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Not Playing Games: Eighth Circuit's Response to CERCLA Contribution in Light of Aviall. Atlantic Research Corp. v. United States

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NOT PLAYING GAMES: EIGHTH CIRCUIT'S RESPONSE TO CERCLA CONTRIBUTION IN LIGHT OF AVIALL

Atlantic Research Corp. v. United States[1]

I. INTRODUCTION

In *Atlantic Research Corp. v. United States*, the Eighth Circuit Court of Appeals answered a question that the Supreme Court expressly refused to address when given the opportunity.[2] The court of appeals was forced to reverse precedent in response to the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services*[3] regarding a liable party's rights to partially recover costs incurred for an environmental cleanup. The Eighth Circuit held that when a private party voluntarily cleans a site for which it may be held liable, it may pursue recovery and contribution actions under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[4] against another liable party.[5] By opening the door for potentially liable parties to an action previously unavailable,[6] the court of appeals was able to choose the best post-*Aviall* alternative available in order to achieve CERCLA's overarching goal of an effective and efficient cleanup.[7]

II. FACTS AND HOLDING

On December 11, 1980, Congress passed CERCLA in an attempt "to 'encourage the timely cleanup of hazardous waste sites'"[8] and "'place

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[1] 459 F.3d 827 (8th Cir. 2006) [hereinafter "*Atl. Research Corp.*"].
[2] *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).
[3] *Id.*
[4] Codified as 42 U.S.C. §§ 9601-9675 (1980), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, 1615 (2005).
[5] *Atl. Research Corp.*, 459 F.3d at 829.
[6] *See* Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998).
[7] Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-36 (8th Cir. 1995).
[8] *Id.* (quoting General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990)).

the cost of that response on those responsible for creating or maintaining the hazardous condition.'"[9] CERCLA effectively makes every party "who contaminate[d] a site strictly liable for the costs of subsequent cleanup."[10] CERCLA, in addition to allowing state and federal governments to recover costs incurred, offers multiple methods for a private party to recoup its costs.[11]

Taking advantage of this private party provision in CERCLA, Atlantic Research Corporation ("Atlantic") filed a complaint seeking partial reimbursement from the United States for costs incurred in a voluntary environmental cleanup.[12] Atlantic was hired by the United States to retrofit rocket motors in Atlantic's facility located in Camden, Arkansas[13] starting in 1981 and ending in 1986.[14] The removal process of the rocket propellant included the use of a high-pressure water spray that Atlantic had on-site.[15] Atlantic would then burn the propellant once it was removed from the rocket motors.[16] Atlantic's own investigation led to the discovery that residue from the burnt rocket propellant eventually contaminated the soil and groundwater surrounding the Camden facility.[17]

After reviewing its own investigation, Atlantic cleaned up the contaminated area.[18] Atlantic then brought the present action against the United States in order to recover a portion of the costs incurred during the

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[9] *Id.* (quoting United States v. Mexico Feed & Seed Co., Inc., 980 F.2d 478 (8th Cir. 1992)).

[10] *Atl. Research Corp.*, 459 F.3d at 830. CERCLA effectuated this result by essentially "transform[ing] centuries of real property and tort liability law." *Id.*

[11] *Id.* CERCLA allows private parties to recover losses incurred during cleanup; first at section 107(a)(4)(B), second under section 113(f)(1), and the third option being section 113(f)(3)(B). *Id.*

[12] *Id.* at 829. Atlantic based its claim on CERCLA. *Id.*

[13] *Id.* Atlantic leased the Camden facility, located within the Highland Industrial Park, from approximately 1979 until October 2003. Brief for Appellee at 9, Atl. Research Corp. v. United States, No. 05-3152 (8th Cir. December 5, 2005).

[14] *Atl. Research Corp.*, 459 F.3d at 829. Atlantic claimed "it retrofitted over 3,200 rocket motors by removing propellant that contained ammonium perchlorate . . . and substituting a different propellant in the motor." Brief for Appellee, *supra* note 12, at 9.

[15] *Atl. Research Corp.*, 459 F.3d at 829.

[16] *Id.*

[17] *Id.*

[18] *Id.*

clean up by citing CERCLA sections 107(a)[19] and 113(f).[20] Soon thereafter, Atlantic and the United States began negotiations to reimburse Atlantic for the cleanup costs identified in Atlantic's complaint.[21]

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[19] *Id.* CERCLA § 107(a) states:

> Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date:
> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (2000).

