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The U.S. Supreme Court in *Cooper Industries v. Aviall Services* held that a potentially responsible party is barred from bringing a Section 113 contribution claim absent an underlying enforcement action, but did not address the ability of a PRP to pursue an action under Section 107. In *U.S. v. Atlantic Research Corp.*, the high court held that a PRP may pursue a cost recovery action under Section 107. In this article, Jeffrey D. Dintzer and Jason B. Stavers discuss the history of cost recovery and contribution under superfund, concluding that, while some issues remain, many of the most thorny issues have been resolved.

CERCLA and Its ''Yellow Brick Road'' to Cleaning Up Hazardous Substances

BY JEFFREY D. DINTZER AND JASON B. STAVERS

On April 17, 2008, the United States Court of Appeals for the Ninth Circuit issued its opinion in *Kotrous v. Bayer CropScience Inc.* et al., No. 06-15162, holding that a potentially responsible party (PRP) may bring an action for cost recovery under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a). *Kotrous* was the third U.S. Court of Appeals opinion to squarely face the Supreme Court's opinion in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), and with its announcement, it appears that clarity of CERCLA and Section 107(a) claims is finally within sight.

The road to clarity of CERCLA has been a long and winding path. Before *Atlantic Research*, precedent in many circuits disallowed, or left in grave doubt, the right of parties that voluntarily undertook to clean up hazardous waste to recover their costs from responsible parties, despite the apparent intent of Congress to permit such claims. Of course, the contours of Section 107 claims have been askew since the inception of the legislation. The act itself is awkwardly written and the Superfund Amendments and Reauthorization Act (SARA), adopted in 1984, led to a series of conflicting, often poorly reasoned decisions, in the circuit courts with a wide disparity of results.

In 2004, the Supreme Court blurred the picture even more with *Cooper Industries Inc. v. Aviall Services Inc.*, 543 U.S. 157 (2004). The Supreme Court in *Aviall* decided the narrow question involving the jurisdictional prerequisites to pursuing contribution rights under Section 113 and, in the process, created a much larger problem in light of the prior circuit court decisions lim-

iting the availability of Section 107 claims to legally responsible parties. The uncertainty created by *Aviall* created three years of gridlock in the lower federal courts, which were polarized on whether Section 107 claims were still available to ''owners,'' ''operators'' and others deemed responsible for releasing hazardous substances into the environment. *Atlantic Research* (which resolves the wide open question left in the wake of *Aviall*) was instrumental in bringing clarity to the field; although in doing so, *Atlantic Research* raises new issues about the connection between Section 113 and Section 107. In any event, the good news is that, at least for now, CERCLA can once again work the way it was supposed to—as a tool to ensure cleanups while allocating the costs of remediation amongst those responsible.

A Rough Start—CERCLA at Its Infancy

Enacted by Congress in 1980, CERCLA was largely a response to the shocking revelations of hazardous waste buried beneath the residential neighborhood of Love Canal, in Niagra Falls, New York. Hurriedly drafted by a lame-duck Congress, CERCLA has been lauded for its goals, but excoriated for its complex and unclear text.

CERCLA has two broad thrusts. First, it authorizes a variety of federal actions aimed at identifying and cleaning the most dangerous hazardous waste sites in the country. To fund these actions, it established the ''Superfund,'' and CERCLA itself is often referred to as Superfund. Second, CERCLA establishes a tort-based liability regime designed to allocate the costs of cleanups among all responsible parties.

CERCLA's early history was marred by its clear failure to enable the actual cleanup of hazardous wastes because of a combination of design flaws and gross mismanagement. The mismanagement was personified by Rita Lavelle, appointed as the first superfund administrator by President Reagan in 1982. Ms. Lavelle, a former chemical company executive, resigned just a year later at the center of a scandal that caused the resignation of over 20 senior EPA officials, including EPA administrator Anne Buford. Ms. Lavelle was convicted for perjury and served three months in prison.[1]

Even after this house cleaning, however, EPA made no significant progress in implementing CERCLA. A series of critical reports from the General Accounting Office, and other bodies, concluded that in four years EPA had identified only a fraction of the serious hazardous waste sites, and that EPA was largely ineffective in cleaning those identified sites.[2]

In 1986, Congress sought to remedy some of the structural deficiencies of CERCLA with the SARA amendments. SARA increased funding and made other modifications to strengthen EPA's ability to act. One of these modifications, intended to give EPA a stronger hand in the negotiation of settlements, left questions about the scope of private rights under CERCLA cost recovery provisions.

