BACK TO THE FUTURE: PRPS REGAIN ACCESS TO COURTS IN *UNITED STATES V. ATLANTIC RESEARCH CORPORATION*

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Introduction

The Supreme Court's unanimous decision in *United States v. Atlantic Research Corporation* in June 2007,[2] interpreting the cost recovery and contribution provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[3] offers new promise for potentially responsible parties (PRPs) seeking to recover costs from recalcitrant parties in the cleanup of contaminated sites and appears likely to ease the logjam of uncertainty caused by *Cooper Industries v. Aviall*[4] in 2004. The Court clarified that PRPs may bring cost recovery suits against other PRPs under CERCLA § 107(a)(4)(B), which provides that PRPs "shall be liable for . . . any . . . necessary costs of response incurred by any other person" and that PRPs that have reimbursed costs to the government typically will have a cause of action under § 113 for contribution. In drawing a line between § 107 rights for costs incurred directly and § 113 rights for contribution for reimbursement payments, however, *Atlantic Research* failed to state decisively what cause of action lies for PRPs that perform work and incur costs pursuant to administrative orders and settlements—a typical scenario at Superfund sites. This article discusses the new intersections between § 107(a) and § 113(f), and other questions left open by *Atlantic Research*, including joint and several liability, contribution protection in settlement, and the reinvigorated role of common law in CERCLA.

Background of Atlantic Research – a PRP Stymied by *Aviall*

After the 1986 Superfund Amendment and Reauthorization Act (SARA) added the § 113(f) contribution provisions, it was common for PRPs to voluntarily remediate contaminated sites and then initiate contribution actions against non-participating PRPs to allocate the costs under § 113(f). CERCLA's other cost recovery provision, § 107(a)(4)(B), was then generally interpreted to be available only to innocent third parties.[5] In 2004, however, the Supreme Court's decision in *Cooper Industries v. Aviall*[6] drastically narrowed the ability of PRPs to bring contribution claims. *Aviall* held that § 113(f) only authorized such claims "during or following" a civil action brought against the PRPs under §§ 106 or 107 of CERCLA[7] or after the PRP had settled its liability with the government.[8] The ruling was contrary to precedent and practice and is believed to have inhibited voluntary cleanup efforts.[9] In particular, after *Aviall*, the government as a PRP could effectively insulate itself from § 113(f) contribution liability by refusing to bring a civil action against another PRP that had voluntarily incurred remediation costs. The *Aviall* decision, however, laid the foundation for the emergence of § 107 actions as a vehicle for cost recovery. Indeed, *Aviall* declined to address whether PRPs could sue other PRPs under § 107(a)(4)(B), and some Circuits after *Aviall* began to overturn or modify earlier opinions limiting § 107 causes of action to innocent parties.[10]

Atlantic Research Corporation leased property from the United States Department of Defense and retrofitted rocket motors for the military. Soil and groundwater at the property became contaminated. Atlantic Research voluntarily cleaned the site and then sought to recover some of its costs from the United States under CERCLA § 107(a)(4)(B). The district court granted the Government's motion to dismiss, holding that § 107(a) did not allow PRPs to recover costs, but the 8th Circuit reversed. The circuit court allowed a PRP to pursue an action under § 107(a), through either direct cost recovery or an implied right of contribution.[11]

The Court in *Atlantic Research* held that private PRPs do have a cause of action under § 107(a)(4), which states that 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; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ." Justice Thomas, in unusually harsh language, rejected as "inexplicabl[e]" and "textually dubious" the Government's argument that "other person" in § 107(a)(4)(B) that was entitled to sue for its response costs had to be some entity distinct from the categories of PRPs described earlier in §§ 107(a)(1)-(4), saying the argument "ma[de] little textual sense."[12] Rather, under a "natural" reading of the statutory language, the "other person" in § 107(a)(4)(B) entitled to sue means any person, including a PRP, other than the government entities listed in § 107(a)(4)(A).[13]

"Two 'clearly distinct' remedies"?

