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CERCLA in the Post-*Atlantic Research* World: Some Emerging Questions

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Approximately a year and half ago, the Supreme Court decided *United States v. Atlantic Research Corporation*,[1] completing what it had started three years earlier in *Cooper Industries, Inc. v. Aviall Services, Inc.*[2] In these cases, the Court resolved some of the most fundamental issues under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): when and whether private parties can assert claims for the recovery of response costs or contribution under Sections 107 and 113.[3] The Court altered the basic legal framework governing CERCLA litigation and brushed aside nearly two decades of case law in the process. In the short time since these decisions, disputes over how to apply these new rules are beginning to bubble to the surface, and district courts are reaching conflicting decisions, presenting potential pitfalls for the unwary. One of the greatest uncertainties is which direction the new administration will try to take the law over the next four, and possibly eight, years.

How We Got Here

Before the Court's *Cooper* decision, nearly all circuit courts had reached a consensus on rules governing when and how private parties could use CERCLA to recover response costs from other potentially responsible persons (PRPs). All plaintiffs who were also considered PRPs could bring contribution actions only under section 113(f)(1). These suits were appropriate anytime the plaintiff had incurred response costs, regardless of whether a prior suit under CERCLA had been brought.[4] Courts equitably allocated responsibility among liable parties, and applied either the six-year or three-year statute of limitations under CERCLA as appropriate.[5] Access to section 107(a), and its more favorable joint and several liability standard, was reserved for "innocent" parties and government plaintiffs.

In an en banc decision, the Fifth Circuit followed these circuit courts and overturned a panel opinion that prohibited PRPs who had not been sued in a prior section 106 or 107 action from bringing an action to recover response costs pursuant to section 113(f)(1).[6] Even though there was no circuit split on this issue, the Supreme Court agreed to review the Fifth Circuit's decision, based primarily on the urging of the United States, which filed a brief urging the Court to consider this "important and recurring" issue.[7]

In *Cooper*, the Court agreed with the original panel decision and held that parties who had not been the subject of section 106 or 107 actions could not bring suit under section 113(f)(1). This significantly reduced the number of parties entitled to bring suit pursuant to section 113(f)(1) and, because of the pre-*Cooper* case law, called into question PRPs' ability to recoup a significant amount of costs for remediation that the PRPs were not responsible for causing. Realizing the impact that this holding might have on the existing case law (which was premised in part on open access to section 113(f)(1)), amicus parties urged the Court to address the question of whether PRPs could bring suit under section 107(a). Although the Court recognized this issue, and discussed the legal framework surrounding it, the Court decided it "more prudent to withhold judgment" because of the factual context in *Cooper* and because the issue had not been fully briefed.[8]

Immediately after *Cooper*, the issue of whether PRPs had access to section 107 was litigated across the country.[9] The position against allowing PRPs access to section 107 was most often and strongly urged by the United States, which finally convinced the Third Circuit to adopt its argument in the *DuPont* decision.[10] Due to the resulting circuit split, the Supreme Court agreed to consider the issue in the *Atlantic Research* case. In that case, the Eighth Circuit had disagreed with the United States' position and permitted

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Atlantic Research to file a section 107 action against the United States despite the fact that it arguably qualified as a PRP.

In *Atlantic Research,* the Supreme Court unanimously rejected the United States' position and held that all persons who have incurred response costs (not just the government) may bring cost recovery actions under section 107 regardless of their status as a PRP.[11] The Court relied on the plain language of the statute—"any other person"—to resolve this question. The Court also confirmed that section 113(f)(3)(B) created a right of contribution for parties who had previously settled their liability with the United States or a state.[12] Beyond this analysis, the Court provided only a bare minimum of direction to courts on how to direct traffic between the newly defined remedies of sections 107 and 113. The Court noted:

> We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under §106 or § 107(a). 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 § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f).[13]

With only this vague explanation from the Court, along with the equally terse language of the statute and the (now) rejected analysis of the pre-*Cooper* case law, district courts have been left to decide which cases are "cost recovery" actions under section 107, and which are "contribution" actions under section 113. The answers to these questions are not merely academic: Because of the differences in statutes of limitation and liability standards, and the contribution protection at stake, the answers will often decide whether a party can recover at all under CERCLA.

The United States Takes a Lead Role in Shaping CERCLA

The answer to many of the open questions identified here will be decided in part on the policy decisions and litigation strategies implemented by the United States in the coming years. Indeed, the United States was one of the driving forces behind the *Cooper*/*Atlantic Research* shift, and the government continues to take an active role in shaping CERCLA, often to its own benefit.