Six Degrees of Separation—Sections 107 and 113

As originally enacted, CERCLA included a broad cost recovery scheme available to private parties and the government to sort out responsibility for hazardous substance cleanups in federal courts. Section 107 essentially provides that any party who touched hazardous substances that made their way into the environment is potentially liable for the costs of proper disposal. However, the statute was silent on the nature of the remedies available to a party that incurred the costs of cleanup. Reasonably enough, courts uniformly read the statute to include a cause of action, thus giving its establishment of liability real weight. There was little dispute that this was in keeping with the text and legislative intent.[3]

As part of the SARA amendments, however, Congress added Section 113(f) (codified at 42 U.S.C. Section 9613(f)), and in doing so established specific conditions under which a party could seek ''contribution'' for cleanup costs. Specifically, Section 113(f) allowed ''contribution'' claims ''during or following any civil action under Section 9606 of this title or under Section 9607(a) of this title,'' and claims brought by a party that ''has resolved its liability . . . in an administrative or judicially approved settlement,'' (Section 113(f)(1)). At the same time, SARA also added certain settlement protections, effectively freezing a party's liability to the amount set by an approved settlement, (Section 113(f)(2)). The intent of these amendments was to strengthen EPA's hand at the negotiating table by making settlements more attractive—under Section 113, a settling party capped its liability and gained a clear path to recover additional funds from other, non-settling parties.

Unfortunately, these provisions succeeded in only confusing the courts. Rather than seeing these new provisions as cumulative, numerous courts chose to read Section 113 as creating ''contribution'' claims and, as a consequence, limiting Section 107 claims. Noting the presence of a new, shorter statute of limitations for Section 113 claims (three years, as opposed to the six years permitted under Section 107), courts decided that Sections 107 and 113 worked together to create two different actions depending on a party's relationship to the hazardous substance in question.

''Innocent'' parties, that is those with no liability under Section 107, could bring an action for cost-recovery directly under Section 107. But for parties that were themselves PRPs, courts reasoned that the only action available was a ''contribution'' action, and therefore required PRPs to bring a claim under Section 113 (although liability was still based on Section 107). Accord-

[1] This would not be Ms. Lavelle's only encounter with the federal prison system in connection with hazardous waste cleanup (or lack thereof). In 2005 she was sentenced to 15 months in prison on one count of wire fraud and two counts of lying to federal investigators arising out her role in a scheme to obtain payment for waste removal and storage services never actually rendered.

[2] *See, e.g.*, Hugh J. Wessinger, senior assoc. director, Res. Cmty & Econ. Dev. Div., Status of the General Accounting Office Reviews Concerning EPA's Superfund Activities, Statement Before the Subcommittee on Commerce, Transportation, & Tourism (Mar. 1, 1984) (''For example, at one site EPA has spent over $300,000 to lower hazardous liquid waste levels in a lagoon three times. Rain water kept refilling the lagoon, threatening to overflow hazardous wastes and pollute nearby drinking water supply. . . . Although our work is not completed, we have indications that this kind of problem has occurred at other locations.'')

[3] *See Cooper*, 543 U.S. at 161-162 (collecting cases)

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ingly, these courts limited contribution claims to the terms of Section 113, but made one notable exception. Unwilling to prevent PRPs that had ''voluntarily'' incurred costs (i.e., not pursuant to a civil action or settlement) from recovering costs, courts ignored the predicate requirements of Sections 113(f)(1) and 113(f)(2)(B), and permitted such parties to bring suit under Section 113.[4]

Pinal Creek, the Ninth Circuit case overruled in *Kotrous*, provides the quintessential example of court interpretations developed after SARA. Rather than seeing Section 113 as providing a discrete set of claims, independent of those in existence before 1986, the *Pinal Creek* court stated that ''Section 113(f) was thus enacted, explicitly recognizing and regulating contribution claims under CERCLA.'' The court went on to state that ''[b]ecause all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution.'' From these premises, of course, the inescapable conclusion is that a PRP may only bring suit under Section 113.[5] Thus, the court reasoned that Sections 107 and 113 together ''provide and regulate a PRP's right to claim contribution from other PRPs. . . . Under CERCLA's scheme, Section 107 governs liability, while Section 113(f) creates a mechanism for apportioning that liability among responsible parties.'' The court made no mention of Section 113's predicate requirements of civil action or settlement; an oversight that would ultimately prove fatal to *Pinal Creek*.

