



ENVIRONMENTAL NEWS

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Supreme Court Clarifies Rights of PRPs to Recover Cleanup Costs from Other PRPs, and the United States

By *Steven Jones*

Putting an end to two-and-a-half years of uncertainty created by its previous ruling in *Cooper Industries v. Aviall Services, Inc* (“*Aviall*”), a unanimous Supreme Court has made clear that parties who voluntarily clean up contaminated property may sue to recover their cleanup costs from other potentially responsible parties (“PRPs”) under section 107(a) of CERCLA. The opinion in *United States v. Atlantic Research Corp.* (“*Atlantic Research*”)[1] was written by Justice Thomas, who also authored the Court’s *Aviall* decision.[2]

In addition to reaffirming the availability of cost recovery claims for volunteers, the decision confirms that PRPs may pursue such claims against the United States at sites where a federal agency is a PRP. The government faces more than \$300 billion in potential liability at such sites.[3]

Procedural Background

Aviall came as a surprise to most long-time environmental practitioners. Prior to that 2004 decision, the majority view was that a party who incurred costs of cleanup could recover its costs from other parties under CERCLA’s contribution provision, section 113, irrespective of the existence of a court order or a claim by EPA or a state. But in *Aviall*, a majority of the Court held that a PRP who had voluntarily undertaken a hazardous waste cleanup but who had not been sued under either section 106 or 107 could not seek contribution from other liable parties under section 113(f)(1). *Aviall* left open the question of whether such parties could pursue recovery of those costs under CERCLA’s “cost recovery” provision, section 107(a).

Subsequent to *Aviall*, three Circuit Courts (the Second, Seventh and Eighth Circuits) held that volunteers could pursue cost-recovery under section 107(a), while a fourth (the Third Circuit) held that they could not.

Factual Background

Atlantic Research retrofitted rocket motors for the United States at a site in Arkansas, extracting rocket propellant using a high-pressure water spray to remove pieces of propellant from the motors, which it then burned.[4] Residue from burnt rocket fuel contaminated the site's soil and groundwater. Atlantic Research cleaned up the contamination at its own expense, and then sought to recover some of its costs pursuant to sections 107(a) and 113(f) of CERCLA.[5] Following the Supreme Court's decision in *Aviall*, Atlantic Research amended its complaint, relying solely on section 107(a) and federal common law to recover its cleanup costs. The United States moved to dismiss, arguing that *Aviall* foreclosed Atlantic Research's section 107 claim. The district court agreed, and dismissed the case.

The Eighth Circuit reversed, joining ranks with the Second Circuit and the Seventh Circuit and holding that, in light of the ruling in *Aviall* that section 107 and section 113's remedies were distinct, "it no longer makes sense" to view section 113(f)(1) as the exclusive route by which liable parties may recover cleanup costs.[6] Just three weeks later, however, the Third Circuit held that section 107 did not create an "implied" cause of action.[7] The Supreme Court accepted certiorari in *Atlantic Research* to resolve this split, as well as to address the issue left open by its earlier opinion in *Aviall*.

"Other Persons" May Sue for Cost Recovery under Section 107(a)

The central dispute in the case centered on the meaning of section 107(a)(4)(B). Section 107(a) makes four different categories of PRPs liable for, among other things:

- 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; [and]
- B. any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. §9607(a)(4)(A)-(B).

The United States argued that the plain language of section 107 did not allow a PRP to recover voluntary cleanup costs,[8] and that section 113(f) provided the exclusive means by which one PRP can sue another.[9] According to the government, allowing PRPs to proceed under section 107 would undermine Congress' objectives in enacting section 113, effectively rendering the Court's prior decision in *Aviall* inoperative.[10]

With the maxim that "statutes must 'be read as a whole,'"[11] the Supreme Court rejected the United States' interpretation, explaining that subparagraph (B) "can be understood only with reference to subparagraph (A)."[12] The Court noted that the provisions are adjacent, have similar structures, and that the text denoted a relationship

between them. Based on this relationship, the Court concluded “it is natural to read the phrase ‘other necessary costs’” by referring to the language in subparagraph (A), namely, that the phrase “any other person” means any person other than the United States, a State or Indian tribe. According to Justice Thomas, accepting the government’s interpretation that “any other person” refers only to a person not identified as a PRP in sections 107(a)(1)-(4), “would destroy the symmetry of subparagraphs (A) and (B) and render subparagraph (B) internally confusing.”^[13] Moreover, because the statute defines PRPs so broadly as to “sweep in virtually all persons likely to incur cleanup costs, accepting the United States’ interpretation would reduce the number of potential plaintiffs to almost zero, rendering subparagraph (B) a dead letter.”^[14]

Harmonizing Section 107 with Section 113

The United States also argued that allowing PRPs a choice between cost recovery actions under section 107 and contribution actions under section 113 would create friction between those two sections.^[15] In response, Justice Thomas pointed to his earlier opinion in *Aviall*, where the Court held that sections 107(a) and 113(f) provide two “clearly distinct” remedies: “CERCLA provide[s] for a *right of cost recovery* in certain circumstances, § 107(a), and *separate rights to contribution* in other circumstances, §§ 113(f)(1), 113(f)(3)(B).”^[16] The “contribution” remedy in section 113(f) reflected the traditional tortfeasor’s right to collect from others who were responsible for the same tort, a right which was contingent on an inequitable distribution of common liability among liable parties.^[17] By contrast, the language of section 107(a) allowed recovery of costs, but “permits a PRP to recovery only the costs it has ‘incurred’ in cleaning up a site.”^[18]