In addition to providing PRPs a cause of action for response costs under § 107(a), *Atlantic Research* sought to devise a bright-line rule distinguishing between § 113(f) contribution and § 107(a) cost recovery, writing that the *Aviall* decision "previously recognized that §§ 107(a) and 113(f) provide two 'clearly distinct' remedies."[14] This attempt to impose logical rigor on an unwieldy statute poses its own problems, as recognized later in the *Atlantic Research* opinion in the critical footnote six. Nonetheless, the Court held that "§ 107(a) permits a PRP to recover only the costs it has 'incurred' in cleaning up a site," and "costs incurred voluntarily are recoverable only by way of §107(a)(4)(B)." Alternatively, "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)."[15] The hallmarks of a § 107(a) action are therefore voluntariness and directly "incurred" cleanup costs; those of § 113(f)(1) or § 113(f)(3)(B) actions are compulsion and reimbursement.

Of course, the distinction is not nearly so clear. In the pivotal footnote six of the opinion, the Court recognized the possibility—in reality a

likelihood—that "a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a)." The Court then observed:

> In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. 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, contrary to the Government's argument.[16]

PRPs that have performed remediation under consent decrees or similar circumstances may be relieved that the Court did not say "or neither"; wherever possible, they should plead claims under both provisions for the same costs, highlighting the compulsion element in the § 113(f)(3)(B) claim and the incurred costs of response in the § 107(a) claim.

Defendants, on the other hand, may try to downplay footnote six and instead interpret *Atlantic Research* as not overturning various Circuit precedent that had held that § 107(a) cost recovery was not available for costs incurred entirely under compulsion, such as consent orders.[17] If courts tend to adopt this latter interpretation, there are further questions about the degree of compulsion (such as an administrative agreement with a state) that will impair a § 107(a) claim, and about whether remedial actions undertaken under agreements that do not rise to the level of § 113(f)(3)(B) settlements are thereby voluntary. Much of the debate following *Atlantic Research* could turn out to be framed in terms of the parameters of "incurred" costs.[18] In any event, it seems clear that the Supreme Court, consistent with the remedial goals of CERCLA, will not countenance strained defense arguments that PRPs that perform necessary cleanups are somehow left without a remedy to pursue recalcitrant parties.

The § 107(a) cost recovery and § 113(f) contribution remedies have different statutes of limitations, which a PRP with potential claims under both provisions must consider. PRPs must institute § 107(a) cost recovery suits "within 6 years after initiation of physical on-site construction of the remedial action."[19] In some cases, this date may be the subject of intense argument, and courts sometimes find pertinent construction to have begun well before PRPs may have realized that their actions would trigger the statute of limitations.[20] Section 113(f)(1) contribution suits, on the other hand, must be instituted within 3 years after judgment in a civil action, while actions brought after an administrative settlement under § 113(f)(3)(B) are not addressed under the § 113(g) statute of limitations and therefore may have the benefit of a longer period.[21]

The still-unclear parameters of the two kinds of § 113(f) actions further muddy the distinctions among possible § 107(a) and § 113(f) remedies. *Atlantic Research* left unanswered what constitutes a "civil action" for the purposes of a § 113(f)(1) claim and what constitutes a "settlement" for the purposes of a § 113(f)(3)(B) claim; courts are divided on both issues. For example, unilateral administrative orders are considered civil actions under CERCLA in some jurisdictions but are deemed insufficient in others;[22] similarly, state administrative settlements may qualify PRP settlers to bring CERCLA contribution actions in some jurisdictions but not in others.[23] These pressing questions remain, but the expanded and as yet not completely defined parameters of a PRP's cause of action under § 107 certainly provide PRPs greater access to the courts and the ability to pressure settlement.

New Life for Joint and Several Liability Under CERCLA?

Does the revival of § 107(a) as a cause of action mean that PRPs can now recover **all** of their cleanup costs under principles of joint and several liability? This tempting prospect (or disastrous outcome for defendants) will be a focus of much of the early post-*Atlantic Research* litigation. While liability under § 113(f) contribution actions is defined largely by the defendant PRPs' proportional shares, subject to adjustment by the court under the equitable factors of § 113(f)(1), liability under § 107(a) is joint and several, unless the defendant PRP can demonstrate that the harm caused by its wastes is divisible. The Court in *Atlantic Research* "assume[d] without deciding that § 107(a) provides for joint and several liability," suggesting that culpable PRPs that sue first at a site might reap a windfall of compete cost recovery. [24]

Facing this incongruous scenario, *Atlantic Research* recommended that defendant PRPs facing joint and several liability may "blunt any inequitable distribution of costs by filing a § 113(f) counterclaim"[25] to obtain equitable distribution. Plainly, a § 113(f)(1) counterclaim will now be an essential responsive pleading for any defendant facing a § 107 claim. In addition, a PRP's ability to seek joint and several liability under § 107(a) may in fact be limited, and the arguments to that effect made by Atlantic Research Corporation—that § 107(a) "permits a voluntary remediator to recover a portion of its costs, *i.e.*, to impose several liability only, just as in the contribution remedy provided by § 113(f)"—remain viable.[26] If lower courts adopt this interpretation, no § 113(f) counterclaims would be necessary to obtain proportional distribution.