ATLANTIC RESEARCH BRUSHED ASIDE NEARLY TWO DECADES OF CASE LAW IN THE PROCESS.

The United States uniquely occupies a dual role under CERCLA. Its first job is its most visible: enforcing the statute as sovereign. It is given special powers to investigate and order PRPs to address past releases of hazardous substances, and it administers the Superfund. Its second role is that of defendant. The United States is likely the largest PRP and CERCLA defendant in the nation. As of 2008, the Treasury Department estimated that the United States faces an estimated $342.8 billion in environmental liabilities, and 157 of the 1,255 sites on the CERCLA National Priorities List are currently or formerly owned by the United States.[14] As both enforcement authority and active defendant, the United States often is forced to choose between these roles in the positions it advocates in federal court, especially in appellate litigation.

For the past several years, its interests as a defendant appear to have significantly influenced the positions asserted by the United States, arguably to the detriment of the congressional goal in enacting CERCLA—to expediently clean up hazardous sites nationwide. For example, when the Seventh Circuit was presented with the question of whether PRPs could assert a cause of action under section 107(a) in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing and Coatings* (the issue subsequently decided by the Supreme Court in *Atlantic Research*), the court requested an amicus curiae brief from the United States Environmental Protection Agency (EPA), seeking comment on this "important issue concerning the proper scope of section 107 of [CERCLA, which] could have a significant impact on the administration of the Nation's environmental policies."[15] The brief submitted by the United States came from the Environmental Defense Section, presenting the same arguments that the United States had urged as a defendant across the country.[16]

This position advanced by the United States in that case, and subsequently in *Atlantic Research*, was that only it, states, and innocent parties should have access to section 107(a). But this limitation on section 107(a), in conjunction with *Cooper*'s restricted view of section 113(f)(1), would likely have resulted in a significant chilling effect on the number of voluntary cleanups nationwide. Without a way to share the costs of cleanup among all liable and responsible parties, PRPs would doubtlessly stop spending money. And because the resources of federal and state enforcement authorities are simply insufficient to identify, order, and manage cleanup at every CERCLA site nationwide, CERCLA's goal of cleaning the environment would have suffered.

The United States' primary focus on defensive litigation is also apparent in the discussion of the *Port of Tacoma* case,[17] where the United States successfully argued for a rule that protects its

immediate defensive interests but again threatens inequitable results for private parties in future litigation. It is too early to tell whether the new administration will change this focus and interpret CERCLA more consistently with the statute's focus on remediation and "polluter pays" rather than the defensive positions it has adopted to date. Whatever positions the United States chooses to take, they will certainly determine which issues gain attention nationwide, just as the government's decision to push *Cooper* and *Atlantic Research* shaped CERCLA litigation under the previous administration.

Bringing a Contribution Claim under Section 113

The Western District of Washington has recently grappled with this issue twice. Initially, in *Port of Tacoma v. Todd Shipyards Corp.,* the court held that a PRP can maintain a section 113 claim even if the PRP is not itself the target of a section 106 or 107 action.[18] The court found the procedural posture of the case dispositive. The United States brought a section 107 action against the Port of Tacoma, among other defendants. The Port of Tacoma later filed a section 113 contribution claim against Todd Shipyards. Todd Shipyards, in turn, filed a third-party section 113 contribution claim against the United States, alleging owner/operator liability because the shipbuilding contracts done at the site were carried out under government wartime contracts. The United States sought to dismiss Todd Shipyards's third-party claim, arguing that *Cooper* required that a party be sued under section 106 or 107 for the party to state a section 113 claim. The court rejected this argument and held that all that is required is that the PRP's contribution claim "stem" from an underlying section 106 or 107 claim, even if filed against another party.[19]

But the court recently reversed course upon the government's motion for reconsideration.[20] The court reasoned that on a closer examination of governing case law, including *Cooper* and *Atlantic Research*, it was persuaded that Todd Shipyards's contribution claim could not stand. First, the court found that *Cooper* demands that a PRP itself have been the subject of a section 106 or 107 action to maintain a contribution claim. Second, the court rejected Todd Shipyards's equitable arguments. Todd Shipyards asserted that as the defendant in a section 113 action, it was likely to pay more than its equitable share because the plaintiff intended to impose liability on Todd that should be imposed on the government. The court concluded that as the defendant in a section 113 action, Todd Shipyards would only be liable for its equitable share of the damage. The court also noted that Todd Shipyards's claim against the government primarily related to contractual indemnity agreements, and it was required to bring these claims in the Court of Federal Claims.

