‘Atlantic Research’ leaves issues for lower courts

It clarified cost-recovery rights of only some parties under CERCLA.

May parties compelled to incur costs sue under § 107?

Other necessary costs of response incurred by any other person consistent with the national contingency plan. Id. § 9607(a)(4)(A)-(B).

In 1986, the Superfund Amendments and Reauthorization Act (SARA) created express rights of contribution under CERCLA, 42 U.S.C. 9613(f) [CERCLA § 113], for PRPs. Section 113(f)(3)(B) grants contribution rights to 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.” More broadly, § 113(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of [CERCLA], during or following any civil action under section 9606 of this title or under section 9607(a) of this title.”

For almost 20 years, most federal courts ignored the “during or following” language in CERCLA § 113(f)(1) and held that a PRP that “voluntarily” cleaned up a contaminated site, in the absence of a government civil action under 42 U.S.C. 9606 or 9607(a), could maintain a federal contribution claim to recover some or all of its cleanup costs from other PRPs under CERCLA § 113(f)(1).

At the same time, a majority of federal appellate courts held that a PRP could not maintain a claim for cost recovery under CERCLA § 107(a) unless the party could determine that it was “innocent,” i.e., that it was not itself a PRP. See, e.g., Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769 (4th Cir. 1998); Pinal Creek Group v. Neumont Mining Corp., 118 F.3d 1298 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997). Thus, a PRP that sought to recover the costs of a voluntary cleanup under CERCLA typically was limited to a contribution claim under § 113(f)(1).

In December 2004, the Supreme Court dramatically changed this legal landscape by significantly restricting the ability of a PRP to recover cleanup costs. In Cooper Industries Inc. v. Aviall Services Inc., 543 U.S. 157, 161 (2004), the court held that a private party that has not been sued by the government under CERCLA § 106 or § 107(a) could not obtain contribution under CERCLA § 113(f)(1) from another liable party based on CERCLA § 113(f)(1)’s “during or following” language. The Aviall dissent urged the majority to decide whether a PRP could maintain a cost-recovery claim under CERCLA § 107(a), or whether that section provided a PRP an implied right of contribution. The majority refused to reach this issue because it had not been briefed in the courts below.

After Aviall was decided, lower federal courts wrestled with and revisited earlier decisions addressing whether and under what circumstances a PRP can maintain a claim under CERCLA § 107(a). Some courts permitted PRPs that incurred response costs voluntarily to maintain claims under CERCLA...
§ 107(a), while others barred PRPs from maintaining such cost recovery actions. See, e.g., Consolidated Edison Co. of New York Inc. v. UGI Utils. Inc., 423 F.3d 90 (2d Cir. 2005) (permitting a § 107 claim); E.I. du Pont de Nemours & Co. v. U.S., 460 F.3d 515 (3d Cir. 2006) (disallowing a § 107 claim).

**The high court’s holding**

Then, on June 11, came the U.S. Supreme Court’s decision in U.S. v. Atlantic Research. The case was brought by plaintiff Atlantic Research, which had retrofitted rocket motors for the defendant United States at a Department of Defense facility. Atlantic Research cleaned the site at its own expense and without any compulsion by the United States, and then sought to recover those costs by suing the United States under CERCLA §§ 107(a) and 113(f). While the litigation was pending, the U.S. Supreme Court issued its decision in Aviall and eliminated Atlantic Research’s contribution claim under CERCLA § 113(f) because Atlantic Research had not been the subject of a CERCLA §§ 106 or 107 action. Thereafter, the United States moved to dismiss the CERCLA § 107(a) claim, arguing that § 107(a) does not allow a PRP to recover its costs.

The district court granted the government’s motion to dismiss. The 8th U.S. Circuit Court of Appeals reversed. It joined the 2d and 7th circuits in holding that CERCLA § 113(f) does not provide “the exclusive route by which [PRPs] may recover cleanup costs.”

**The Supreme Court’s decision**

The Supreme Court affirmed the 8th Circuit, holding that Atlantic Research could sue the United States under CERCLA § 107(a). 127 S. Ct. at 2335. The court found that “any other person” who may sue under § 107(a)(4)(B) is defined as any other person than the United States, a state or an Indian tribe. Id. at 2336. Thus, the court determined that any private party, including PRPs, may maintain a cost-recovery action under CERCLA § 107(a)(4)(B). In making this determination, the court rejected the reasoning adopted by a majority of circuit courts that § 107(a)(4)(B) claims may be brought only by innocent non-PRPs.