A potential complication might arise where a plaintiff PRP is performing work under a settlement and sues other PRPs for joint and several liability under § 107(a) for matters encompassed by the settlement (*i.e.*, the scenario illustrated in footnote six of *Atlantic Research*, as discussed *supra*). In that case, it is conceivable that a defendant PRP bringing a § 113(f) counterclaim would face the argument that the settlement bar in § 113(f)(2) (discussed *infra*) bars such a suit. *Atlantic Research* also left open whether there is an implied right of contribution under § 107(a), as the 8th Circuit below had held; however, it cited cases in which implied rights were not found in statutes, suggesting a reluctance to affirm an implied right of contribution in CERCLA.[27] While the specter of joint and several liability is certainly a bludgeon that PRP plaintiffs will attempt to swing, it likely will result in more noise than impact as courts apply their considerable equitable authority under CERCLA to apportion liability fairly.

"But I settled at this Site" — Whither Contribution Protection?

Atlantic Research may have a significant impact on a PRP's incentive to settle with the government. PRPs used to be able to rely on the settlement protection in § 113(f)(2), under which any contribution claims against a party that had settled its liability with the government would be dismissed: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." Now, other PRPs that voluntarily undertake cleanup efforts can still pursue § 107(a) cost recovery claims against PRPs that have settled, because the settlement bar only protects against suits for contribution; "[t]he settlement bar does not by its terms protect against cost-recovery liability under §107(a)."[28]

Addressing this concern, the Court stated that a defendant PRP in such a scenario should file a § 113(f) counterclaim for equitable distribution, because "[a] district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus." Critically, the Court overlooked the key advantage of § 113(f)(2) contribution bars – they bar lawsuits in the first instance or at least enable a PRP that has been sued to obtain a rapid dismissal.[29] Accordingly, the contribution protection is largely eviscerated if a settling party is forced to litigate and argue its appropriate share. PRPs, when considering settlement, could consider asking the district court for an equitable order barring such later claims by non-settling PRPs. Such an order would be supported by pro-settlement policy arguments, the court's express ability under § 113(f) to "allocate response costs among liable parties using such equitable factors as [it] determines are appropriate," and some prior practice and precedent.[30] At the least, § 113(f)(2)'s requirement that the non-settlers only have their share of costs reduced by what the settlers paid (the pro tanto methodology) should be looked to for guidance as the courts fashion federal common law to resolve these issues.[31] Bar orders, however, may be challenged by parties that were not part of the litigation at the time as violating due process.[32]

Even if the district courts could be relied upon to set the § 107(a) liability of PRPs that have settled to zero, the *Atlantic Research* ruling imposes transaction costs to defend suits after settlement, potentially discouraging companies from seeking settlement. Furthermore, the Government argued that permitting liable parties to sue under § 107 would discourage PRPs from settling with the Government, not only because of fear that other PRPs could still sue them after settlement, but also because PRPs might prefer to preserve their right to sue other PRPs under the generally more plaintiff-favorable § 107 provisions.[33] The Court, however, assumed that the remaining benefits of protection from contribution suits and resolution of liability to the government will serve as sufficient incentive for PRPs to settle.[34] It remains true that early settlement with the government by the larger PRPs at a contaminated site will remain attractive, and parties that perform the remedy will typically be the plaintiffs in any subsequent cost recovery litigation. Thus the threat of a § 107 action by a recalcitrant PRP that upends a settling party's protection against contribution suits may be more theoretical than real because the non-settling party will have to incur significant cleanup costs in the first instance to have a § 107 cause of action.

State Law Contribution Rights Post-Atlantic Research?