The practical effect of the court's holding upon reconsideration could be significant. The holding bestows a significant amount of power in the hands of the plaintiff bringing the 106 or 107 action and in the first-tier PRP defendant like the port in *Port of Tacoma*. These parties appear to be able to circumscribe the pool of persons subject to contribution claims stemming from cleanup at a particular site. While the court noted that under a section 113 claim, a party should not be liable for more than its equitable share, how much comfort can a defendant truly take from that?

Putting a slight spin on the facts in *Port of Tacoma* illustrates the dangers awaiting a PRP who has been sued under CERCLA. Imagine a situation where the government brings a 106 or 107 action for the entirety of a site's cleanup costs against the current owner, Deep Pockets. Deep Pockets, in turn, brings a contribution action against Mr. Smith, who owned the site for a limited time, but not against Ms. Doe, who may have also operated the site during the period of Mr. Smith's ownership. Under the reasoning of the court in *Port of Tacoma*, Mr. Smith could not bring Ms. Doe into the litigation. And it is easy to understand how Mr. Smith would take little comfort from the fact that he should only be liable for his equitable portion of the damages under a section 113 action. For as between Deep Pockets and Mr. Smith, the equities may indeed suggest that Mr. Smith cover all costs related to his period of ownership even though Ms. Doe also may be responsible for a portion of the contamination during that period. It would now be incumbent on Mr. Smith to prove the liability of a nonparty in the suit, Ms. Doe, in order to solely pay his equitable share.

Using Section 107(a) to Recover Costs

The task of distinguishing between which cause of action is available to a prospective plaintiff is not straightforward, and district courts have adopted differing (and seemingly contradictory) approaches. *In Niagara Mohawk Power Corporation v. Consolidated Rail Corporation*,[21] the district court held that because the plaintiff had incurred costs "involuntarily"—pursuant to a state-approved consent decree—it was unable to proceed under section 107. Instead, the plaintiff was required to plead a contribution cause of action under section 113(f)(1). In reaching this result, the district court relied on pre-*Cooper* (and *Atlantic Research*) circuit court case law applying the voluntary/involuntary distinction.[22] The utility of that distinction (and the premise of that prior circuit case law) was that PRPs may not bring section 107(a) causes of action.[23] Although the *Niagara* court noted that the Second Circuit declined to revisit that prior case law after *Cooper*, the premise underlying that prior case law—that PRPs may not bring section 107(a) causes of action—was addressed and squarely rejected by the Supreme Court in *Atlantic Research*, not *Cooper*. Indeed, a subsequent decision from the District of New Jersey rejected any reliance on the voluntary/involuntary distinction—finding it at odds with the language of the statute and *Atlantic Research*.[24]

In direct opposition to *Niagara Mohawk*, the Eastern District of Missouri found that a state-approved consent decree not only did not preclude a plaintiff from bringing a section 107 cause of action, but also that it could not support a section 113(f)(1) action.[25] The court also took a narrow view of section 113(f)(1), prohibiting the plaintiff from relying on two previous lawsuits, which had been dismissed, to provide a basis to bring a section 113(f)(1) claim. The court reasoned that for a party to rely on section 113(f)(1), a

civil action must either be pending or, if concluded, have established that party's liability. Again, this result appears to be at odds with the plain language of the statute, which provides solely that a person may seek contribution "during or following any civil action under section [106] of this title or under section [107](a)."[26]

Bringing a "Mixed" Action under Both Sections 107 and 113

In *Appleton Papers Inc. v. George A. Whiting Paper Co*., the Eastern District of Wisconsin found that if a plaintiff has been found liable under a court-approved consent decree, then it must bring a section 113(f)(1) cause of action regardless of whether the costs were incurred pursuant to the consent decree.[27] In that case, the United States and Wisconsin brought a CERCLA action and secured a consent decree binding two PRPs to undertake cleanup. These PRPs brought suit against other PRPs (including other settling PRPs) under sections 107 and 113. The plaintiffs argued that, based on *Atlantic Research*, some of their "voluntary" response costs, such as "the costs of identifying other responsible parties, conducting risk assessments, funding natural resources damages projects, and otherwise investigating and responding to . . . contamination" were recoverable under section 107 because they were incurred outside of their obligations under the consent decree.[28] The defendants argued that a section 113 action is a plaintiff's exclusive CERCLA remedy under such circumstances and that the section 107 claim should be dismissed. The district court agreed, finding that the PRP plaintiffs who entered into a court-approved consent decree must bring any subsequent action to recover costs under section 113(f)(1)—even if they seek reimbursement for costs that were not mandated by the consent decree. The court held that PRPs cannot parse the costs sought to be reimbursed and elect to bring a section 107 action for the "voluntarily" incurred costs and seek the remainder under section 113. Instead, the court concluded that once a section 113 action is available to PRPs, all costs must be recovered pursuant to that section. The court further stated that even where a party seeks reimbursement for costs incurred before the civil action triggering its section 113 cause of action was filed, those costs must also be recovered under section 113. In so holding, the court considered common law principles of contribution and focused on whether the plaintiff seeks recovery for costs relating to the "common liability" of the parties.

