

## U.S. Supreme Court Issues Superfund Decision

On June 11, 2007, the United States Supreme Court continued its recent shake up of Superfund law in its unanimous opinion in *United States v. Atlantic Research Corporation*. In *Atlantic Research*, the Court resolved an outstanding issue regarding contaminated site cleanup cost recovery left open in *Cooper Industries, Inc. v. Aviall, Inc.*, 543 U.S. 157 (2006).

### Background

Before *Aviall*, parties which incurred costs cleaning up contaminated sites under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* could seek to recover those cleanup costs under the provisions of section 107(a) or section 113(f). Under section 107(a) cost-recovery provisions, parties which were not liable under CERCLA, so called innocent parties, could recover all of their cleanup costs from liable parties, so-called potentially responsible parties (PRPs). PRPs seeking to recover cleanup costs were limited to seeking contribution from other PRPs under section 113(f), subject to equitable apportionment of costs by the court. Pre-*Aviall*, a PRP could bring 113(f) claims for costs incurred in voluntary cleanups—i.e., those cleanups at sites that were not the subject of litigation or government enforcement.

In *Aviall*, the Supreme Court held that a PRP could seek contribution under section 113(f) only when the PRP had been sued by the government (under CERCLA section 106) or by private parties (under section 107). The issue left open by the Court was whether a PRP had a cause of action under section 107(a) to recover costs from other liable parties.

### Analysis

In a unanimous 11-page opinion written by Justice Thomas, the Court held that any PRP could recover costs against another liable party in a section 107(a) action. The Court found that the remedies available under sections 107(a) (for cost recovery) and 113(f) (for contribution) are complementary. A party which incurs costs in cleaning up a contaminated site can bring a section 107(a) cost recovery action against other PRPs. On the other hand, a party which has been sued by a PRP or the government, has not incurred its own response costs and cannot recover under section 107(a), but must bring an action under 113(f).

The Court outlined its prediction of how sections 107(a) and 113(f) would interact in practice. A PRP that has cleaned up a contaminated site would

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bring a 107 action against another PRP to recover its cleanup costs. The defendant PRP, which has not incurred cleanup costs, but has now been sued under section 107(a), would file a section 113(f) counterclaim against the plaintiff PRP. In this way, the court, in ruling on the counterclaim, would apply equitable principles in apportioning cleanup costs among all liable parties, including the plaintiff PRP.

Finally, the court asserted that its holding would not “eviscerate” the settlement bar under section 113(f)(2), which prohibits contribution claims against any PRP which has settled with the U.S. or a state. Acknowledging that the settlement bar does not apply to 107(a) cost recovery claims, the Court nonetheless explained that its ruling would not discourage settlement for three reasons.

First, a settling PRP that is sued by another PRP under section 107(a) could assert a contribution counterclaim as described above, and thus a court, in allocating liability, “would undoubtedly consider any prior settlement as part of the liability calculus.” (Slip op. at 11). Second, the settlement bar continues to provide protection from contribution suits. Third, “settlement carries the inherent benefit of finally resolving liability as to the United States or a State.” *Id.*

### **Impact**

The Supreme Court’s rather abbreviated decision in *Atlantic Research* represents a sea change in CERCLA cost recovery and contribution law and procedure. Because of the summary nature of the opinion, we expect it will take some time for the trial courts to flesh out the substance of the decision.

Nonetheless, we see two immediate impacts. First, settling parties, once secure in contribution protection under section 113(f), now face the possibility of 107(a) cost recovery actions brought by parties performing cleanup. And without the protection of the settlement bar, settling parties could find themselves in a long, complicated and expensive apportionment battle against a 107(a) plaintiff. Second, PRPs performing voluntary cleanups, left with uncertain avenues for cost recovery after *Aviall*, are now armed with potent relief under 107(a).

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