The *Atlantic Research* decision allowing PRPs to bring cost recovery claims under CERCLA § 107(a)(4)(B) may alter the legal landscape for state law claims for contribution and restitution, especially where PRPs may have both § 107(a) and § 113(f) claims. Some cases decided before *Aviall* had held, based on a review of CERCLA's purposes, that state common law contribution claims conflicted with the CERCLA § 113(f) contribution provisions and were therefore preempted.[35] These cases, however, were decided at a time when it was thought that PRPs that voluntarily incurred remediation costs could sue under § 113(f) but not under § 107(a). After *Aviall* and *Atlantic Research* clarified that essentially the reverse is true, plaintiff PRPs may have new opportunities to try to add previously precluded state law claims, particularly where work is performed pursuant to state mandates or settlements.

Conclusion

Atlantic Research should lift the uncertainty and outright impediments to cost recovery and contribution litigation that followed the *Aviall* decision of 2004, and will encourage voluntary remediation by PRPs consistent with the purposes of the statute. Now, PRPs as well as innocent "other person[s]" may bring cost recovery claims under CERCLA § 107(a)(4)(B), as long as they have "incurred" remediation costs themselves; if PRPs have settled with the government or been subject to a civil action, they may bring contribution claims under CERCLA § 113(f). If PRPs have "incurred" remediation costs under some compulsion, such as under a consent decree, they arguably have claims under both § 107(a) and § 113(f) as suggested in footnote 6 of the *Atlantic Research* opinion, as long as each provision's respective statute of limitations is met. With the doors reopened to more expansive cost recovery, PRPs can focus on basic liability issues, including whether cleanup costs are necessary and consistent with the National Contingency Plan.

Going forward, however, PRPs have to contend with some uncertainty regarding how the new cause of action under 107(a) will work in practice. Courts and litigators will have to interpret the overlap between §§ 107(a) and 113(f); the impacts of § 107(a)'s joint and several liability, now officially available to plaintiff PRPs, and the mechanics of § 113(f) counterclaims that defendant PRPs may now have to use in order to obtain equitable division; the new, potentially large § 107(a) loophole in the previously reliable settlement bar of § 113(f)(2); the intersection of the *Atlantic Research* CERCLA framework and state law claims; and other issues to be identified.

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[2] 551 U.S. ___, 127 S. Ct. 2331 (2007).

[3] 42 U.S.C. §§ 9601-9675 (2006).

[4] 543 U.S. 157 (2004).

[5] *See, e.g., Atl. Research Corp. v. United States*,459 F.3d 827, 831-33 (8th Cir. 2006) (explaining history of interpretation of CERCLA §§ 107 and 113).

[6] 543 U.S. 157 (2004).

[7] CERCLA § 113(f)(1) ("Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.").

[8] CERCLA § 113(f)(3)(B) ("A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement . . . .").

[9] *See, e.g.*, Charles F. Helsten, Heather K. Lloyd and Harvey M. Sheldon, *The Effect of* Aviall *on Brownfields Programs*, ABA ENVTL. TRANSACTIONS AND BROWNFIELDS CMTE. NEWSL. 1, 3-4 (March 2005) (describing practical effects of Aviall).

[10] *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006); *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.* ("Con Ed"), 423 F.3d 90 (2d Cir. 2005); *contra E.I. Dupont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006).

[11] *Atl. Research Corp. v.* United States, 459 F.3d 827, 834-37 (8th Cir. 2006)

[12] 127 S. Ct. at 2336-37.

[13] Id. at 2336.

[14] *Id.* at 2337.

[15] *Id.* at 2338.

[16] *Id*. at 2338 n.6 (citations omitted) (emphasis added).

[17] *See, e.g., Consolidated Edison Co. of N.Y. v. UGI Utils., Inc*. ("Con Ed"), 423 F.3d 90, 100 (2d Cir. 2005), cert. denied, No. 05-1323, 75 U.S.L.W. 3677, 2007 U.S. LEXIS 7732 (June 18, 2007); cf. *Schaefer v. Town of Victor*, 457 F.3d 188, 200-03 (2d Cir. 2006) (widening the opportunity for § 107(a) cost recovery to include PRPs that had begun to incur costs prior to, and therefore not entirely due to, a consent decree).

[18] *See, e.g., Grace v. Zotos*, No. 05-2798 (2nd Cir. June 28, 2007) (order granting motion to file supplemental brief) ("[T]he parties should address specifically whether or not Grace 'incurr[ed] . . . response costs' within the meaning of § 107(a) . . . .").