This conclusion appears to be in tension with the language of section 113(f)(1), which permits contribution claims solely "during or following any civil action." It could be argued that the decision is also at odds with *Atlantic Research*'s focus on how the costs were incurred—costs "incurred" voluntarily by a prospective plaintiff are recoverable by way of section 107(a)(4)(B), and costs of "reimbursement" to another person pursuant to a legal judgment or settlement are recoverable by way of section 113(f). Because the plaintiffs in *Appleton Paper* themselves voluntarily incurred the costs, section 107(a) may well have provided a cause of action.

> *ATLANTIC RESEARCH* GIVES A SIGNIFICANT AMOUNT OF POWER TO THE PLAINTIFF.

The *Appleton Paper* ruling also raises questions about the significantly shorter statute of limitations period for section 113 claims. It is certainly possible that more than three years after a party undertakes cleanup pursuant to a consent decree, it may discover additional contamination relating to another person not yet a party to the case. If the party then incurs costs to address that contamination, that party should be able to pursue a section 107(a) action against the responsible person regardless if three years have passed since the entry of an arguably unrelated consent decree.

Is Compliance with Section 122 Required as Well?

In *Cooper*, Justice Thomas announced that section 113(f)(3)(B) provided a separate contribution right under CERCLA—a part of the statute that previously received little attention by litigants or academics. Section 113(f)(3)(B) provides persons who have resolved their CERCLA liability to the United States or a state "in an administrative or judicially approved settlement" with a contribution cause of action against any person not party to a qualifying settlement.

Courts have struggled with defining this contribution right. In *Ford Motor Co. v. Edgewood Properties Inc.,* a district court found that a state administrative consent order was not sufficient to provide the basis of a contribution cause of action under section 113(f)(3)(B) because it was not yet "final."[29] The Sixth Circuit similarly found fault in the "finality" of an administrative order on consent between a plaintiff and the EPA in *ITT Industries, Inc. v. BorgWarner, Inc*.[30] The court found two principal issues in that regard. First, the EPA reserved its right to nullify the administrative order and to bring action against the plaintiff should it not comply with the terms of the order. Second, the court noted that the plaintiff failed to resolve any of its liability because it expressly did not concede any liability under the administrative order.

Courts have also struggled with what type of document constitutes "an administrative or judicially approved settlement." In *ITT Industries*, the court concluded that the EPA's administrative order on consent did not. The court reasoned that the settlement was entered into pursuant to the authority in CERCLA section 122(g) and not pursuant to the provisions identified in section 113(g)(3), the limitations section relating to settlement-driven contribution claims.

Courts have similarly found fault with consent orders entered into with state authorities. In *Niagara Mohawk Corporation v. Consolidated Rail Corporation*, the court concluded that because the New York Department of Environmental Conservation had not been vested with CERCLA

authority, and that a state lacks any such authority absent agreement with the EPA, the consent order could not have resolved the party's CERCLA liability.[31] But in another case involving the New York Department of Environmental Conservation at nearly the same time, a different district court reached the opposite conclusion. In *Seneca Meadows, Inc. v. ECI Liquidating, Inc.,* the court held that a consent order that expressly stated that the party "shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2)" to be sufficient.[32] The court dismissed arguments accepted by the *Niagara Mohawk* court—that New York lacked settlement authority because it had not been delegated CERCLA authority by the EPA. The court reasoned that states have ample authority to undertake remediation actions and bring actions to recover any such activity, and thus New York may settle the party's CERCLA liability to the state.

Potential Difference When the United States Is a Plaintiff

The Supreme Court agreed to hear this term an appeal from the Ninth Circuit decision in *United States v. Burlington Northern & Santa Fe Railway. Co.*[33] This marks the first time that the Supreme Court will decide a case wherein the liability standard under section 107(a) will be tested. Pre-*Atlantic Research* circuit court decisions have long held that plaintiffs can hold defendants under section 107(a) jointly and severally liable for costs incurred. The *Burlington Northern* case asks the Court to opine on the circumstances where defendants can escape application of that liability standard by proving a divisibility of harm. Specifically, the Court must decide the evidentiary standard a defendant must meet in order to apportion liability and thereby avoid imposition of joint and several liability. The lower courts more or less agree that several liability is appropriate where a "reasonable basis" for apportionment exists but they disagree on when this standard is met.

