

Do CERCLA Cost Recovery And Contribution Rights Overlap?

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The Comprehensive Environmental Response, Compensation, and Liability Act provides for two causes of action to hold others liable for response costs: a cost recovery action under Section 107, which was included in the original statute passed in 1980, and a contribution action under Section 113(f), which was later added as part of the Superfund Amendments and Reauthorization Act, which amended CERCLA in 1986.

The U.S. Supreme Court has referred to these causes of action as “similar and somewhat overlapping,”^[1] “clearly distinct”^[2] and “complementary yet distinct.”^[3] In the last eight years, six circuit courts have adopted the idea that these remedies are distinct, with no overlap. Two recent district courts in circuits that have yet to decide this question have reached the same conclusion, and there appears to be no forthcoming break in the wave of decisions narrowing access to Section 107.

After the SARA amendments, “courts began directing traffic between the sections” to “prevent Section 107 from swallowing Section 113.”^[4] “Traffic-directing dramatically narrowed Section 107 by judicial fiat” as “courts gradually steered liable parties away from Section 107 and required them to use Section 113; Section 107 was reserved for ‘innocent’ plaintiffs who could assert one of the statutory defenses to liability.”^[5] Indeed, “[i]n the pre-Aviall analysis, Section 113 was presumed to be available to all liable parties, including those which had not faced a CERCLA action.”^[6]

In 2004, the Supreme Court’s Aviall decision put an end, at least temporarily, to the funneling of potentially responsible parties to Section 113. The court held that “[t]he natural meaning of [Section 113(f)] is that contribution may only be sought subject to the specified conditions, namely, ‘during or

following' a specified civil action." [7] As such, a PRP that voluntarily incurred response costs — without first having settled liability or been sued under CERCLA — was foreclosed from recovering its costs from another PRP. Such a PRP could not bring an action under either Section 107(a) or Section 113(f). [8]

Certain courts did an about-face after *Aviall* — allowing PRPs that had not settled their liability or been sued under CERCLA to recover response costs from other PRPs under Section 107. [9] Three years after *Aviall*, the Supreme Court in *Atlantic Research* held that PRPs could assert a Section 107 cost recovery action, resolving the question that it had expressly left open in the *Aviall* decision. [10] To reach that decision, the court had to address (and reject) arguments by the United States that opening Section 107 cost recovery actions to PRPs would eviscerate Section 113, essentially making that provision a nullity. [11] It emphasized that when a party had not incurred costs on its own, but rather agreed to pay another person who had incurred the costs, there was no choice of remedies: "Thus, at least in the case of reimbursement, the PRP cannot choose the six-year statute of limitations for cost recovery actions over the shorter limitations period for [Section] 113(f) contribution claims." [12] And if a PRP did seek to impose joint and several liability on another PRP under Section 107, a "defendant PRP ... could blunt any inequitable distribution of costs by filing a Section 113(f) counterclaim." [13] The court also rejected the United States' doomsday predictions that opening Section 107 would destroy the contribution protections that encourage settlement found in Section 113(f)(2). [14]

The court recognized, however, that it was leaving undecided another question over which litigants and courts have wrestled since: If a person incurs response costs directly, but does so pursuant to a consent decree or otherwise incurs such costs "involuntarily," can that person assert a cost recovery cause of action under Section 107 or is that person relegated to asserting a contribution right under Section 113, subject to its narrower provisions and shorter limitations period? "In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under Section 113(f), Section 107(a) or both." [15]

Since *Atlantic Research*, circuit courts have returned to their pre-*Aviall* practice of directing traffic between CERCLA's sections — and once again, courts are funneling PRPs to Section 113. Six circuits — the Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits — have narrowed the availability of Section 107 by directing an increasing number of PRPs exclusively to Section 113 if they meet any one of the statutory triggers of Section 113(f). [16]

The hand of the United States can be seen in many of these post-*Atlantic Research* cases. Even though the United States was a party in only one of these disputes, it participated as *amicus curiae* in many of these cases and urged the courts to restrict access to Section 107 in order to preserve Section 113(f)'s contribution protection provisions. [17] In doing so, the United States has repackaged its pre-*Atlantic Research* argument (that courts should restrict Section 107 to "innocent" parties) into an argument that courts should restrict Section 107 to parties who have incurred costs "voluntarily" or, at most, parties who meet none of the Section 113(f) triggers.