[20] *Atl. Research Corp.*, 459 F.3d at 829. CERCLA § 113(f) states:

> (1) Contribution: Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

Once the United States Supreme Court handed down its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*,[22] the United States ended its negotiations with Atlantic.[23] The Supreme Court, in *Aviall*, held that a party seeking contribution under section 113(f) could only do so "during or following" a section 106 or section 107(a) CERCLA action.[24] Because there was no cause of action brought against Atlantic under either sections 106 or 107(a), Atlantic's section 113(f) contribution claim was barred.[25]

Atlantic attempted to rectify the problem created by *Aviall* by amending its complaint to rely solely on section 107(a) and federal common law.[26] In response to the amended complaint, the United States government moved to dismiss the claim under Federal Rule of Civil Procedure 12(b)(6),[27] arguing that the Eighth Circuit's decision in *Dico, Inc. v. Amoco Oil Co.*[28] foreclosed Atlantic's section 107 claim.[29] In *Dico*, the Eighth Circuit held that a liable party could not bring an action under section 107.[30] Following this holding, the district court agreed with the government's assertion that Atlantic was barred from bringing a claim under section 107 and granted the government's motion to dismiss.[31] Ever persistent, Atlantic appealed to the Eighth Circuit arguing that its analysis in *Dico* was undermined by the Supreme Court decision in *Aviall*.[32]

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42 U.S.C. § 9613(f).

[21] *Atl. Research Corp.*, 459 F.3d at 829.

[22] 543 U.S. 157 (2004).

[23] *Atl. Research Corp.*, 459 F.3d at 829.

[24] *Aviall*, 543 U.S. at 160.

[25] *Atl. Research Corp.*, 459 F.3d at 829.

[26] *Id.*

[27] FED. R. CIV. P. 12(b)(6). This rule states "failure to state a claim upon which relief can be granted" warrants dismissal of the complaint. *Id.*

[28] 340 F.3d 525 (8th Cir. 2003).

[29] *Atl. Research Corp.*, 459 F.3d at 830.

[30] *Dico*, 340 F.3d at 530. The *Dico* court reasoned that section 107 allowed complete recovery from other parties, and a liable party should not be entitled to 100% recovery. *See Id.* at 531.

[31] *Atl. Research Corp.*, 459 F.3d at 829-30.

[32] *Id.* at 830. Atlantic raised the argument that "it is well settled that a panel may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent." *Id.* (quoting T.L. v. United States, 443 F.3d 956, 960 (8th Cir. 2006)).

On appeal, the Eighth Circuit reviewed the district court's order to dismiss Atlantic's claim, taking into consideration that the Supreme Court had recently undermined *Dico*'s rationale.[33] The Eighth Circuit ultimately reversed the order of the district court.[34] In *Atlantic*, the Eighth Circuit held that a private party that "voluntarily undertakes a cleanup for which it may be held liable, thereby 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."[35]

III. LEGAL BACKGROUND

The interaction between CERCLA sections 107(a) and 113(f)(1) is at the crux of the *Atlantic* decision.[36] When CERCLA was first passed in 1980, it contained section 107(a), which currently "has a six-year statute of limitations, and allows a plaintiff to recover 100% of its response costs from [any] liable parties," regardless of whether the parties have settled their CERCLA liability with the United States.[37] Section 107(a) creates four classes of potentially responsible persons ("PRPs")[38] and states that PRPs shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[39] Litigation over section 107 quickly followed in an attempt to determine if CERCLA allowed a PRP who incurred cleanup costs to recover from other PRPs.[40] Numerous federal circuit courts determined that CERCLA section 107 allowed a cause of action for private parties against other

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[33] *Id.*
[34] *Id.* at 837.
[35] *Id.*
[36] *Id.* at 830.
[37] *Id.* at 831.
[38] *See* 42 U.S.C. § 9607(a). The four classes are (1) current owners of facility, (2) past owners that contaminated, (3) persons contracted to remove and/or dispose of contaminants, and (4) persons accepting/accepted removal or disposal of contaminants. *Id.*
[39] *Id.* § 9607(a)(4)(B). "The national contingency plan [sets forth] procedures for preparing and responding to contaminate[d sites] and was [propagated] by the Environmental Protection Agency ("EPA") pursuant to CERCLA § 105." *Aviall*, 543 U.S. at 161 n.2.
[40] *Aviall*, 543 U.S. at 161.

PRPs even if the private parties had incurred response costs voluntarily and were not themselves subject to suit.[41]

Litigation also addressed the separate question of whether a private party that had already been sued for cost recovery could seek contribution from other PRPs.[42] Since CERCLA, under its original enactment, did not expressly address the issue of a right to contribution, the courts were left to decide the question.[43] Some courts found an implied right of contribution from section 107[44] or as a matter of federal common law.[45] Finding an implied right was questionable because the Supreme Court had refused to recognize an implied right of contribution in the context of other federal statutes.[46]

This litigation forced Congress to make changes to CERCLA, which led to the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[47] SARA included an express provision that allowed a cause of action for contribution, codified as CERCLA section 113(f)(1).[48] Additionally, SARA also produced a separate right of contribution under section 113(f)(3)(B) for a "person who has resolved its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement."[49]

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[41] *See* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890-892 (9th Cir. 1986); Walls v. Waste Res. Corp., 761 F.2d 311, 317-318 (6th Cir. 1985); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982).

