government is presumed to have paid its fair share and can accordingly defeat any Section 107 claim against it—the lower courts could, in essence, adopt a judge-made contribution-protection rule for Section 107 claims to parallel the statutory provision for Section 113 claims. If they do so, the *Aviall/Atlantic* cases may become a full-fledged summer trilogy, with the third installment coming some time down the road.

For now, most interested parties are likely to welcome this decision. Among other things, it will largely moot out the great attention that has been paid post-*Aviall* to which settlements with the government create contribution claims, and, in particular, whether EPA Administrative Orders on Consent create such claims. The principal group unhappy with this decision will likely be federal PRPs, who will now be forced to defend an increased body of CERCLA litigation by parties who have never been sued by or settled with EPA.

We hope that you find this brief summary helpful. If you would like more information, or assistance in addressing or commenting on the issues raised in this advisory, please feel free to contact:

Joel Gross
+1 202.942.5705
Joel.Gross@aporter.com

Brian Israel
+1 202.942.6546
Brian.Israel@aporter.com