Recently, two district courts within circuits that have yet to decide the question of whether any overlap exists between these two sections reached the same conclusion and further limited Section 107's availability to PRPs. In *PCS Nitrogen Inc. v. Ross Development Corp.*, [18] U.S. District Judge Margaret Seymour of the District of South Carolina found that an unilateral administrative order issued against PCS by the U.S. Environmental Protection Agency qualified as a "civil action" pursuant to Sections 106 or Section 107 of CERCLA, triggering its right of contribution under Section 113(f)(1). As such, the court held that PCS could not use Section 107(a) to recover the costs that it had incurred responding to the unilateral administrative order: "If a PRP meets one of the requirements for suit under Section 113, then

it must proceed under that section rather than under Section 107(a).”[19]

Although the court ultimately adopted the reasoning of Hobart, Solutia and the other circuits that have addressed this question, it carved out a narrow exception and rejected an argument that other courts[20] have endorsed: that Section 107 claims are limited to the recovery of voluntarily incurred response costs. Taking a textualist approach, the court reasoned that “[n]owhere does the statutory language of Section 107(a) limit the cause of action only to voluntarily incurred response costs” and “[t]he Supreme Court’s Atlantic Research decision nowhere prohibits the recovery of involuntarily incurred response costs under Section 107(a).[21] As such, if the court had concluded that an unilateral administrative order is not a “civil action” for the purposes of Section 113 (and had PCS not brought suit following a separate civil action under Section 107),[22] then PCS likely could have asserted a Section 107 cause of action. Nonetheless, the court’s decision provides for no overlap between the two causes of action — if a person has a Section 113(f) claim, then that person does have a Section 107 cause of action.

In *Exxon Mobil Corp. v. United States*, U.S. District Judge Lee Rosenthal of the Southern District of Texas recently dealt with slightly different facts than those in PCS.[23] Instead of receiving an unilateral administrative order from the EPA, as PCS had, Exxon entered into two agreed orders with Texas settling alleged violations of the Texas Solid Waste Disposal Act and requiring Exxon to conduct investigation, monitoring and remediation activities at its Baytown site. As an initial matter, the court joined the wave of previous cases and held that, “If the orders Exxon and the state of Texas signed requiring Exxon to pay to clean up the Baytown site qualify as administrative settlements under Section 113(f)(3)(B), Exxon may not bring a Section 107(a) claim for the cleanup costs it incurred in complying with those orders.”[24] In other words, the court’s opinion leaves no overlap between the two causes of action.

The court then interpreted “liability” and “response action” in Section 113(f)(3)(B) expansively, reasoning that “Congress did not limit Section 113(f)(3)(B) to administrative settlements specifically resolving CERCLA liability.”[25] The court therefore held that because “[t]he two agreed orders fully resolved Exxon’s potential civil liability for cleanup costs for the Baytown site,”[26] “[t]he procedural circumstances entitle Exxon to seek contribution under Section 113(f), but not cost recovery under Section 107(a), for the cleanup costs it incurred at that site.”[27] In a similar manner to the court in PCS, the Exxon court determined that “the critical question is the PRP’s procedural circumstances, not whether its response costs were voluntary or involuntary.”[28] The court then applied this reasoning to reject Exxon’s argument that “it may sue under Section 107(a) to recover the cleanup costs it voluntarily incurred at Baytown before signing the 1995 agreed orders.”[29]

Expansive interpretations of Section 113(f)(3)(B) — such as the Exxon court’s determination that settling state law claims for civil penalties amounts to a resolution of liability for a “response action” — could exacerbate the risks of limiting Section 107 causes of action. Courts of appeals differ on whether a party that is limited to a Section 113(f)(3)(B) claim must bring suit either within three years after the date of the order, or within three after completion of a removal action or six years after initiation of on-site construction of a remedial action.[30] The United States, again as *amicus curiae*, has argued for application of the more-stringent limitations period.[31] If parties are limited to three years from the date of the resolution of liability for RCRA claims, state law civil penalties claims, or other non-CERCLA liability, then the limitations period may run before a party completes a site investigation or begins to identify other PRPs. Thus, by deeming a non-CERCLA settlement to be a trigger to a CERCLA limitations period, courts run the risk of discouraging parties from remediating sites willingly and expeditiously.

The trend in the courts is clear and shows no signs of abating: Sections 107 and 113's causes of action

have no overlap, and a person who meets one of Section 113's triggers is limited to pursuing a remedy under that provision only. When compounded with courts' broad interpretations of the Section 113(f) triggers, such as the Exxon court's expansive readings of "liability" and "response action," this trend will funnel more parties into Section 113, with its narrower provisions and shorter limitations period.