The *Aviall* Mess—Sometimes Its Better to Say More Than Less

This was the state of the law until 2004, when the Supreme Court decided *Aviall*. The underlying facts in *Aviall* involved a ''contribution'' action against Cooper that originally cited to Sections 107 and 113 in the complaint. In keeping with the prevailing interpretation, however, Aviall abandoned its separate Section 107 claim and relied on a ''combined'' Section 113 and 107 claim for contribution. Astutely, Cooper pointed out that Aviall could not satisfy the predicate requirements of Section 113(f): It had not been the subject of a civil action, nor had it entered into a settlement (although it had been told to clean up the site by state authorities or face an enforcement action). The Fifth Circuit, sitting en banc, agreed with Cooper, and the Supreme Court agreed to take the case.

On the narrow question of Section 113's enabling clause, the Court has rarely faced an easier decision. Justice Thomas dispensed with the issue in six paragraphs, and the two dissenting Justices did not take issue with the majority's conclusion that ''Section 113(f)(1) does not authorize Aviall's suit.'' What motivated the dissent, rather, was the limited scope of the opinion. After noting that the Court's narrow result risked putting Aviall out of court despite its obviously valid claim, Justice Ginsberg wrote, ''I would not defer a definitive ruling by this Court on the question whether Aviall may pursue a § 107 claim for relief against Cooper.'' Justice Thomas, however, declined to reach the question of Aviall's potential action under Section 107, on the grounds that the question had not been decided below.

The Supreme Court's caution left CERCLA law once again in disarray. The lower courts for years had constructed an apparatus whereby claims by PRPs were ''regulated'' by the ''mechanism'' of Section 113. After *Aviall*, however, the courts could no longer ignore one of the salient aspects of that mechanism, the limitation to parties who were the subject of a civil action or settlement. As a result, PRPs who did not qualify under Section 113 were left no road to follow to bring a ''contribution'' action. This created an absurd situation: Parties who voluntarily undertook to clean up hazardous waste sites were suddenly unable to obtain compensation for those costs, while recalcitrant parties who resisted cleanup until after state or federal authorities brought an enforcement action, retained a cause of action.

This broken jurisprudence did have one major beneficiary—recalcitrant parties with substantial liability that were unable or unwilling to engage in cleanup operations. To these parties, *Aviall* was an unexpected and stunning gift. In a further irony, the largest of these beneficiaries was the United States itself, specifically the Department of Defense. The DOD, and similarly-situated parties, immediately set about attempting to freeze CERCLA jurisprudence in the half-reformed state left by *Aviall*.

The high-water mark for these efforts came on August 29, 2006, when the Third Circuit decided *E. I. DuPont de Nemours and Co. v. United States*, 460 F.3d 515. In *DuPont*, DuPont admitted to partial responsibility for waste releases at various sites, but alleged that the United States was also responsible, and sought contribution. Pursuant to the standard pre-*Aviall* interpretation, DuPont brought its action under Section 113. However, because DuPont was not the subject of a civil action or settlement, the Third Circuit affirmed the dismissal of DuPont's claim.

On its basic facts, *DuPont* was a shockingly unfair decision. The case involved cleanup efforts at 15 sites, all of which had been ''owned or operated by the United States at various times during World War I, World War II, and/or the Korean War, during which time the United States was responsible for some contamination.'' DuPont incurred significant cleanup costs, and then sought to obtain contribution from the United States (and other responsible parties) for its share of those costs. But the Third Circuit, in a 2–1 decision, told DuPont that it could not sue because it voluntarily in-

[4] *See, e.g.*, *Aviall Servs. v. Cooper Indus.*, 312 F.3d 677, 686-687 (5th Cir. Tex. 2002) (overruled by *Aviall*, 543 U.S. at 171) (''But the dissent has effectively limited the availability of [contribution] actions by requiring prior initiation of a lawsuit by the federal government. This interpretation would be unnecessary if the dissent had accorded the properly broad scope to the last sentence of § 113(f)(1) and considered the first sentence, as we do, to be a statement of non-exclusive circumstances in which actions for contribution may be brought.''); *Id.*, at 682 n.7 (listing ''other published federal decisions allowed CERCLA actions for recovery in the nature of contribution to proceed even though the plaintiff had not been sued under § 106 or § 107''); *Pinal Creek*; *Reading*.

[5] *Accord Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998) (''We find that parties who themselves are PRPs, potentially liable under CERCLA and compelled to initiate a hazardous waste site cleanup, may not bring an action for joint and several cost recovery, but are limited to actions for contribution governed by the mechanisms set forth in CERCLA § 113(f).''); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1124 (3d Cir. 1997) (PRP ''may not bring a Section 107 action against another potentially responsible person''); *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (claim by PRPs ''must be classified as one for contribution'').

curred those costs, rather than requiring EPA or another party to litigate the matter, or arrange for an administrative settlement.