[42] *Aviall*, 543 U.S. at 162.

[43] *Id.*

[44] *See* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457 n.3 (9th Cir. 1986); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985).

[45] *See* United States v. New Castle County, 642 F. Supp. 1258, 1265-66 (D. Del. 1986); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486-1493 (D. Colo. 1985).

[46] *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 638-647 (1981) (finding no implied right for contribution in the Sherman Act or the Clayton Act); Northwest Airlines, Inc. v. Transp. Workers, 451 U.S. 77 (1981) (finding no implied right for contribution in the Equal Pay Act of 1963 nor Title VII of the Civil Rights Act of 1964).

[47] Pub. L. No. 99-499, 100 Stat. 1613.

[48] 42 U.S.C. § 9613(f)(1) (2000).

[49] 42 U.S.C. § 9613(f)(3)(B).

Congress' intent in adding section 113 was to "clarify and confirm" the right to CERCLA contribution.[50] Congress also made the express right of section 113 more restrictive than the right offered by section 107.[51] The right of contribution under section 113 is subject to a three-year statute of limitations, plaintiffs can only recover costs exceeding their equitable share, and plaintiffs cannot recover from a party that has previously settled concerning the contamination in question.[52] Essentially, SARA provided parties a right to cost recovery under CERCLA in certain situations (section 107(a)) and separate rights of contribution in other situations (sections 113(f)(1), 113(f)(3)(B)).[53]

The addition of SARA in 1986 created an impasse between sections 107 and 113.[54] Courts realized that the newly amended CERCLA created circumstances where plaintiffs might "quickly abandon section 113 in favor of the substantially more generous provisions of section 107," essentially rendering section 113 useless.[55] Courts went about attempting to circumvent the problem by "directing traffic" between the two sections of CERCLA.[56] This effectively led courts to analyze sections 107 and 113 together, regardless of which CERCLA section the plaintiff claimed, in an attempt to distinguish the sections.[57] This resulted in courts effectively reserving section 107 for "'innocent' plaintiffs who could assert one of the statutory defenses to liability" and forcing all liable parties to use section

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[50] United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994).
[51] *Atl. Research Corp.*, 459 F.3d 827, 832 (8th Cir. 2006).
[52] 42 U.S.C. §§ 9613(f)(1)-(2), (g)(3).
[53] Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 (2004).
[54] *Atl. Research Corp.*, 459 F.3d at 832.
[55] New Castle County v. Haliburton NUS Corp., 111 F.3d 1116, 1123 (3d Cir. 1997).
[56] *Atl. Research Corp.*, 459 F.3d at 832.
[57] *Id.*

113.[58] Therefore, CERCLA section 113 was not rendered void because the courts implemented a restrictive reading of section 107.[59]

A consequence of the court's system of forcing PRPs to use section 113 was that section 113 was "available to all liable parties, including those that had not faced a CERCLA action."[60] Directly preceding the Supreme Court's *Aviall* decision, the Eighth Circuit published its own opinion in *Dico* which followed the precedent of narrowly construing section 107.[61] In *Dico*, the EPA forced Dico, Inc., and another liable party to clean up a contaminated site in Iowa.[62] Dico sued the other liable party for 100% of its costs under section 107 and added a contribution claim under section 113.[63] Because the other party had previously settled with the EPA, the district court granted summary judgment for the other party.[64] Effectively, Dico could not sue the other liable party under section 107 because Dico was also a liable party and it could not sue under section 113 because the other party had previously reached a settlement concerning the issue.[65]

Then, the Supreme Court handed down its decision in *Aviall*, drastically changing the dynamics of the relationship between section 107

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[58] *Id.* (citing Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998).; Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 347 (6th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-02 (9th Cir. 1997); New Castle County v. Haliburton NUS Corp., 111 F.3d 1116, 1121-22 (3d Cir. 1997).; Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996); United Techs. Corp. v. Browning-Ferris Inds., Inc., 33 F.3d 96, 99; Azko Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994)).

[59] *Id.*

[60] *Id.*

[61] *See* Dico, Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003).

[62] *Id.* at 527. "[T]richoloroethylene . . . was detected in water coming from underground wells located near the property owned by Dico. *Id.*

[63] *Id.* Dico incurred $5.7 million in cleanup costs and brought suit against Shell Oil Company, BP Products North America, Inc., Monsanto Company, Chevron Chemical Company, and Bayer Corporation. *Id.*

[64] *Id.* at 528. The EPA found the other group 39% responsible for the contamination and invited both parties to start settlement negotiations. *Id.* at 527-28. Both were notified of the liability protection that would result from a settlement, but Dico refused to settle. *Id.* at 528.