The Supreme Court has been reticent to weigh in — it denied petitions for certiorari posing this question in *Agere*, *Morrison*, *Solutia* and most recently in *Hobart* — and it may continue to abstain until a true split among the circuits emerges. Until then, courts' direction of traffic between CERCLA's sections continues.

Today, the world of CERCLA looks much like it did before *Aviall* and *Atlantic Research* — as an increasing number of parties are relegated to asserting Section 113 claims, while Section 107 is reserved either for recovery of costs incurred voluntarily or, at its most expansive, recovery of costs by a party that has not triggered any of Section 113(f)'s provisions.

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[1] *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994)

[2] *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 163 n.3 (2004) ("*Aviall*"). The court attempted to reconcile its seemingly contradictory characterizations by reasoning that "[t]he cost recovery remedy of Section 107(a)(4)(B) and the contribution remedy of Section 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct." *Id.*

[3] *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007)

[4] *Atl. Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007)

[5] *Id.* (collecting cases)

[6] *Id.*

[7] *Aviall*, 543 U.S. at 166

[8] See, e.g., *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 532 (3d Cir. 2006)

[9] *Atl. Research*, 459 F.3d at 837 ("[A] private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's Section 113, may pursue an action for direct recovery or contribution under Section 107, against another liable party."); *Consol. Edison Co. of N.Y. v. UGI Utils. Inc.*, 423 F.3d 90, 92-95 (2d Cir. 2005) (allowing a PRP to maintain a Section 107(a) action); see also *Metropolitan Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings*

Inc., 473 F.3d 824 (7th Cir. 2007) (same)

[10] Atl. Research, 551 U.S. at 131

[11] Id. at 140-41; see also Atl. Research, 459 F.3d at 836 (“The government argues that if we allow Atlantic a Section 107 remedy, we will render Section 113 meaningless. ... This argument fails.” (internal citation omitted))

[12] Atl. Research, 551 U.S. at 139

[13] Id. at 140; see also id. (“The choice of remedies simply does not exist.”)

[14] Id. at 140-41 (“[P]ermittting PRPs to seek recovery under § 107(a) will not eviscerate the settlement bar set forth in § 113(f)(2).”)

[15] Id. at 139 n. 6

[16] See NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 691 (7th Cir. 2014) (“[A]lthough a strict reading of the phrase ‘necessary costs of response’ in Section 107(a) might suggest that parties who pay pursuant to an enforcement action might be able to sue under Section 107(a), this court — like our sister circuits — restricts plaintiffs to Section 113 contribution actions when they are available.”); Hobart Corp. v. Waste Mgmt. of Ohio Inc., 758 F.3d 757, 767 (6th Cir. 2014) (concluding that “PRPs must proceed under Section 113(f) if they meet one of that section’s statutory triggers,” including incurring costs in response to an administrative settlement); Bernstein v. Bankert, 733 F.3d 190, 205-06 (7th Cir. 2012) (“[W]e agree with our sister circuits that a plaintiff is limited to a contribution remedy when one is available” because “to allow [a qualifying contribution plaintiff] to proceed under Section [107](a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under Section [113].” (internal quotation marks and citation omitted)); Solutia Inc. v. McWane Inc., 672 F.3d 1230, 1235-37 (11th Cir. 2012) (per curiam) (affirming the dismissal of a group of PRPs’ Section 107 claims because the PRPs had entered into a consent decree that imposed cleanup obligations); Morrison Enters. LLC v. Dravo Corp., 638 F.3d 594, 602-04 (8th Cir. 2011) (holding that a PRP that had agreed to administrative settlements imposing cleanup obligations and that had been sued by the EPA under Sections 106 and 107 is barred from asserting Section 107(a) claims against other PRPs); Agere Sys. Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 227-29 (3d Cir. 2010) (holding that PRPs that have entered into consent decrees with the EPA are limited to contribution claims under Section 113(f)); Niagara Mohawk Power Corp. v. Chevron U.S.A. Inc., 596 F.3d 112, 127-28 (2d Cir. 2010) (holding that a PRP that entered into a consent order with a state is limited to a Section 113(f)(3)(B) contribution claim)

