

Management Alert

Supreme Court Clears Way for CERCLA Cost Recovery Actions

Suppose, under the threat of an enforcement action by an environmental agency, you spend money cleaning up a contaminated property for which you may bear some liability. Until last week's Supreme Court decision in *United States v. Atlantic Research Corp.*,¹ it was uncertain whether—absent an enforcement action or lawsuit—you would be able to recover any of those costs from other potentially responsible parties under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² Now, however, it is clear that Section 107 of CERCLA allows a potentially responsible party (PRP) under CERCLA³ to recover costs from other PRPs in the absence of an enforcement or cost recovery action.

In late 2004, the Supreme Court held in *Cooper Industries, Inc. v. Aviall Services, Inc.*⁴ that a private party could seek contribution under Section 113(f) of CERCLA for costs it incurred during an environmental remediation only after facing enforcement action under Section 106 or being sued under 107(a) of CERCLA. Section 106 allows an action to enforce an administrative order issued against a PRP, while Section 107(a) allows a cost recovery action. The Court, at the time of the *Aviall* decision, left for another

day the question of whether a private party would have a right to cost recovery under Section 107. On June 11, 2007, however, the Supreme Court answered this question and held that Section 107 of CERCLA allows private party PRPs to recover costs from other PRPs.

In *Cooper Industries, Inc. v. Aviall Services, Inc.* the Court decided only *when* Section 113(f) actions could be brought by PRPs, but the Court did not decide whether Section 113(f) provided the exclusive remedy for PRPs. The 1986 amendments to CERCLA added an express right of contribution in Section 113(f). Following the enactment of Section 113(f), courts generally held that Section 113(f) provided the exclusive remedy for PRPs, and that Section 107 relief was not available to PRPs.⁵ Prior to the 1986 amendments to CERCLA, most courts interpreted Section 107 as imposing joint and several liability upon a liable party. To ameliorate the harshness of such liability, they also construed Section 107 as providing an implied right of contribution, thus providing a cause of action for a liable party to recover in contribution against other liable parties to the extent that it paid more than its fair share.⁶

¹ <http://www.supremecourtus.gov/opinions/06pdf/06-562.pdf>

² 42 U.S.C. § 9601, et seq.

³ 42 U.S.C. § 9607. Section 107(a) defines four broad categories of "covered persons," commonly referred to as potentially responsible parties.

⁴ 534 U.S. 157 (2004).

⁵ See *Cooper Industries*, 534 U.S. at 169.

⁶ See *Id.* at 161-62; *Key Tronic Corp. v. United States*, 511 U.S. 809, n. 7 (1994).

The Court's *Aviall* decision was also silent with respect to some lower court's holdings that Section 107 only afforded "innocent parties"—those able to establish a complete defense under CERCLA—the opportunity to recover clean-up costs.⁷ This latest decision by the Supreme Court, however, makes clear that cost recovery is available to private party PRPs, "innocent" or not, under Section 107.

It should be noted that this newly secured avenue of cost recovery brings into play Section 107's six-year statute of limitation, allowing some PRPs, if they have incurred recoverable costs, more time to bring their claims where they previously seemed left with the Section 113 three-year statute of limitation, if they had any action at all. While holding that a private party PRP may pursue a cost recovery action under Section 107 when it "has itself incurred cleanup costs" the Court, however, made clear that private party PRPs that have not incurred costs do not have a "choice of remedies" between Section 107 and 113 that would allow the PRP to take advantage of the longer statute of limitations for Section 107 actions.

The Court's decision still leaves open some questions regarding the means of recovering costs sustained in environmental remediation actions. Though the Court states that Sections 113(f) and 107(a) provide two distinct remedies, the Court did not resolve the question of whether response costs that are not incurred voluntarily, such as those sustained by a PRP pursuant to a consent decree entered following a suit under Section 106 or 107, are recoverable under Section 113(f), 107(a) or both. While the Court explains that clean-up costs incurred voluntarily are recoverable only in a Section 107 action and costs of reimbursement to another person pursuant to a settlement or judgment are recoverable only in a Section 113 action, the Court does not clarify under which Section

costs incurred as a result of mandated court action or administrative order may be recovered. Furthermore, the Court's decision leaves open the possibility that a party who resolves their liability with the government may still be subject to a Section 107 action brought by another potentially responsible party, despite Section 113's provision providing the option of barring contribution actions against parties who settle with the government. Finally, the Court did not definitively decide whether Section 107 provides for joint and several liability in suits brought by PRPs.⁸ It has long been the case that liability was thought joint and several only for actions brought by the United States under Section 107. Now it appears that the same may hold true for cost recovery actions brought by private parties.

The immediate impact of this decision is that companies are again encouraged to take on clean-ups and those who have been reluctant to voluntarily incur clean-up costs no longer need to fear that they will have no means of recovering these costs under CERCLA. This also means that companies do not need to face the excruciating choice of bearing the cost of a clean-up alone or waiting for an enforcement action—and the unappealing side effects of such actions—before undertaking a remediation.

Any company, whether "innocent" or itself a PRP, who has incurred costs in cleaning up a contaminated site should examine the possibility of bringing a claim against PRPs under Section 107 of CERCLA. Moreover, any party currently pursuing a claim for contribution under Section 113 should determine if a Section 107 claim may also be added, as the Court has made clear that actions under Section 107 and 113 are distinct. Section 113 allows for the recovery of sums paid to satisfy a settlement or court judgment, while Section 107 permits cost recovery for

⁷ See, e.g. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998); *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003).

⁸ The Court states: "We assume without deciding that § 107(a) provides for joint and several liability."

parties who have themselves incurred clean up costs. Lastly, defendants in Section 107 cost recovery actions should explore the possibility of filing a Section 113 counterclaim in order to prevent the possibility of an inequitable distribution of costs.

If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work or any Environmental, Safety and Toxic Torts attorney on our website at www.seyfarth.com

Furthermore, the Environmental, Safety and Toxic Torts attorneys of Seyfarth Shaw will be hosting a teleconference discussing the impact of the Atlantic Research decision on Thursday, June 28th at 12:30 p.m. To learn more about this teleconference and to register please visit our website at www.seyfarth.com/events.

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