[65] *Id.* at 527-32.

and section 113.[66] *Aviall* concerned a company, Aviall Services, Inc., that performed an environmental cleanup but was never subject to a CERCLA action.[67] Aviall brought claims for cost recovery under section 107 and contribution under section 113.[68] After researching the courts' precedent, Aviall amended its pleading seeking recovery only under section 113 assuming that the section 107 claim would be preserved in the section 113 claim.[69] Upon granting certiorari, the Supreme Court interpreted section 113's "during or following" statement, indicating the "natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."[70] Therefore, a court that allowed a section 113 claim, without a prior sections 106 or 107 action would make section 113's precondition void.[71]

Because *Aviall* directly undermined the Eighth Circuit's *Dico* opinion, the Eighth Circuit found it necessary to address the issue in light of the *Aviall* decision.[72] The Eighth Circuit, under *Atlantic*, was able to confront the issue of whether a liable party may recover costs advanced beyond its equitable share "from another liable party in direct recovery, or by section 107 contribution, or as a matter of federal common law."[73]

IV. INSTANT DECISION

In *Atlantic*, the Eighth Circuit examined whether CERCLA barred a party that voluntarily cleaned up a site for which it was only partially

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[66] *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

[67] *Id.* at 163-64. Aviall restored four aircraft engine maintenance sites in Texas and sought to recover some of those costs from the previous owner Cooper Industries, Inc. *Id.*

[68] *Id.* at 164. Aviall incurred at least $5 million in cleanup costs. *Id.*

[69] *Id.*

[70] *Id.* at 165-66. The Court found the "during or following" statement to create a condition precedent for a § 113(f) claim. *Atl. Research Corp.*, 459 F.3d 827, 833 (8th Cir. 2006).

[71] *Atl. Research Corp.*, 459 F.3d at 833-34. The Court also expressly declined to address the issue of whether Aviall could recover costs under § 107(a) even though it was a PRP. *Aviall*, 543 U.S. at 584.

[72] *Atl. Research Corp.*, 459 F.3d at 833-37.

[73] *Id.* at 834.

responsible from recovering any of its incurred costs from another liable party.[74] Despite already having addressed this issue in previous cases, such as *Dico*, the new precedent set forth in *Aviall* made it necessary for the Eighth Circuit to tackle the issue again. In reviewing the instant case, the court explicitly noted, "where the prior decision can be distinguished, or its rationale has been undermined, a subsequent decision can depart from the prior path."[75] The Eighth Circuit realized that when dealing with *Atlantic* it must analyze the intertwined history of CERCLA sections 107 and 113 through the lens of a post-*Aviall* microscope.[76]

The Eighth Circuit noted that the Second Circuit is the only court that has considered the question of whether a liable party can recover costs incurred from cleanup from other liable parties under section 107 since the *Aviall* decision.[77] Like the Eighth Circuit, the Second Circuit's precedent prior to *Aviall* would not allow a liable party to recover under section 107.[78] Upon revisiting the issue post-*Aviall*, the Second Circuit concluded that section 107 allowed a liable party to recover voluntarily incurred costs for cleanup from another liable party.[79]

In light of *Aviall*'s holding, the Eighth Circuit found the Second Circuit's reasoning that it is no longer sensible to view section 113(f)(1) as the only route available to liable parties seeking cleanup costs very persuasive.[80] The Eighth Circuit declared that if liable parties are able to use section 113 (in pre-*Aviall* conditions), then they should be barred from seeking contribution under section 107.[81] However, Atlantic was barred from using section 113 because Atlantic had not been sued under section 107, and thus the Eighth Circuit agreed with the Second Circuit in

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[74] *Id.* at 829.
[75] *Id.* at 830.
[76] *Id.* at 830-31.
[77] *Id.* at 834.
[78] Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998).
[79] Consol. Edison Co. v. UGI Utils., Inc., 423 F3d. 90, 100 (2d Cir. 2005). The Second Circuit, in its reasoning, distinguished *Edison* from *Bedford* in coming out with seemingly different conclusions. *Id.* at 100-01.
[80] *Id.* at 99. The court looked into § 107's language of "any other person" and found "no basis for reading into this language a distinction between so-called 'innocent' parties and parties [which] . . . would be held liable under section 107(a)." *Id.*
[81] *Atl. Research Corp.*, 459 F.3d at 834-35.

concluding that it does not make sense to bar liable parties from recovery under section 107.[82]

The Eighth Circuit expressly rejected the concept of viewing section 107 remedies "through a [section] 113 prism" as the circuit court did previously in *Dico*.[83] The Eighth Circuit rejected an approach that "categorically deprives a liable party of a [section] 107 remedy."[84] The court in *Atlantic* explicitly stated that parties may, "under appropriate procedural circumstances," bring suit to recover costs incurred under section 107.[85]