[17] See, e.g., Brief for U.S. as Cross-Appellant, Appellee & Amicus Curiae Supporting Appellees at 48, NCR Corp., 768 F.3d 682 (7th Cir. 2014) (Nos. 13-2447 et al.) (“[A] CERCLA plaintiff may not pursue a claim under CERCLA Section 107(a) when a contribution claim under Section 113 is (or was) available.”); Brief for U.S. as Amicus Curiae Supporting Appellees, Hobart, 758 F.3d 757 (6th Cir. 2014) (No. 13-3272) (“PRPs who fall within the terms of Section 113(f) must use that provision and cannot sue under Section 107(a)(4)(B).”); Brief for U.S. as Amicus Curiae Supporting Appellees at 17-18, Solutia, 672 F.3d 1230 (11th Cir. 2012) (No. 10-15639) (“Congress did not intend CERCLA to provide PRPs in circumstances addressed by the provisions of Section 113(f) with the option to recover response costs under Section 107(a) and thereby evade the limitations Congress imposed on CERCLA contribution actions.”); Brief for U.S. as Amicus Curiae Supporting Appellees at 12-14, Morrison, 638 F.3d 594 (8th Cir. 2011) (Nos. 10-

1468 & 10-1469) (arguing that “[Section] 113(f) provides the exclusive remedy for those PRPs that fall within its ambit” and urging the Eighth Circuit to rely on pre-*Aviall* and pre-*Atlantic Research* Circuit precedent, including *Dico Inc. v. Amoco Oil Co.*, 340 F.3d 515 (8th Cir. 2003), “which held that PRPs may only seek contribution under Section 113(f).”); Brief for U.S. as Amicus Curiae Supporting Appellant, *Niagara Mohawk*, 596 F.3d 112, (2d Cir. 2010) (No. 08-3843-cv), 2008 U.S. 2nd Cir. Briefs LEXIS 343, at *9 (“Because the 2003 consent order is a qualifying settlement under Section 113(f)(3)(B), Niagara is limited to seeking contribution under that section and cannot bring a claim under Section 107(a)(4)(B). Otherwise, if PRPs could choose between bringing Section 107 and Section 113 claims, Section 113 would be rendered meaningless, as PRPs would opt for Section 107 to avoid the limitations of section 113.”)

[18] *PCS Nitrogen Inc. v. Ross Dev. Corp.*, Civ. No.: 2:14-4252-MBS, 2015 U.S. Dist. LEXIS 60343 (D.S.C. May 8, 2015)

[19] *Id.* at *13 n.4, 25

[20] See, e.g., *Morrison*, 638 F.3d at 602, 604 (“Section 107(a)(4)(B) permits a private party who has voluntarily incurred costs cleaning up a site for which it may be held liable to recover necessary response costs from another liable party through a direct recovery action. ... Response costs incurred pursuant to [] administrative settlements following a suit under Section 106 or Section 107(a) are not incurred voluntarily. ... [Thus,] [t]he district court correctly concluded *Morrison* could not maintain a cost-recovery action under Section 107(a)” (internal citation omitted))

[21] *Id.* at *17

[22] *Id.* at *28

[23] *Exxon Mobil Corp. v. United States*, Civil Action Nos. H-10-2386 & H-11-1814, 2015 U.S. Dist. LEXIS 72593 (S.D. Tex. June 4, 2015)

[24] *Id.* at *54

[25] *Id.* at *57

[26] *Id.* at *60

[27] *Id.* at *65. This decision is colored by the fact that Exxon’s counsel took both sides of this argument at different stages of the case. See *id.* at *56-57 (“In its opening memorandum in support of its motion for partial summary judgment, Exxon argued that its two agreed orders with the state of Texas are within Section 113(f)(3)’s contribution provision. Faced now with the prospect that this remedy is exclusive and may be time-barred, Exxon now argues that the orders are not administrative settlements under Section 113(f)(2). The court agrees with Exxon’s original position.” (internal citation omitted))

[28] *Id.* at *63-64

[29] *Id.* at *62; see also *id.* at *64 (“It would make little sense to have a mini-trial on whether a party incurred costs outside the scope of an administrative settlement ... in every CERCLA contribution action.”)

[30] Compare *id.* at *70 (“Section 113(g)(2)’s six-year limitations period governs Exxon’s initial contribution action for the costs it incurred at the Baytown site” (citing *Geraghty & Miller v. Conoco Inc.*, 234 F.3d 917, 924-25 (5th Cir. 2000)) with *Hobart*, 758 F.2d at 773-74 (“Section 113(g)(2) is irrelevant to resolving whether [a] contribution action [based on costs incurred in response to state administrative settlement] was timely filed and ... Section 113(g)(3) provides the statute of limitations for all contribution actions” after *Aviall* and *Atlantic Research*).

[31] See, e.g., Brief for U.S. as Amicus Curiae Supporting Appellees at 22-27, *Hobart*, 758 F.3d 757 (6th Cir. 2014) (No. 13-3272)

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