The court explained that the type of CERCLA claim available to a PRP is determined not by a PRP’s culpability, but rather by whether the “procedural circumstances” presented by the case rendered the PRP’s claim one for contribution, which is governed by CERCLA § 113(f), or one for cost recovery, which is governed by CERCLA § 107(a). The court sought to clarify its approach to the two “clearly distinct” remedies of § 107(a) and § 113(f) to ease the friction between those two statutory provisions. Id. at 2337.

The court explained that CERCLA § 113(f), which provides rights to contribution, allows a party to bring a contribution claim if the party has paid greater than its equitable share of costs in reimbursing a third party. A party that has paid costs to satisfy a settlement agreement or a court judgment under CERCLA §§ 106 or 107 does not incur its own costs of response. Rather, such a party has reimbursed a third party for costs that the third party incurred. See Aviall, 543 U.S. at 167. As the court explained, this reading of § 113(f) fits the classic definition of “contribution.”

On the other hand, a party may bring an action under CERCLA § 107(a) to recover costs only if that party has “incurred its own costs of response.” Id. The court made clear that two types of parties “incur” their own costs of response: the sovereign parties listed in § 107(a)(4)(A), and parties that voluntarily perform cleanup work and incur their own response costs as a result. The plaintiff in Atlantic Research fell in this latter category, having incurred costs without first being subject to government order or suit.

In making this distinction, the court expressly recognized that not all PRPs have access to a § 107(a) remedy, affirming the 8th Circuit’s reasoning “that PRPs’ that have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continuing vitality.” Id. at 2335. Thus a PRP that has reimbursed another as a result of a settlement or a judgment on a CERCLA §§ 106 or 107 claim asserted against that PRP is limited to seeking contribution under § 113 and cannot “simultaneously seek to recover the same expenses under § 107(a)” Id. at 2338. The court explained: “[A] PRP could not avoid § 113(f)’s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a). The choice of remedies simply does not exist.” Id.

While holding that PRPs that voluntarily incur costs may pursue § 107 claims, the Supreme Court expressly declined to decide whether a party compelled to incur costs of response has a right of action under CERCLA §§ 107 or 113, or both. Further, the application of the CERCLA § 113(f)(2) settlement bar is confused by the court’s determination that voluntary PRPs may bring § 107(a) claims. Section 113(f)(2) prohibits § 113(f) contribution claims against “[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement.” If a PRP settles with the United States, though § 113(f)(2) prohibits the voluntary plaintiff PRP from filing a § 113(f) contribution claim against that settling PRP, the court recognized that the voluntary plaintiff PRP is not prohibited from filing a § 107(a) claim against the settling PRP.

Although it recognized this concern, the court doubted that the “supposed loophole would discourage settlement,” because a defendant PRP may trigger equitable apportionment by filing a § 113(f) counterclaim; the § 113(f)(2) settlement bar would continue to provide significant protection from contribution suits by PRPs that have inequitably reimbursed costs incurred by another party; and settlement carries the inherent benefit of finally resolving liability to the United States.

A district court in Alabama is faced with resolving some of these issues in Solutia Inc. v. McWane Inc., No. CV-03-PWG-1345-E (N.D. Ala. filed June 5, 2003). There, cross-motions for summary judgment are pending that raise the issue of whether the plaintiffs, PRPs that have sustained expenses under a partial consent decree, may bring a CERCLA § 107 claim, and, if so, whether such a claim can survive the contribution protection afforded to defendants that have reached an administrative settlement with the government.

The government’s position in the case is particularly noteworthy. In an amicus brief, the government has taken the position that the plaintiffs are limited solely to a CERCLA § 113(f) contribution claim, and may not maintain a CERCLA cost recovery claim under § 107(a). The government reasons that allowing a PRP that has sustained expenses under a partial consent decree to bring § 107 claim would be at odds with the plain language of § 113(f); undermine the contribution protection provided by § 113(f)(2) and the de minimis settlement provisions of § 122(g); and serve to discourage settlements with the government.

Given the confusion related to both the impact of a consent decree on PRPs’ claims and the loophole associated with the § 113(f)(2) settlement bar, the Supreme Court may have created a significant disincentive to either voluntary or involuntary settlement with the government. Lower courts are left to tackle difficult questions relating to the impact of Atlantic Research on PRPs that sustain expenses under a consent decree, and on PRPs that settle with the government to avoid further litigation. It is likely, therefore, that within the next few years, the Supreme Court will find itself confronted again with defining the scope and limits of contribution rights under CERCLA.