The Eighth Circuit went on to recognize the fact that section 107 allows a party to fully recover all costs incurred during cleanup.[86] Upon first glance, section 107 may seem counterproductive to hold a liable party (the party who cleaned the contaminated site) responsible for cleanup costs if that party can recover 100% of the cleanup costs.[87] In order to extinguish these worries, the court "reaffirm[ed] *Dico*'s holding that a liable party may not use [section] 107 to recover its full response cost."[88]

The Eighth Circuit then looked at Congress' intent in passing CERCLA.[89] The Eighth Circuit concluded that "[c]ontribution is crucial to CERCLA's regulatory scheme."[90] Following this conclusion, the court cited *Key Tronic Corp. v. United States*,[91] which stated, "'CERCLA is

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* The "appropriate procedural circumstances" are "parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under sections 106 or 107. *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* The Eighth Circuit follows the Second Circuit in establishing the fact that CERCLA is able to keep liable parties in check from full reimbursement by stating, "[i]f a plaintiff attempted to use § 107 to recover more than its fair share or reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)." *Id.* (citing Consol. Edison Co. v. UGI Utils., Inc., 423 F3d. 90, 100 n.9 (2d Cir. 2005)).
[89] *Id.* at 836. The Eighth Circuit stated, "[w]e discern Congress's intent by looking to CERCLA's language, its legislative history, its underlying purpose and structure, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Id.*
[90] *Id.*
[91] 511 U.S. 809 (1994).

designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'"[92] The *Atlantic* court found that when Congress passed section 113, its purpose was not to eliminate other methods of recovery because section 113 states in its savings clause that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under either sections 106 or 107.[93]

The Eighth Circuit reached its holding by combining the CERCLA language with the reasoning that if Congress wanted section 113 to completely replace section 107 then it would have done so expressly.[94] Congress did not intend CERCLA to punish parties that voluntarily cleaned up a contaminated site by categorically excluding them from a right of contribution.[95] The Eighth Circuit deemed that this interpretation is the only way to reconcile previous decisions "with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites."[96] If the court adopted the United States' reading of section 107,[97] the United States would be able to avoid liability by refusing to bring a CERCLA action or refusing to allow a liable party to settle.[98]

Due to the preceding reasoning, the Eighth Circuit concluded that a private party that takes it upon itself to clean up a site for which it may be liable, effectively barring it from contribution under section 113, is not

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[92] *Atl. Research Corp.*, 459 F.3d at 836 (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 819 n.13 (1994)). The Eighth Circuit points to the fact that when Congress looked at CERCLA in 1986, Congress "enacted an explicit right to contribution in [section] 113 . . . [which] reflects Congress's unambiguous intent to allow private parties to recover in contribution." *Id.*

[93] *Id.* (citing 42 U.S.C. § 9613(f) (2000)). The Eighth Circuit supports this view by also pointing towards § 113's legislative history that echoed "Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution." *Id.*

[94] *Id.*

[95] *Id.* ("We discern nothing in CERCLA's words suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting-indeed, penalizing-those who voluntarily assume such duties.").

[96] *Id.* (citing *Key Tronic*, 511 U.S. at 819, n.13).

[97] A liable party is not able to use § 107 based on the simple fact that the party is liable and not able to use § 113 until an action has been brought. *See* Brief for Appellee, *supra* note 12, at 8-9.

[98] *Atl. Research Corp.*, 459 F.3d at 837.

without remedy.[99] The liable party may file a section 107 claim against another liable party for direct recovery or contribution.[100]

V. COMMENT

After decades of litigation painted the prim rose path for various claims under CERCLA, the Supreme Court blurred the lines of distinction with its decision in *Aviall*.[101] The decision in *Aviall* has left many district and circuit courts scrambling to reconcile cases and address one or more of the unresolved issues left after the *Aviall* decision.[102] The majority of decisions since *Aviall* have focused on the issue of whether one PRP has the ability to bring an action against another PRP under section 107 of CERCLA.[103] Different district and circuit courts have handed down varying alternatives in answering the issue that *Aviall* explicitly refused to address.[104]

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[99] *Id.*

[100] *Id.*

[101] *See* Carter E. Strang, *The Resource Conservation and Recovery Act's Citizen Suits in a Post-*Cooper *Era*, 53 FED. LAW. 26 (Jul. 2006) ("The U.S. Supreme Court shook the world of environmental law with its decision in *Cooper Industries Inc. v. Aviall Services Inc.*"); David M. Winfrey, *Recovering From Cooper: Assessing Damage, Decisions and New Directions After Cooper Industries, Inc. v. Aviall Services, Inc.*, SL063 ALI-ABA 191 (2006) ("[T]he decision left little certainty within the PRP community as to grounds for PRPs to base a contribution and/or cost recovery action."); Richard O. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 TUL. ENVTL. L.J. 323, 337 (2005). Faulk and Bishop state:

> We also have returned [from the *Aviall* decision] with something quite unexpected and, indeed, something that upsets traditional and settled expectations—something that threatens the fabric so carefully developed to allocate environmental liabilities equitably among responsible parties—and something that, for almost twenty years, worked to promote the protection of our nation's environment.