This decision takes on even more importance given the Court's prior *Atlantic Research* opinion that opened section 107 to all private parties. Since *Atlantic Research*, at least two courts have agreed that the joint and several standard is appropriate even when the plaintiff is itself a PRP.[34] The *Burlington Northern* case could now limit the circumstances in which a PRP can hold defendants jointly and severally liable. *Burlington Northern* appears likely to be a third seminal decision from the Supreme Court that, with *Aviall* and *Atlantic Research*, will define the issues in CERCLA cost recovery litigation that will occupy both private litigants and the EPA under the new administration.

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Endnotes

1. 127 S. Ct. 2331 (2007).
2. 543 U.S. 157 (2004).
3. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9607(a), 9613(f).
4. *See, e.g.,* Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998) (collecting cases).
5. *See* 42 U.S.C. § 9613(g)(2) (providing a six-year statute of limitations for section 107 cost recovery actions); 42 U.S.C. § 9613(g)(3) (providing a three-year statute of limitations for section 113 contribution actions).
6. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002); *see also* 42 U.S.C. § 9613(f)(1) (providing that a contribution action may be brought "during or following any civil action under section [106] of this title or under section [107(a)] of this title").
7. Amicus Curiae Brief of the United States, No. 02-1192, 2003 WL 22977858 at *9 (Dec. 12, 2003).
8. *Cooper*, 543 U.S. at 169–70.
9. *See* Atl. Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006); *see also* Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824 (7th Cir. 2007); E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2006); Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90 (2d Cir. 2005).
10. E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2006).
11. *Atl. Research*, 127 S. Ct. at 2339.
12. *See id.* at 2338 n.5; *see also Cooper*, 543 U.S. at 163; 42 U.S.C. § 9613(f)(3)(B).
13. *Atl. Research*, 127 S. Ct. at 2338 n.6.
14. U.S. Dep't of the Treasury, Financial Report of the United States Gov't (2008) (*available at* www.gao.gov/financial/fy2008/08frusg.pdf, last accessed Jan. 26, 2009); Environmental Protection Agency, NPL Site Totals by Status and Milestone (*available at* www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm, last accessed Jan. 26, 2009).
15. Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc., No. 05-3299 (7th Cir. Order entered Jan. 23, 2006).
16. Amicus Curiae Brief of the United States Environmental Protection Agency, filed May 2, 2006.
17. Port of Tacoma v. Todd Shipyards Corp., 2009 WL 113852 (W.D. Wash. Jan. 14, 2009).
18. 2008 WL 4454136, at *6 (W.D. Wash. Sept. 30, 2008).
19. *Id*.
20. *Port of Tacoma*, 2009 WL 113852.
21. No. 98-CV-1039, 2008 WL 2746912 (N.D.N.Y. July 16, 2008).
22. *See Niagara Mohawk*, 2008 WL 2746912 (citing Bedford Affiliates v. Sills, 156 F.3d 416, 425 (2d Cir. 1998)).
23. *See Bedford Affiliates*, 156 F.3d at 425 (citing New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997)).
24. Reichhold, Inc. v. United States Metals Ref. Co., Civ. No. 03-453, 2008 WL 5046780, at *7 (D.N.J. Nov. 20, 2008).
25. *See* Westinghouse Elec. v. United States, No. 03cv861, 2008 WL 2952759 (E.D. Mo. July 29, 2008).
26. 42 U.S.C. § 9613(f)(1).
27. No. 08-C-16, 2008 WL 3891304 (E.D. Wis. Aug. 20, 2008).
28. *Id.* at *4.
29. No. 06-278, 2008 WL 4559770 (D.N.J. Oct. 8, 2008).
30. 506 F.3d 452, 459–61 (6th Cir. 2007).
31. 436 F. Supp. 2d 398, 401–02 (N.D.N.Y. 2006).
32. 427 F. Supp. 2d 279, 286–87 (W.D.N.Y. 2006).
33. 520 F.3d 918 (9th Cir. 2008).
34. *See* Raytheon Aircraft Co. v. United States, 532 F. Supp. 2d 1306, 1310 (D. Kan. 2007); *Reichhold, Inc.*, 2008 WL 5046780.