As shocking as the outcome was, the court's reasoning was equally remarkable. The court purported to reconsider the controlling precedent (*New Castle* and *Reading*) in light of *Aviall*, but rather than acknowledge that *Aviall* had undermined the superstructure upon which those decisions depended, the court constructed an entirely novel justification for SARA and its modifications to CERCLA's liability scheme. SARA, the court concluded, was intended to *discourage* voluntary cleanups, and funnel all hazardous waste cleanups through EPA oversight.

DuPont's support for this remarkable conclusion was murky at best. The majority relied on a series of statements in the legislative history in which various parties had made statements in favor of negotiated settlements with EPA. That in itself is unremarkable, it was well known that SARA was intended to strengthen EPA's hand in bringing parties to the negotiating table. Where *DuPont* went astray was in concluding that a positive view towards negotiated settlements necessarily included a corollary negative view towards voluntary cleanups. For that leap of logic, the court relied on a single 1983 statement by EPA critical of cleanups undertaken without EPA oversight, on the grounds that that they were often not successful, or that they consisted of parties seeking to classify routine maintenance as a ''cost of response.'' Its only other ''authority'' was a law review article written by ''the attorneys who prevailed in *Cooper Industries*,'' in which the authors claimed that permitting recovery for voluntary cleanups would risk the ''integrity of [CERCLA's] legislative scheme.'' The court made no reference to the fact that it was strongly in Cooper's interest that this view be adopted.

The notion that in 1986, with EPA in disarray and the hazardous waste problem essentially unimproved since 1980 and with a popular anti-regulatory administration in the White House, Congress sought to discourage private companies from cleaning up hazardous waste is fantastic and untenable. But it was this revisionist history that would potentially immunize the United States from a significant portion of its environmental liabilities. It wiped the slate clean of all voluntarily costs incurred, such as those sought by DuPont. And it stalled all future claims, as parties would have to be sued or obtain a settlement from either a state or federal agency. And of course, this created a massive conflict of interest for EPA, which would potentially expose the United States to liability every time it negotiated a settlement.

Before *DuPont*, it appeared that the circuits intended to extend *Aviall* to resolve the Section 107 question as Justice Ginsberg had urged her colleagues to do in 2004. The Eighth Circuit in *Atlantic Research*, and the Second Circuit in *Consolidated Edison* both permitted PRPs to go forward under Section 107, overruling or distinguishing prior precedent, respectively. But with *DuPont* on the books, the United States and other parties with sizeable liabilities and no intention of engaging in voluntary cleanups, had new ammunition to push their skewed view of the law.

Atlantic Research Rights the Ship

Last year, the Supreme Court unanimously affirmed the *Atlantic Research* decision, reaching the result demanded by the dissent in *Aviall*. *Atlantic Research* held that PRPs had a cause of action for *cost recovery* under Section 107, independent of the requirements of Section 113. With the issue now properly before him, Justice Thomas had no trouble concluding that Section 107 ''permits costs recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs.'' He dismissed the long-standing notion that any action by a PRP is necessarily one for contribution, criticizing the United States for using ''the word 'contribution' as if it were synonymous with any apportionment of expenses among PRPs,'' and citing *Pinal Creek* as another example of such ''imprecise usage.'' He addressed the *DuPont* theory of SARA (that it was meant to suppress voluntary cleanups) only indirectly, concluding the opinion with brief discussion of the ways in which EPA's negotiating power was not undermined by this decision.

Were it not for the tortured history of CERCLA before *Atlantic Research*, it would have been natural to assume that Justice Thomas' second opinion finally put the matter to rest. In context, some skepticism was surely warranted. However, three Courts of Appeals have now considered the situation and issued published opinions holding that *Atlantic Research* requires them to abandon the maze of precedent that had controlled these cases, and permit PRPs to bring Section 107 cost recovery actions absent satisfaction of Section 113's enabling clause.[6] *Kotrous* is the third of these opinions.