Id..

[102] Winfrey, *supra* note 100, at 196.

[103] *Id.* at 196. *See also* Michael David Lichtenstein & Priya R. Masilamani, *Recent Developments in Toxic Torts and Environmental Law*, 41 TORT TRIAL & INS. PRAC. L.J. 755, 767 (2006); Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law In Private Cleanup Costs Disputes*, 33 ECOLOGY L.Q. 1, 50 (2006).

[104] Winfrey, *supra* note 100, at 196.

One approach that district courts have taken post-*Aviall* is to hold that a PRP has no right to seek contribution under section 107(a).[105] It is readily apparent that these district courts have approached these cases by following their respective circuit courts' precedent, while simultaneously asking them to review the precedent in light of *Aviall*.[106] The most reasonable explanation district courts state regarding why circuit courts should overrule the relevant precedent[107] is that "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle."[108] This result would certainly be counterproductive to CERCLA's intention to "'encourage the timely cleanup of hazardous waste sites'"[109] and "'place the cost of that response on those responsible for creating or maintaining the hazardous condition.'"[110] The problem with this alternative is straightforward and, therefore, shows this option is an inefficient and uneconomical way to address the issue left by *Aviall*.

A second alternative courts have taken is when a PRP has a section 107(b) defense available,[111] the PRP is deemed "innocent" and can pursue

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[105] *See* Montville Twp. v. Woodmont Builders, LLC., 2005 WL 2000204 (D. N.J. Aug. 17, 2005) (relying upon pre-*Aviall* Third Circuit precedent that only innocent parties can sue under section 107, thus barring a PRP claim.); Mercury Mall Assoc., Inc. v. Nick's Market, Inc., 368 F. Supp. 2d 513 (E.D. Va. 2005) (following Fourth Circuit law, but stating that the Fourth Circuit should review case as a result of the *Aviall* decision); City of Waukesha v. Viacom Inter., Inc., 362 F. Supp. 2d 1025 (E.D. Wis. 2005) (following Seventh Circuit law stating only innocent parties can sue under section 107).

[106] Winfrey, *supra* note 100, at 197 n.a1 ("[S]ome district courts . . . have taken a 'hands tied' approach.").

[107] *See* Mercury Mall Assoc., 368 F. Supp. 2d 513.

[108] *Atl. Research Corp.*, 459 F.3d 827, 837 (8th Cir. 2006).

[109] Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-36 (8th Cir. 1995) (quoting General Elec. Co. v. Litton Indus. Automation Systems, Inc., 920 F.2d 1415, 1418 (8th Cir. 1990)).

[110] *Id.* (quoting United States v. Mexico Feed and Seed Co., Inc., 980 F.2d 478, 486 (8th Cir. 1992)).

[111] 42 U.S.C. § 9607(b) (2000):

> There shall be no liability . . . for a person . . . who can establish by a preponderance of the evidence that . . . the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with

a section 107 claim.[112] These decisions recognize the fact that a PRP may be left without a judicial remedy if not allowed to assert a section 107 claim. One problem with this approach, as with the first approach, is that there would still be instances in which the government could insulate itself from responsibility by not bringing an action and refusing settlement when a PRP did not have a section 107(b) defense available.[113] Still, in other circumstances, this approach would virtually render section 113 void.[114] In these instances, a PRP that permitted the three-year limitation period allowed under section 113 to expire[115] could take advantage of the more generous provisions allowed under section 107.[116] The numerous inadequacies with this "middle of the road" approach show that it is not the most desirable path for courts or the parties.

The third alternative courts could adopt as post-*Aviall* precedent is the approach taken by *Atlantic*[117] in allowing a PRP the right to seek

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> a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

[112] City of Rialto v. United States Dep't of Def., 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 16, 2005).

[113] *Atl. Research Corp.*, 459 F.3d at 837.

[114] New Castle County v. Haliburton NUS Corp., 111 F.3d 1116, 1123 (3d Cir. 1997).

[115] 42 U.S.C. § 9613(g)(1):

> Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following: (A) [t]he date of the discovery of the loss and its connection with the release in question [or] (B) [t]he date on which regulations are promulgated under section 9651(c) of this title.

[116] 42 U.S.C. § 9607(a).

