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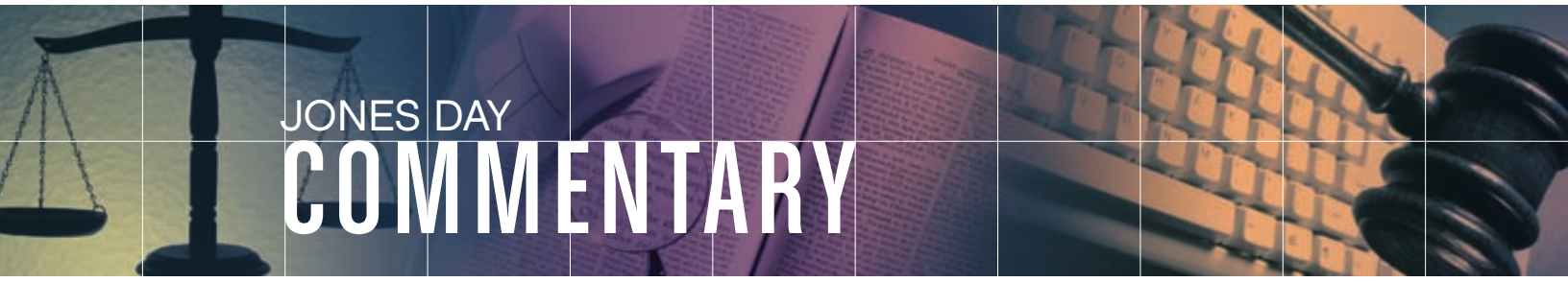


# *ATLANTIC RESEARCH CORP.:* AFFIRMING THE GOVERNMENT'S WAIVER OF IMMUNITY UNDER CERCLA

For nearly two and a half years, since the United States Supreme Court decision in *Cooper v. Aviall*, 543 U.S. 157 (2004) (holding that the plain language of CERCLA § 113(f) does not allow parties to bring a contribution claim unless and until a related civil action is brought under § 106 or § 107), parties have been limited by that holding in their ability to recover voluntary cleanup costs from other potentially responsible parties ("PRPs") under CERCLA. Despite the express waiver of sovereign immunity in CERCLA, *Aviall* also insulated the federal government from suit where it shares potential CERCLA liability with others at a site. The government exploited its newfound protection under *Aviall* and circumvented potential costs, by issuing or threatening to issue unilateral administrative orders ("UAOs") to private parties for the cleanup of sites where it shares liability with private parties. The government's actions caused private parties to choose between two negatives: either immediately comply with the UAO or risk the enterprise on the uncertain "sufficient cause" defense as a way to avoid $32,500 for each day of noncompliance and punitive damages of up to three times the costs that the government incurs to remediate a site. *Id.* The *Aviall* decision effectively insulated the federal government from having to litigate or pay for its own CERCLA liability at those sites where it has liability. Members of the environmental defense bar criticized the government for its disingenuous use of UAOs, particularly given the government's express waiver of sovereign immunity under CERCLA.

In a reversal of fortune for the government, the Supreme Court, on June 11, 2007, opened the door for private entities to recover their voluntary contamination cleanup costs under CERCLA § 107. In an opinion

authored by Justice Clarence Thomas, the Court held that a PRP can bring suit under CERCLA § 107(a) against other responsible parties to recover voluntary cleanup costs. *United States v. Atlantic Research Corp.*, 551 U.S.___, No. 06-562, slip op. at 1 (2007).

Atlantic Research retrofitted rocket motors for the United States. *Id.* at 3. Using a high-pressure water spray, Atlantic Research removed pieces of propellant from the motors and burned them, creating wastewater that contaminated the soil and groundwater at the site in Arkansas. *Id.* Atlantic Research voluntarily investigated and cleaned up the contamination, incurred costs in the process, and sought to recover a portion of those costs from the United States by invoking CERCLA §§ 107(a) and 113(f). *Id.* at 4. Atlantic Research and the government entered into negotiations that quickly stalled when the U.S. Supreme Court issued its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). With its § 113(f) claim foreclosed by *Aviall*, Atlantic Research amended its complaint to rely solely on § 107(a) and federal common law as the basis for its cost-recovery claim. The government moved to dismiss, arguing that the Eighth Circuit's pre-*Aviall* decision in *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003) (holding that a liable party could maintain a claim only under § 113 of CERCLA, not § 107), foreclosed Atlantic's § 107 claim, and the district court dismissed the case. But the Eighth Circuit reversed, recognizing that *Aviall* undermined the reasoning of its prior precedent. *See Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006). Recognizing conflicting authority outside the Eighth Circuit, the Supreme Court granted *certiorari* and unanimously affirmed *Atlantic Research*, resolved the Circuit split, and confirmed that § 107(a)(4)(B)'s plain terms allow a PRP to recover voluntary cleanup costs from other PRPs. *Atlantic Research*, slip op. at 11.