Before ruling on *Kotrous*, the Ninth Circuit mercifully consolidated four pending appeals that all presented the question of the availability of Section 107 actions to PRPs (*Kotrous* itself, *Adobe Lumber Inc. v. Hellman, et al.*; *Goodrich Corp. v. United States*; *City of Rialto v. United States*).[7] In a stroke of historical irony, the panel for the consolidated appeal included Judge Tashima, the author of *Pinal Creek*. But if opponents of Section 107 claims hoped that Judge Tashima would find a way to save his venerable *Pinal Creek* opinion, they were disappointed. Judge Tashima wrote the opinion in *Kotrous*, and faced the issue head on. The opinion begins, ''We are required to consider the continuing viability of [*Pinal Creek*].'' It concludes, ''*Atlantic Research* overruled our holding in *Pinal Creek* that an action between PRPs is necessarily for contribution. Under *Atlantic Research*, Kotrous and Adobe are entitled to bring a claim for recovery of costs under § 107(a), even if they are PRPs.'' The bulk of the opinion is a review of the *Aviall-Atlantic Research* history and a concise application of the new law to the facts of *Kotrous* and *Adobe Lumber* (*Goodrich* and *City of*

[6] The other two cases are *E. I. du Pont de Nemours and Co. v. United States*, 508 F.3d 126, 135 (3rd Cir. 2007) (''Following *Atlantic Research Corp*., there is no doubt that, contrary to our precedents, a PRP may bring a cause of action for cost recovery under § 107 and need not rely upon § 113 as its exclusive remedy.'') and *ITT Indus. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) (''Although Atlantic Research was not decided at the time the district court dismissed Plaintiff's claims, it is now controlling precedent. Thus, Plaintiff, as a PRP, may now state a claim for cost recovery upon which relief can be granted''). An earlier Third Circuit panel also reached the same conclusion in an unpublished opinion, *Montville Twp. v. Woodmont Builders LLC*, 244 Fed. Appx. 514, 517-518 (3d Cir. 2007).

[7] The authors represent Goodrich Corporation in the latter two matters and in related litigation.

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Rialto, which presented the issue in a different procedural posture, were addressed in a separate memorandum disposition). Wisely perhaps, Judge Tashima eschewed additional analysis, and simply applied the clear command of the high court to the cases before him.

At this time, there is no momentum in the lower courts to cling to their pre-*Atlantic Research* jurisprudence, and the basic question of the availability of cost recovery claims for PRPs seems settled. Generally speaking, any party may bring an action at any time (within the six-year statute of limitations) against a PRP to recover incurred costs, provided that said costs are NCP-compliant. A party may bring an action for contribution once they have either become the subject of a civil action, an enforcement action, or have resolved their liability to the United States or a state in a qualifying settlement.

For plaintiffs bringing new cost recovery claims, the path is clear, although careful and thorough briefing will likely be required to ensure that *Atlantic Research* and *Aviall* are not obscured by the myriad of confusing lower court opinions that diverge from the straightforward holdings of those cases. For plaintiffs with *existing* claims, however, frustrating issues may linger. Complaints drafted before *Atlantic Research* are likely to reflect the confused state of the law, and may allege causes of action such as ''combined Sections 113 and 107 claim for cost recovery,'' (or contribution), or a ''Section 113 action for 107 liability.'' Today, these claims *may* be more properly styled as simply, ''Section 107 action for cost recovery.'' Depending on the court and status of the case, plaintiffs may be well-served to seek leave to amend such complaints to conform them to *Atlantic Research*, rather than litigate that question in opposition to a motion to dismiss.

CERCLA does not give up its mysteries all at once however, and some significant areas of dispute remain. For example, to what extent does qualifying for a Section 113 contribution action preclude a party from moving under Section 107? Section 113's shorter, three-year statute of limitations has caused some to argue that parties should not be permitted to escape its strictures once coming within its reach. Similarly, does Section 107 provide a contribution cause of action for parties not eligible under Section 113? In *Atlantic Research*, Justice Thomas noted in a footnote that the Court ''need not address the alternative holding of the Court of Appeals that § 107(a) contains an additional implied right to contribution for PRPs who are not eligible for relief under § 113(f).'' This question may simply be an echo of the violence wrought upon traditional notions of contribution and cost recovery by the pre-*Atlantic Research* cases, with no real-world import. Traditionally, of course, contribution is only available to a party who has paid money in satisfaction of a judgment: Thus one struggles to come up with an example of a party that does not qualify for Section 113, but still has a cognizable contribution claim. Finally, while the importance of interpreting 113(f)(2)'s ''administrative or judicially approved settlement'' has receded, now that PRPs are not dependent on Section 113 for reimbursement, it remains a difficult issue to resolve in many instances, where the language and authority of various state court orders is unclear.

No doubt, CERCLA litigation will continue to involve these and other questions about Congress' unwieldy liability scheme. But with *Atlantic Research*, the main battle ground may begin to shift to the more fundamental, and essentially factual, issues raised by CERCLA: Who is a PRP, what constitutes a ''release,'' and whether incurred costs are NCP-compliant. In other words, CERCLA litigation may primarily turn to that oft-overlooked issue: the merits.