

Supreme Court Holds That Potentially Responsible Parties May Recover Voluntary Cleanup Costs Under CERCLA

June 14, 2007

On June 11th, the Supreme Court unanimously held that section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) permits a potentially responsible party (PRP) that has not been sued or ordered to participate in an administrative proceeding, to recover from other PRPs necessary response costs it incurred voluntarily. *United States v. Atlantic Research Corp.* (Case No. 06-562) (*Atlantic Research*). In doing so, the Court resolved a question left open by its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) (*Aviall*), and clarified the relationship between the right to cost recovery and the right to contribution provided by CERCLA sections 107(a) and 113(f).

Background

In 2004, the Court held, based on the specific language in the statute, that section 113(f) prevented PRPs from bringing contribution actions against other PRPs before they were the subject of a CERCLA enforcement action. *Aviall*, 543 U.S. at 161. In *Aviall*, the Court anticipated that PRPs likely would return to asserting claims to recover voluntarily incurred response costs under section 107(a)(4)(B), but explicitly declined to address the issue at that time. *Id.* at 168.

Following the Court's decision in *Aviall*, conflicts arose in the appellate courts regarding the ability of a PRP to recover voluntarily incurred response costs from other PRPs under CERCLA. Ostensibly to address the inequities created by *Aviall*, some courts found that section 107(a)(4)(B), in addition to allowing for cost recovery, provided an implied right of contribution. See *Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005); *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F. 3d 824 (7th Cir. 2007). Other courts, however, acknowledged the express right of contribution provided upon enactment of section 113(f) in 1986 and concluded that section 113(f) was the exclusive remedy by which a PRP could seek recovery from other responsible parties. See *E.I. Dupont de Nemours & Co. v. United States*, 460 F. 3d 515 (3rd Cir. 2006).

In *Atlantic Research*, Atlantic Research Corporation (ARC) retrofitted rocket motors for the United States at a site owned by the federal government and leased by ARC. After water and propellant residue from the retrofit process contaminated the soil and groundwater at the site, ARC cleaned the site at its own expense and then sued the United States under CERCLA section 107(a) and federal common law to recover some of its costs. After finding that section 107(a) did not allow PRPs to recover costs, the district court dismissed the case. In reversing the district court, the Eighth Circuit determined that section 113(f) was not the exclusive means for PRPs to recover costs and that section 107(a)(4)(B) provided a cause of action to "any person other than the persons permitted to sue under § 107(a)(4)(A)." *Atlantic Research Corp. v. United States*, 459 F. 3d 827, 835 (8th Cir. 2006).

The Decision

In affirming the decision of the Eighth Circuit, the Supreme Court rejected the government's argument that the phrase "any other person" in section 107(a)(4)(B) refers to parties not identified as PRPs in sections 107(a)(1)-(4). The Court concluded that section 107(a)(4)(B) provides a cause of action for cost recovery to any person other than the United States, a State, or an Indian tribe (i.e., the entities listed in section 107(a)(4)(A)).

The Court further distinguished the nature of the remedies available under sections 107(a) and 113(f) by emphasizing that "CERCLA provide[s] for a *right to cost recovery* in certain circumstances, §107(a), and *separate rights to contribution* in other circumstances, §§113(f)(1), 113(f)(3)(B)." Thus, the Court clarified that section 107(a) allows a PRP to recover costs that it has incurred in cleaning

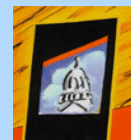
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up a site, but does not create a right to contribution. Section 113(f) provides a right to seek contribution based upon an inequitable distribution of common liability among liable parties following an action brought under sections 106 or 107(a).

The Court also rejected the government's argument that this interpretation would create unavoidable friction between sections 107(a) and 113(f). Rather, the Court determined "the remedies in §§107(a) and 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances.'" In reaching this conclusion, the Court disagreed with the three examples asserted by the government. First, a PRP cannot choose the longer statute of limitations for section 107(a) cost-recovery actions over the shorter period for contribution claims under section 113(f) in circumstances where the PRP has reimbursed another party's response costs. The Court stated that such a PRP could seek contribution under section 113(f), but cannot recover under section 107(a) because the PRP would not have incurred its own costs of response. Second, a PRP cannot avoid the equitable distribution of costs under section 113(f) by seeking to impose joint and several liability under section 107(a), because a defendant PRP could counterclaim for contribution under section 113(f). Third, allowing recovery under section 107(a) will not eviscerate the section 113(f)(2) prohibition on contribution claims against parties that have settled their liability with the United States or a state. The Court proffered several reasons why it felt such settlements would not be discouraged: (a) a defendant PRP could bring a section 113(f) counterclaim and expect the court to consider any prior settlement; (b) the settlement bar will continue to protect against some contribution suits; and (c) settlement allows a party to resolve its liability to the United States or a state.

Implications of the Court's Decision

In addition to removing a significant deterrent to voluntary remedial actions, the Court's decision in *Atlantic Research* will provide needed clarity to PRPs in resolving cleanup liability issues under CERCLA at both Superfund and non-Superfund sites. In deciding that section 113 is not the only mechanism for recovering cleanup costs, the Court has restored an important pillar of CERCLA jurisprudence – that a PRP may seek cost recovery under section 107(a)(4)(B) in the absence of an enforcement action under section 106 or 107(a).

For Additional Information

For additional information on this case or chemical and waste regulation, please contact Mitch Bernstein in our Washington, DC office at (202) 298-1800, Marlys Palumbo in our Seattle office at (206) 623-9372, or any member of the firm at www.vnf.com.

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