[19] CERCLA § 113(g)(2)(B) (actions to recover costs from remediation). Actions to recover costs from removal only, as distinct from remediation, must be instituted within three years of completion of removal. CERCLA § 113(g)(2)(A).

[20] *See, e.g., Schaefer v. Town of Victor*, 457 F.3d at 203-210 (holding that "physical on-site construction of the remedial action" began while the landfill was still operational and before adoption of a final remedial action plan);but see *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661 (9th Cir. 2004) (adopting bright-line rule that "remedial" construction can only begin "after the final remedial action plan is adopted").

[21] *See, e.g., Sun Co., Inc. v. Browning Ferris, Inc.*, 124 F.3d 1187, 1192 (10th Cir. 1997).

[22] *Compare, e.g., Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006) (holding that § 106 administrative orders do not qualify as civil actions under § 113(f)(1)) with *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827 (W.D. Tenn. 2006) (opposite).

[23] *Compare, e.g., Con Ed*, 423 F.3d at 95-97 (holding that a state administrative settlement, which on the facts did not resolve CERCLA liability, did not qualify plaintiff to bring § 113(f)(3)(B) claim) and *Grace v. Zotos*, 2005 U.S. Dist. LEXIS 8755 (W.D.N.Y. 2005) (holding that a state administrative settlement did not qualify a plaintiff to bring a § 113(f)(3)(B) claim because CERCLA authority had not been delegated to the state through a formal cooperative agreement) with *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys.*, 255 F. Supp. 2d 134, 154-155 (holding that state administrative settlement which declared that it was a § 113(f)(3)(B) settlement qualified plaintiff to bring § 113(f)(3)(B) claim).

[24] 127 S. Ct. at 2339 n.7. The question is generally viewed as settled, since CERCLA defines "liability" in § 101(32) with reference to § 311 of the Clean Water Act, 33 U.S.C. § 1321, which has also long been interpreted as imposing strict, joint and several liability.

[25] 127 S. Ct. at 2339.

[26] Initial Brief for Appellee-Respondent at 17, *United States v. Atl. Research Corp.*, 551 U.S. ___, 127 S. Ct. 2331 (2007) (No. 06-562).

[27] 127 S. Ct. at 2339 n.8.

[28] 127 S. Ct. at 2336. See CERCLA § 113(f)(2).

[29] *See, e.g., Dravo Corp. v. Zuber*, 804 F. Supp. 1182, 1187-87 (D. Neb. 1992) (discussing advantages of an "effective contribution bar").

[30] *See, e.g., U.S. Oil & Gas v. Wolfson*, 967 F.2d 489, 494 (11th Cir. 1992) ("[S]ettlement bar orders allow settling parties to put a limit on the risks of settlement."); *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (affirming the propriety of orders barring non-settling defendants from seeking contribution from settling defendants in a class action suit under the Securities Exchange Act, which imposes joint and several liability); *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 834 F. Supp. 342, 344-46 (D. Kan. 1993) (discussing and granting an order "bar[ring] future claims by any party against the Settlors" in a CERCLA settlement). See also Allen J. Topol and Rebecca Snow, Superfund Law and Procedure § 7:93 (2006 ed.) (discussing contribution protection, indemnification protection and bar orders).

[31] *E.g., Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999) ("Extending the pro tanto approach of § 113(f)(2) to claims under § 113(f)(1) enables the district court to avoid what could be a complex and unproductive inquiry into the responsibility of missing parties").

[32] *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) (holding in civil rights class action that because of the requirements of due process "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement"); Federal Judicial Center, Manual for Complex Litigation (Fourth) § 13.13 (2004) ("To ensure binding effect [of contribution bar orders], the affected parties or their representatives should be before the court, and their rights should be protected.").

[33] 127 S. Ct. at 2336.

[34] Petition for Writ of Certiorari at 29, *United States v. Atl. Research Corp.*, 551 `U.S. ___, 127 S. Ct. 2331 (2007) (No. 06-562).

[35] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998) (holding that state law claims for restitution and indemnification would upset CERCLA's settlement-incentive scheme); In re Reading, 115 F.3d 1111, 1117 (3d Cir. 1990) (same).