[117] *Atl. Research Corp.*, 459 F.3d at 837.

contribution under section 107.[118] Absent any Congressional amendment to CERCLA,[119] the Eighth Circuit's decision in *Atlantic* appears to be the most efficient and effective alternative for courts to follow.[120]

The Eighth Circuit's internal logic for determining its holding in *Atlantic* was based soundly upon the altered landscape of post-*Aviall* environmental law. The Eighth Circuit used common sense to determine that it was no longer sensible to allow section 113 to be a PRP's exclusive remedy[121] and found that a plain reading of section 107 permitted Atlantic's recovery because Atlantic was "any other person."[122] The Eighth Circuit also thwarted critics' main concern when it addressed the issue of total cost recovery under section 107.[123] The Eighth Circuit pointed out that if a plaintiff attempted to recover more than its fair share, it would be open to a counterclaim by the defendant and, therefore, the Eighth Circuit reaffirmed *Dico's* holding that a liable party may not use

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[118] For cases in which courts have chosen this alternative, *see* Consol. Edison Co. v. UGI Utils., Inc., 423 F3d. 90, 100 (2d Cir. 2005) (PRP conducting voluntary cleanup may seek contribution under section 107(a)); Viacom, Inc. v. United States, 2005 WL 1902849 (D.D.C. Jul. 19, 2005) (Finding that a 'plain reading' of section 107 permits recovery by 'any other person' and that the result was supported by the policy goal of encouraging cleanups); Kotrous v. Goss-Jewett Co. of N. Cal., 2005 WL 1417152 (E.D. Cal. June 16, 2005) (Finding under controlling Ninth Circuit precedent); Metro. Water Reclamation Dist. Of Greater Chicago v. Lake River Corp., 365 F. Supp. 2d 913 (N.D. Ill. 2005) (Relying on 'any other person' language in section 107 and the policy goals of CERCLA); Vine St. LLC v. Keeling, 362 F. Supp. 2d 754 (E.D. Tex. 2005).

[119] E.I. DuPont de Nemours & Co. v. United States, 460 F. 3d 515, 543 (3d Cir. 2006) ("the debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner . . . or should favor settlements and other enforcement actions . . . is a matter for Congress, not our Court.").

[120] Donn L. Calkins, *CERCLA Contribution Actions After* Cooper v. Aviall, 34 COLO. LAW. 99, 103 (Sept. 2005). Calkins states:

> Further, any fine-tuning of the rights afforded by [section] 107 or [section] 113 likely will come from the courts rather than from Congress. Legislative fixes to CERCLA are rare, time-consuming, and contentious. Therefore, for the foreseeable future, practitioners will need to keep a close eye on cases making their way through the courts to determine the shape of CERCLA contribution actions.

Id.

[121] *Atl. Research Corp.*, 459 F.3d at 834.

[122] *Id.*

[123] *Id.*

section 107 to recover its full response costs.[124] The last point covered by the Eighth Circuit addressed section 113's savings clause and stated that Congress' enactment of section 113 reflected no intent to eliminate other rights of contribution available to a party.[125] Using this line of reasoning, the Eighth Circuit built a solid foundation of new CERCLA precedent upon the unsettled territory of post-*Aviall* environmental law.

There are several results and ramifications that flow from the Eighth Circuit's decision in *Atlantic*, which shows the Eighth Circuit chose the most effective and efficient alternative available. One major ramification, from which other, smaller results flow, is the fact that allowing PRPs to sue under section 107 achieves CERCLA's goal of providing fast and effective cleanups of contaminated sites.[126] A PRP facing the decision of whether to voluntarily clean up a contaminated area or wait until forced to clean the site by a government agency would understandably be hesitant to voluntarily clean the site if the PRP faced the possibility of not being able to recover its costs under CERCLA.[127] Any incentive to hold-off government enforcement of clean up does not work towards CERCLA's goal of timely cleanups.[128] However, after the Eighth Circuit's decision in *Atlantic*, PRPs no longer have to worry about the possibility of not having their days in court because they are allowed to bring suit under section 107.[129]

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[124] *Id.* at 835.

[125] *Id.* at 836.

[126] Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-36 (8th Cir. 1995).

[127] Aronovsky, *supra* note 102, at 53-54. Aronovsky states:

> A PRP incurring cleanup costs at a site faces a series of difficult choices in light of *Aviall*: (1) Should the PRP make no change in its behavior and assume that the court of appeals will reverse prior decisions and hold that a PRP may bring a section 107(a) claim? (2) Should the PRP refuse "voluntarily" to comply with a regulatory agency cleanup order and wait to be sued under section 106 (in the rare instance that EPA is involved in the site and issues an administrative order) or section 107(a) in order to obtain CERCLA cost contribution from other PRPs? (3) Should the PRP try to negotiate a settlement with the EPA or a state regulatory agency in order to trigger CERCLA contribution rights?

Id.

[128] *Id.*

[129] *Atl. Research Corp.*, 459 F.3d at 837.