The parties' arguments, and the Supreme Court's decision, focused on what "other person[s]" may sue under § 107(a)(4)(B). CERCLA § 107(a)(1)–(4) lists four broad categories of persons as PRPs that are, by definition, liable to other parties for various costs. They are: owners and operators of a facility; past owners of a facility at the time of disposal; parties that arranged for disposal, treatment, or transport of hazardous waste to a facility; and hazardous-waste transporters. CERCLA § 107(a)(4)(B) makes PRPs liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan," and the government argued that "other person" refers to non-PRPs or any person not identified in § 107(a)(1)–(4). *Id.* at 5. Atlantic Research countered that subparagraph (B) provides a cause of action to anyone except the United States, a state, or an Indian tribe because subparagraph (A) provides a cause of action to those parties. *Id.* The Court agreed with Atlantic Research. *Id.*

Following the Supreme Court maxim that "statutes must be read as a whole," the Court held that subparagraph (B) could be understood only with reference to subparagraph (A) and held that "it is natural to read the phrase 'any other person' by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe." *Id.* "The phrase 'any other person' therefore means any person other than those three." *Id.* at 6. As a consequence, the Court recognized, "the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs." *Id.*

The Court also rejected the government's argument on quasi-policy grounds: "The Government's reading of the text logically precludes all PRPs, innocent or not, from recovering cleanup costs. Accordingly, accepting the Government's interpretation would reduce the number of potential plaintiffs to almost zero, rendering § 107(a)(4)(B) a dead letter." *Id.*

The government further challenged the Court's reasoning, stating that it would "cause friction between § 107(a) and § 113(f), the very harm the courts of appeals have previously tried to avoid." *Id.* at 7–8. The government gave three examples of the potential friction, stating that: (1) the Court's holding effectively allows PRPs to circumvent § 113(f)'s shorter statute of limitations; (2) PRPs would eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a); and (3) the Court's interpretation would eviscerate the settlement bar set forth in § 113(f)(2). *Id.* Justice Thomas handled each challenge in turn.

The Court recognized that §§ 107(a) and 113(f) provide two clearly distinct remedies. *Id.* ("CERCLA provide[s] for a right to a *cost recovery* in certain circumstances, § 107(a), and *separate rights to contribution* in other circumstances, §§ 113(f)(1), 113(f)(3)(B)."). But the Court again disagreed with the government by explaining that §§ 107(a) and 113(f) complement each other by providing causes of action "to persons in different procedural circumstances." *Id.* As the Court stated:

> Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a). And § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a). Thus, at least in the case of reimbursement, the PRP cannot choose the 6-year statute of limitations period for § 113(f) contribution claims.

*Id.*

The Court further noted that, for similar reasons, "a PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a)." *Id*. at 10.

Finally, the Court held that permitting PRPs to seek recovery under § 107(a) "will not eviscerate the settlement bar set forth in § 113(f)(2)." *Id.* at 11. That provision prohibits § 113(f) contribution claims against "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . . ." *Id.* (citing 42 U.S.C. § 9613(f)(2)). Rather, the Court noted that a defendant PRP may trigger equitable apportionment by filing a § 113(f) counterclaim and a district court "would undoubtedly consider any prior settlement as part of the liability calculus." *Id.* Further, the Court noted that the "settlement bar continues to provide significant protection from contribution suits by PRPs that have inequitably reimbursed the costs incurred by another party." *Id.* Finally, "settlement carries the inherent benefit of finally resolving liability as to the United States or a State." *Id.*

The Court's holding, affirming that § 107(a)(4)(B) affords a PRP the opportunity to recover voluntary costs from other PRPs, including the United States, should hopefully discontinue the government's practice of issuing UAOs to private parties that share some liability with it at a given site. The fact that the government is no longer immune to suit from parties that perform voluntary cleanup at a site removes at least some disincentive for those entities that desire to voluntarily clean up contamination at a site for which the federal government has some responsibility. Now, they can do so and seek reimbursement from the United States.

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