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## Supreme Court

# Continuing Waste

By Brian D. Langa

Recently, in *United States v. Atlantic Research Corp.*, 2007 DJDAR 8503 (June 12), the U.S. Supreme Court thoroughly tipped over the apple cart that it had previously put off balance in *Cooper Industries Inc. v. Aviall Services Inc.* 543 U.S. 157 (2004). *Atlantic Research* forces Comprehensive Environmental Response, Compensation and Liability Act practitioners to think twice before entering into CERCLA settlement agreements with the government. It is now more likely than ever that a party entering into such a settlement may find itself still involved in resource-consuming litigation involving the same CERCLA site that the settlement covered.

### New Concerns

To briefly recap the concerns raised by *Atlantic Research*, one must first understand that CERCLA primarily provides two causes of action to prospective plaintiffs: (1) a cost recovery action under Section 107(a) through which potentially responsible parties ("PRPs") are strictly, jointly and severally liable for response costs, and (2) a contribution action under Section 113(f)(1), through which a person may seek contribution from other PRPs as allocated by equitable factors as a court may deem appropriate. Historically, the government asserted cost recovery claims against PRPs under Section 107(a), and PRPs then asserted contribution claims against other PRPs under Section 113(f)(1). This is because Section 107(a) claims previously were held available only to non-PRPs, and CERCLA's list of four broad PRP classes encompasses almost all persons associated with a particular site, including for example,

the current owner or operator of a site even if that owner or operator was not "responsible" for the alleged contamination.

In *Atlantic Research*, the Supreme Court held that this long-standing CERCLA practice was inconsistent with the clear wording of the statute, and any person that incurs response costs, even a PRP, is entitled to assert a Section 107(a) claim. The court's analysis was relatively simple; Section 107(a)(4)(B) allows for the recovery of response costs by "any other person," and this language is not limited to non-PRPs. Of course, the interpretation is not so cut and dried. The "any other person" language follows the listing of classes of PRPs and could be read (and indeed was historically read) as meaning any person other than those that fall within the four classes of PRPs. The clumsy construction of CERCLA Section 107(a) is more than partially to blame for the present situation.

The *Atlantic Research* outcome was hinted at somewhat by *Aviall*. Therein, the Supreme Court strictly interpreted CERCLA to hold that a party performing a cleanup may seek CERCLA Section 113(f)(1) contribution only if it was a defendant in a CERCLA civil action, or if it had previously resolved its liability in an administrative or judicially approved settlement. Thus, for example, *Aviall Services, Inc.*, which was a PRP only by dint of its ownership of contaminated sites, was precluded from recovering response costs from *Cooper Industries Inc.*, the alleged contaminator of the sites, because *Aviall* committed the sin of "voluntarily" cleaning the sites when threatened by government agencies instead of forcing the government agencies to sue

it and then settling. Perhaps to take some of the sting out of this result, the *Aviall* decision hinted that a PRP such as *Aviall* could possibly assert a claim under CERCLA Section 107(a). In *Atlantic Research*, the court confirmed that a PRP could assert a claim under Section 107(a), but in doing so, the court held that such a claim was not a contribution claim but rather a distinct claim in cost recovery.

### Metastasizing Effects

This *Atlantic Research* rationale may have created a larger problem when one examines its potential effect on settlements with the government. CERCLA provides the significant incentive of contribution protection to encourage prompt and efficient settlement of CERCLA claims with the government. Contribution protection, located at CERCLA Section 113(f)(2), provides that a party that settles with the government "shall not be liable for claims for contribution regarding matters addressed in the settlement." Section 113(f)(2) has been made even more powerful by courts that have properly held that a settlement with the government also bars common law or state law contribution and indemnity claims against a settling PRP. Congress recognized that this "measure of finality" is of significant value to a potential settling party and thus fosters prompt settlement.

Therefore, once a party settles CERCLA claims with the government, it is protected from any and all such claims in contribution. A settling party still had to be wary of Section 107(a) claims, but because only the government typically had the ability to assert such claims at most sites previously, a settlement and release with the government provided finality.

