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## CERCLA: To Clean or Not to Clean - The Supreme Court Says There is no Question. *U.S. v. Atl. Research Corp.*

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# CERCLA: TO CLEAN OR NOT TO CLEAN—THE SUPREME COURT SAYS THERE IS NO QUESTION

*U.S. v. Atl. Research Corp.*<sup>1</sup>

## I. INTRODUCTION

Pollution takes many shapes and forms. From the air we breathe, to the food we eat, to the water we drink to the soil below us, to the noise around, pollution contributes to increased health problems and the degradation of the environment. Since the publication of Rachel Carson's environmental novel *Silent Spring*<sup>2</sup> in 1962, heightened public awareness of environmental problems prompted calls for proactive steps to improve the quality of life by improving the quality of the environment.<sup>3</sup> The government, at all levels, responded to the demands through the promulgation of regulations designed to reduce environmental pollution levels. Passage and implementation of the Clean Air Act,<sup>4</sup> Clean Water Act,<sup>5</sup> and Comprehensive Environmental Response, Compensation, and Liability Act of 1980,<sup>6</sup> has furthered the development and enforcement of regulations to protect the general public from exposure to hazardous contaminants. In its recent decision, *U.S. v. Atlantic Research Corp.*,<sup>7</sup> the United States Supreme Court took elevated steps to ensure hazardous sites are identified and cleaned in a timely, efficient manner by providing responsible parties with the opportunity to recover costs incurred in the voluntary clean-up of contaminated sites.<sup>8</sup>

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<sup>1</sup> 127 S.Ct. 2331 (2007).

<sup>2</sup> RACHEL CARSON, *SILENT SPRING*, (Houghton Mifflin 1962).

<sup>3</sup> See Jack Lewis, *The Birth of the EPA*, EPA Journal, Nov. 1985, available at <http://www.epa.gov/history/topics/epa/15c.htm> ("EPA today may be said without exaggeration to be the extended shadow of Rachel Carson. The influence of [*Silent Spring*] has brought together over 14,000 scientists, lawyers, managers, and other employees across the country to fight the good fight for 'environmental protection.'").

<sup>4</sup> 42 U.S.C. § 7401 (2000).

<sup>5</sup> 33 U.S.C § 1251 (2000).

<sup>6</sup> 42 U.S.C § 9601 (2000).

<sup>7</sup> *Atl. Research Corp.*, 127 S.Ct. 2331.

<sup>8</sup> *Id.* at 2333-34.

## II. FACTS AND HOLDING

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) contains two provisions in which private parties can recoup costs for cleaning contaminated sites.<sup>9</sup> Section 107(a) allows for the recovery of costs incurred in site cleanup and section 113(f)(1) grants potentially responsible parties (PRP(s)) a right to contribution from other liable parties.<sup>10</sup> At the heart of this case is a determination of whether, and under what provision, one PRP may recover cleanup costs from another.<sup>11</sup>

In *U.S. v. Atl. Research Corp.*, Atlantic Research leased property at a facility operated by the Department of Defense.<sup>12</sup> Under contract with

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<sup>9</sup> *Id.*

<sup>10</sup> 42 U.S.C. §§ 9607, 9613 (2000); Section 107(a), codified in 42 U.S.C. section 9607(a), defines four categories of potentially responsible parties (PRPs) 42 U.S.C. § 9607(a)(1)-(4). It also makes them 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;” and “(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.” 42 U.S.C. §§ 9607(a)(4)(A)-(B) (2000). Section 113(f)(1) is codified in 42 U.S.C. section 9613(f)(1) and states in pertinent part: “Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a) [42 U.S.C. § 9607(a)].” 42 U.S.C. § 9613(f)(1) (2000).

<sup>11</sup> (11) *U.S. v. Atl. Research Corp.*, 127 S.Ct. 2331, 2334 (2007). Section 107(a)(1)-(4) lists four categories of persons as PRPs who are liable to other persons for assorted costs: (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 of 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 [various costs].