The Court explained that the two remedies complement each other, by providing causes of action “to persons in different procedural circumstances.”^[19] Section 113(f) allows contribution among PRPs with common liability, while section 107(a) permits recovery by a private party which has incurred cleanup costs itself. The Court took pains to point out that, when a PRP pays a judgment or discharges its obligation under a settlement agreement, “it does not incur its own costs of response ... [but] reimburses other parties for costs that those parties incurred.”^[20] In those circumstances, recovery must be pursued under section 113(f), rather than section 107. This avoids the potential for a PRP to choose the six-year statute of limitations under section 107, instead of the shorter limitations period under section 113(f).^[21]

Finally, the Court rejected the United States’ prediction that permitting PRPs to seek recovery under section 107(a) would eviscerate the settlement bar set up by section 113(f)(2), which prohibits contribution claims against “[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement. ...” While acknowledging the fact that the “settlement bar does not by its terms protect against §107(a) cost-recovery liability,” the Court “doubt[ed] this supposed loophole would discourage settlement”^[22] since a PRP could seek equitable apportionment under section 113(f) and “a district court applying traditional equity rules would undoubtedly consider any prior settlement in the liability calculus.”^[23]

The opinion left open the question of whether PRPs who incur expenses pursuant to a

consent decree following a suit by EPA under section 106 or section 107(a) may recover those compelled costs pursuant to section 107(a), section 113(f), or both.^[24]

Conclusion

In previous articles in this Newsletter reporting on *Atlantic Research*, we noted that parties often on different sides of environmental disputes – environmentalists, landowners, industry and States – all lined up against the United States' interpretation of section 107(a)^[25] Part of the reason for this alliance was the fact that the party which benefited most from the *Aviall* decision was the United States, particularly at sites where a federal agency was a PRP, since the government had the possibility of preventing the prosecution of section 113 claims at such sites by not initiating enforcement actions under section 106 or section 107. With its decision in *Atlantic Research*, the Supreme Court adopted a reading of section 107 that reinstates the incentives for cleanup and redevelopment of contaminated property. It also allows a lot of lawyers who had previously advised their clients that they could recover their remediation costs to rest a bit easier.

For more information on this decision or on environmental litigation generally, please contact [Steve Jones](#).

[1] No. 06-562, 511 U.S. ___, ___ S. Ct. ___, 2007 WL 1661465 (June 11, 2007).

[2] 543 U.S. 157 (2004). A number of prior articles in this newsletter have analyzed the implications of *Aviall* and the various Courts' of Appeals opinions that followed it. See, e.g., [Congress Stays Out of Aviall Debate, Leaving the Courts to Resolve Uncertainties Created by Landmark Superfund Ruling](#), Marten Law Group *Environmental News* (March 8, 2006), and ["Son of Aviall" -- Supreme Court to Resolve Right of "Volunteers" to Cost Recover Under CERCLA Section 107](#), Marten Law Group *Environmental News* (January 24, 2007).

[3] See U.S. Dep't of the Treasury, Financial Report of the United States Government (2006) (*cited* in Lockheed Martin's amicus brief, 2007 WL 1047955 (April 5, 2007), at n 10).

[4] *Atlantic Research*, 2007 WL 1661465, *3.

[5] *Id.*

[6] *Atlantic Research Corp. v. United States*, 459 F.3d 827, 833-34 (8th Cir. 2006).

[7] *E.I. Du Pont De Nemours and Co. v. United States*, 460 F.3d 515 (3rd Cir. 2006).

[8] United States' opening brief, 2007 WL 66923 (March 1, 2007), at 14-21.

[9] *Id.* at 26-36.

[10] *Id.* at 33, 36-43.

[11] *Atlantic Research*, 2007 WL 1661465, *3 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)).

[12] *Id.*

[13] *Id.*

[14] *Id.* at *4. This was precisely the result that several amici had argued against, claiming that if the United States' interpretation of CERCLA was accepted, "far fewer Superfund cleanup actions will occur and that the public fisc will bear the enforcement costs of those that do." See State of Washington's amicus brief, 2007 WL 1074688 (April 5, 2007), at 18 (quoting EPA Chief of Staff M. Vanderbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029, 2089-90 (2005)); see also amicus brief filed by former EPA Administrator Carol M. Browner, Former Assistant Administrators Don R. Clay, Timothy Fields, Jr., Steven A. Herman, Marianne Lamont Horinko, Elliott P. Laws, and Dr. Winston Porter, and Former General Counsel Jonathon Z. Cannon and Jean C. Nelson of the Environmental Protection Agency, who argued that, without a right of action under section 107, private PRPs had no incentive to carry out independent cleanups prior to enforcement action. This brief can be viewed at 2007 WL 1046711 (April 5, 2007).

[15] *Atlantic Research*, 2007 WL 1661465, *4.

[16] *Id.* (quoting *Aviall*, 543 U.S. at 153 n. 3) (italics in *Atlantic Research* opinion).

[17] *Id.*

[18] *Id.*

[19] *Id.* at *5 (quoting *Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc.* 423 F.3d 90, 99 (2nd Cir. 2005) and Judge Sloviter's dissent in *DuPont*, 460 F.3d at 548. A previous article in this newsletter analyzed the *Consolidated Edison* case when it first came out. See [Second Circuit Short Circuits Cooper Industries](#), Marten Law Group *Environmental News* (September 9, 2005).

[20] *Atlantic Research*, 2007 WL 1661465, *4.

[21] *Id.* at *5. In making this statement, the Court acknowledged that there could be some overlap between section 113(f) and section 107(a)(4)(B). *Id.* at *6 n. 6 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994), and noting that the statutes provide "similar and somewhat overlapping remed[ies].")

[22] *Id.* at *5.

[23] *Id.*

[24] *Id.* at *6.

[25] See [Supreme Court Takes a Second Bite at CERCLA Contribution Rights](#), Marten Law Group *Environmental News* (April 25, 2007), providing overview of the briefing and oral argument in the case.

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