However, since the *Atlantic Research* opinion confirms that any party that incurs response costs can assert a claim under Section 107(a), and such a claim does not sound in contribution, these claims avoid CERCLA's contribution bar. If *Atlantic Research* had adopted *Aviall's* suggestion that Section 107(a) allows for an "implied right of contribution," then one could argue that Section 113(f)(2)'s bar "for claims for contribution" applied to these implied contribution claims asserted under Section 107(a). Now, however, it is clear that a plaintiff's claim under Section 107(a) is one of "cost recovery" and is thus not affected by the contribution bar. Therefore, a CERCLA settlement provides much less finality to settling parties because the settling party may remain subject to litigation with other private parties. In real world practice, the ability to be dismissed and avoid ongoing litigation is often the primary incentive for settlement — especially where insurers providing defense costs are an instrumental party in funding the settlement.

#### Unpersuasive Rationales

The *Atlantic Research* court recognized that its decision may impact settlements, but then opined, "For several reasons, we doubt this supposed loophole would discourage settlements." However, the reasons offered by the court are not persuasive because they do not address the fact that the settling party remains involved in ongoing litigation.

For example, the court states that, "the settlement bar continues to provide significant protection from contribution suits by PRPs..." However, after *ARC*, such contribution suits are less likely than ever. The court distinguished a cost recovery claim from a contribution claim by asserting the former is an action permitting any plaintiff to recover costs incurred in cleaning up a site, whereas the latter is to seek reimbursement for funds that the party paid to satisfy a settlement agreement or court judg-

ment. However, this distinction is blurry, as recognized by the court when it admits there may still be an "overlap" between the two claims. The court then posited a case where a PRP sustains expenses pursuant to a consent decree entered into with the government. The court did not state whether this extremely common fact pattern falls within the cost recovery or contribution classification. However, if a PRP that enters into a consent decrees with the government can assert a cost recovery claim, then most every PRP could be a potential plaintiff that could assert a claim against settling parties.

Perhaps even more troubling is that CERCLA provides that a party can obtain declaratory relief on liability under Section 107(a), so that it may not be necessary for the plaintiff to actually have incurred significant response costs to initiate a Section 107(a) claim against a settling party.

One can expect plaintiffs to exploit this "overlap" and gravitate toward Section 107(a) claims since, under such a claim, a plaintiff enjoys an advantageous statute of limitations, the ability to seek joint and several liability, and an avoidance of the contribution bar.

Another rationale offered by the *Atlantic Research* court in support of continued settlements is that a settlement still carries the benefit of resolving liability as to the United States or a state. However, it would be shortsighted for a settling party to fully fund a settlement to one plaintiff and leave other plaintiffs waiting in the wings seeking to recoup their costs. For example, if a recalcitrant PRP feels a settling PRP did not fully fund the settler's share to the government (which is almost always the case), then the recalcitrant PRP may assert a cost recovery claim against the settling PRP.

Finally, the *Atlantic Research* court offers an unrealistic solution that, when faced with a Section 107(a) claim, the settling PRP can counterclaim against the plaintiff in contribution under Section 113(f). The court then offers legal advice by stating the settling PRP should cite the Restatement (Second) of Torts and request that the district court equitably take into account the prior settlement "as part of the liability calculus." Thus, under this court-proffered solution, not only does the settling party remain in litigation, but it also must prosecute its own counterclaims — all in the hope of an endgame in which the district court agrees that the settling party fully paid its debt in the initial settlement. In other words, the best the settling party can hope for is to expend sums in litigation and ultimately receive a judgment that its initial settlement fully resolved its liability at a site. This hardly seems like an incentive to settle. Most important, if the plaintiff has entered into a settlement with the government, it very likely enjoys the contribution bar and is immune from the contribution counterclaim.

In short, a settling party under CERCLA must consider the very real possibility that it will remain in litigation notwithstanding its payment of settlement to the government. Absent amending CERCLA to create a 107(a) claim bar, there are few alternatives providing a finality to a settling party, and *Atlantic Research* could very well have a chilling effect on settlements, and, in turn, the cleanup of impacted sites.

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