Even in instances in which cleanup has already occurred, the Eighth Circuit's decision offers the best option to facilitate a timely resolution to party liability when compared to the other alternatives.[130] Once a PRP has cleaned a toxic waste site, the PRP will likely seek a settlement in order to recoup a portion of the costs. At this point, the Eighth Circuit's suggestion that any other alternative would allow the government to insulate itself from liability by not bringing an action and refusing settlement[131] becomes extremely relevant. A government agency facing the decision of whether to remain a mere bystander, which will not bring liability, or negotiate a settlement, which will open claims for contribution, will be inclined not to approach the negotiating table.[132] Thus, "a PRP seeking to settle with a [governmental] agency in order to trigger [any] contribution rights often will lack negotiating power" under the other alternatives.[133] PRPs that are put in this disadvantageous position may be forced to accept unproductive terms if they are even able to get the agency to the negotiating table.[134]

In an *Atlantic* jurisdiction, PRPs are given the powerful tool of increased leverage in negotiations with government agencies.[135] If the government does not want to play fair, then a PRP can resolve the issue effectively and efficiently by bringing the government into court under a section 107 claim.[136] Governments facing the alternative of negotiating agreeable terms with a PRP versus the possibility of owing a higher amount announced by judicial decree have an incentive to bring the situation to a timely conclusion.[137]

Atlantic's decision creates the incentive for a timely conclusion, which is an effective way to achieve one of CERCLA's primary objectives.[138] One of the main problems that arise under the other

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[130] *See* Winfrey, *supra* note 100; Aronovsky, *supra* note 102, at 33; *but see* Petition for Writ of Certiorari, United States v. Atl. Research Corp., No. 06-562 (Oct. 24, 2006).
[131] *Atl. Research Corp.*, 459 F.3d at 837.
[132] *See generally* Winfrey, *supra* note 100.
[133] Aronovsky, *supra* note 102, at 57.
[134] *Id.*
[135] *See generally id.*
[136] *Atl. Research Corp.*, 459 F.3d at 836-37.
[137] *See generally* Aronovsky, *supra* note 102.
[138] Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-36 (8th Cir. 1995).

alternatives that the Eighth Circuit rejected is that they effectively force one party to wait for the other party to move.[139] This waiting game slows down the process considerably and may not lead to a conclusion at all.[140] However, the overall effect of *Atlantic's* decision to allow PRPs the right to sue under section 107 will eventually show that *Atlantic's* solution allows PRPs and other parties involved to become proactive in the cleanup of contaminated sites and effectuate efficient and effective allocations of costs to those parties responsible.[141]

In light of the Supreme Court's decision in *Aviall*, the Eighth Circuit correctly identified the pitfalls presented in the environmental law landscape[142] and took the best plan of action available. The other alternatives available to the courts were ones in which the government would be allowed to adequately shield itself from possible liability against PRPs.[143] Additionally, the other alternatives do not provide a means in which contaminated sites will be promptly and efficiently cleaned,[144] which is the main goal of CERCLA.[145] The Eighth Circuit's decision in *Atlantic* accomplishes CERCLA's goal and holds the government accountable for its liability by allowing a PRP to pursue an action under section 107 against another liable party.[146]

VI. CONCLUSION

Atlantic answered a question that many circuit courts will soon have to address in light of *Aviall*. The Eighth Circuit takes an approach that does not allow the government to shield itself from potential liability. The decision also maintains section 113's viability while preventing

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[139] Aronovsky, *supra* note 102, at 55 ("[S]ome commentators suggested that PRPs delay cleanups and wait for a government agency to initiate enforcement litigation as a trigger for section 113(f)(1) contribution rights . . . . [This] would seem inconsistent with the goal of encouraging prompt, efficient cleanups.").
[140] *Id.* at 53-54; Winfrey, *supra* note 100, at 195.
[141] *Atl. Research Corp.*, 459 F.3d at 836.
[142] *Id.* at 834-37.
[143] *Id.* at 837.
[144] Aronovsky, *supra* note 102, at 55.
[145] Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-36 (8th Cir. 1995).
[146] *Atl. Research Corp.*, 459 F.3d at 837.

section 107 from overwhelming it. The alternative chosen by the Eight Circuit does not present the problem of 100% cost recovery because section 107 allows defendants to counterclaim against an overreaching plaintiff. Nor does the court's approach allow parties to play a waiting game in order to see which party will act first in the cleanup process. Furthermore, the decision by the circuit court essentially levels the playing field for parties that wish to negotiate a settlement without judicial intervention. Conclusively, the Eighth Circuit Court of Appeal's holding that a potentially liable party may pursue an action for recovery or contribution under CERCLA section 107 best allows CERCLA to achieve its goal of prompt, effective cleanups of contaminated sites.

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