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# 'Atlantic Research': Who Can Sue for Remediation Costs

In *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 US 157 (2004), the Supreme Court held that a person who voluntarily cleans up a contaminated site does not have a contribution claim against the person or persons who caused the contamination.

The decision surprised most practitioners and created a significant amount of confusion regarding the relationship between the Superfund Law's contribution provision (§113) and the Superfund Law's primary liability provision (§107).

It also discouraged voluntary cleanup and created the possibility that at many contaminated sites, those who caused the contamination would not be required to pay for the costs of cleanup.

## Resolving Split in Federal Circuits

Federal courts quickly developed a number of responses to the challenges created by *Aviall* and the Supreme Court in *United States v. Atlantic Research Corp.* (June 11, 2007) (*Atlantic Research*) resolved a split in the federal circuits, approved the volunteer's right to bring a cost recovery action and attempted to clarify the relationship between §§107 and 113 of the Superfund Law.

Prior to *Aviall,* most courts permitted volunteers to bring contribution claims under §113. Most courts also held that a §107(a) claim could only be brought by a party who was not a potentially responsible party (PRP). PRP was defined very broadly to include almost anyone who could incur response costs. Therefore, §107(a) claims were essentially limited to government claims. In *Aviall,* while cutting back on contribution rights, the Court indicated in a footnote, that the volunteer who did not have a contribution claim may have a claim under §107(a), but declined to address the issue. 543 US at 168. In *Atlantic Research,* the Court resolved that issue.

*The High Court in 'Atlantic Research' approved the volunteer's right to bring a cost recovery action and tried to clarify the relationship between §§107 and 113 of the Superfund Law.*

Atlantic Research was a tenant at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. Atlantic Research cleaned up the site at its own expense and brought a claim against the U.S. government to recover its costs. After the *Aviall* decision prevented its §113 claim from going forward, Atlantic Research amended its complaint to allege a §107 (a) claim. The United States moved to dismiss, arguing that §107 does not allow claims by PRPs.

The District Court dismissed the action and the Court of Appeals reversed. 459 F3d at 827 (8th Cir. 2006), joining the U.S. Courts of Appeals for the Second and Seventh circuits in finding a PRP who did not have a contribution claim because of *Aviall,* had a cause of action under §107(a). See, *Consolidated Edison v. UGI, Utilities, Inc.,* 423 F3d 90 (2d Cir. 2005) and *Metropolitan Water Reclamation District v. North American Galvanizing & Coatings,* 473 F3d 824 (7th Cir. 2007). The U.S. Courts of Appeals for the Third Circuit had taken the opposite view in *E.I. Dupond de Nemours & Co. v. United States,* 460 F3d 515 (3d Cir. 2006).

The Supreme Court affirmed, reasoning that a volunteer can incur costs that are recoverable under §107(a) and to read the statute any other way would render a portion of the statute meaningless. Thus, the task before the court was to explain how the various liability sections of Superfund fit together.

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The Superfund Law contains two main liability provisions. Section 107(a) permits suits for the recovery of remedial costs, while §113 permits claims for contribution. The pre-*Aviall* law assigned a role to each; providing that PRPs could only bring §113 actions and non-PRPs could bring §107 actions. The flaw in that arrangement, the court explained, was that §107(a) really contains two distinct liability provisions and each needs to have a role. While §107(a)(4)(A) explicitly authorizes actions by the United States or a state, §107(a)(4)(B), authorizes suits "by any other persons." If §107(a)(4)(B) were limited to government claims, the court explained, then the phrase "by any other party" would be rendered meaningless. Everyone seemed to be either the government (a §107(a)(4)(A) plaintiff) or a PRP (a §113 plaintiff).

The government had argued that §107(a)(4)(B) was intended to provide a claim for "innocent" parties who are not government and not PRPs. The court rejected that because §107 defines PRP "so broadly as to sweep in virtually all persons likely to incur cleanup costs."

By holding that §107(a)(4)(B) provides a cause of action for PRPs, the court needed to then address when a PRP may bring a 107 claim and when it may (or must) bring a 113 claim. Or, put another way, if private parties can proceed under §107, why do we need §113?

The court answered this question with a fairly novel definition of "response costs." Section 107(a)(4)(B) permits the recovery of "necessary costs of response." This was generally held to mean cleanup costs as well as litigation costs brought on behalf of one who had not cleaned up the property, but had, by settlement with the government, contributed to a cleanup. See, *Key Tronic Corp. v. United States,* 511 US 809 (1994). Under the new scheme, "response costs" are cleanup costs, while payments to someone who has cleaned up are not. Thus, a 107 action is available to a volunteer who has cleaned up, but not to one who has contributed to the costs. This is similar to the reasoning the Second Circuit had used in *Con Ed v. UGI,* but even the Court recognized that the dividing line is far from clear.

## Practical Implications

Typically, when the government identifies a site that needs to be remediated, it identifies the potentially responsible parties and gives them the opportunity to remediate the site. This opportunity can be accompanied by a number of threats, such as the threat that if the responsible parties do not remediate, the government will and the government will then initiate a cost-recovery action. Many PRPs agree to remediate because the government is likely to spend more money on remediation than a private party and because there are essentially no defenses under Superfund. Thus, the refusal to clean up as a volunteer can be considerably more costly than refusing to cleanup and waiting to be a cost-recovery defendant.

The *Aviall* decision made it more difficult for parties to agree to remediate because a volunteer could not proceed against other PRPs. This slowed down remediations and made litigation more likely. Additionally, in matters already in litigation, it provided a procedural means for responsible parties to avoid liability. This also had the effect of increasing the amount of litigation by encouraging some defendants not to settle.

The Supreme Court in *Atlantic Research,* has found a way to avoid the problems created by *Aviall,* without overturning *Aviall.* By providing the volunteer with a claim, the volunteer is more likely to cleanup and other PRPs have an incentive to join in. The result should be more remediation and less litigation.

One area in which *Atlantic Research* could have the effect of increasing litigation concerns the new definition of "response costs." There are significant advantages to being a §107 plaintiff and perhaps greater advantages to being a §113 defendant. Potential plaintiffs will have a great incentive to structure their dealings with the government to permit a §107 claim. This could increase the number of voluntary remediations. It could also increase litigation seeking to clarify the fine line between "response costs" and contribution.

## Not a Clear Line

The Supreme Court noted in footnote 6, that the line it has attempted to draw is not very clear and that there is indeed overlap between §§107 and 113: "We do not suggest that §§107(a)(4)(B) and 113(f) have no overlap at all.... We do not decide whether these compelled costs of response are recoverable under §113 (f), 107(a) or both."

As in *Aviall,* the court explicitly left open an issue that will be the subject of future litigation. Unlike *Aviall,* however, they did not leave open an issue so fundamental to the liability scheme that it is likely to require a Supreme Court resolution within such a short period of time.

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