42 U.S.C. § 9607(a)(1)-(4) (2000).

<sup>12</sup> *Atlantic*, 127 S.Ct. at 2335.

the United States, Atlantic Research retrofitted rocket motors by removing propellant from the motors with pressurized water and burning the waste.<sup>13</sup> The resulting wastewater and burned fuel contaminated the soil and groundwater on the leased property.<sup>14</sup> Atlantic Research voluntarily incurred site cleanup expenses, and subsequently sought to recover a portion of its costs by suing the United States under both recovery provisions.<sup>15</sup> However, after the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, Atlantic Research amended its complaint to seek damages solely under section 107(a).<sup>16</sup>

The United States moved to dismiss Atlantic Research's claim, arguing section 107(a) does not allow Atlantic Research, a PRP in itself, a cause of action to recover cleanup costs against another PRP.<sup>17</sup> The District Court granted the motion and dismissed the case.<sup>18</sup>

On appeal, the Eighth Circuit reversed the District Court's decision, reasoning section 113(f)(1) "does not provide 'the exclusive route by which [PRPs] may recover cleanup costs.'"<sup>19</sup> The Court held that section 107(a)(4)(B) permitted suit by any person other than those authorized under section 107(a)(4)(A) and consequently allowed Atlantic Research a cause of action.<sup>20</sup> On review, the United States Supreme Court classified the term "other persons" under section 107(a)(4)(B) and determined it afforded Atlantic Research a cause of action against a fellow PRP.<sup>21</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Supreme Court held section 113(f)(1) authorized contribution claims only "during or following" a civil action under 42 U.S.C. section 9606 or 9607(a). *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). Because Atlantic was not previously or currently involved in litigation under 42 U.S.C. sections 9606 or 9607(a), they would not have a contribution claim under section 113(f)(1) following the *Cooper* decision. *Id.*

<sup>17</sup> *Atl. Research Corp.*, 127 S.Ct. at 2335.

<sup>18</sup> *Id.* *Atl. Research Corp. v. United States*, 2005 U.S. Dist. LEXIS 20484 (June 1, 2005).

<sup>19</sup> *Atl. Research Corp. v. United States*, 459 F.3d 834 (8th Cir. 2006) (citing *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90 (2nd Cir. 2005).

<sup>20</sup> *Atl. Research Corp.*, 127 S.Ct. at 2335.

<sup>21</sup> *Id.* at 2335-36.

The United States argued the term “other persons” referred to anyone not identified as a PRP in sections 107(a)(1)-(4) and that section 107(a)(4)(B) allowed suits only by non-PRPs, barring Atlantic Research’s claim.<sup>22</sup> To the contrary, Atlantic Research argued section 107(a)(4)(B) should be read in accordance with the immediately preceding subparagraph.<sup>23</sup> Under this interpretation, section 107(a)(4)(B) would provide anyone other than the United States, a State, or an Indian tribe—those parties specifically listed in section 107(a)(4)(A) — with a cause of action against another PRP.<sup>24</sup> Because Atlantic Research fit within the classification of “other persons” as read in accordance with section 107(a)(4)(A), the Supreme Court held section 107(a) afforded PRPs - such as Atlantic Research - a cause of action for the recovery of cleanup costs against other PRPs.<sup>25</sup>

### III. LEGAL BACKGROUND

CERCLA is a federal law implemented with the objective to promote the cleanup of sites contaminated with hazardous pollutants<sup>26</sup> whose goals include shifting cleanup costs to parties responsible for “creating or maintaining the hazardous condition” and “encouraging the timely clean-up of hazardous waste sites.”<sup>27</sup> CERCLA authorizes the Environmental Protection Agency (EPA) to promulgate a National Contingency Plan that outlines the precise steps that parties must take when cleaning a hazardous waste site.<sup>28</sup> Additionally, the EPA may obtain an injunction or administrative compliance order directing responsible parties to respond to the contamination of sites deemed

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2336.

<sup>25</sup> *Id.* at 2339.

<sup>26</sup> *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2nd Cir. 2005).

<sup>27</sup> *Id.* at 94 (citing *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935-36 (8th Cir. 1995)).

<sup>28</sup> *Metro. Water Reclamation Dist. of Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007).

imminent threats.<sup>29</sup> Finally, the EPA may initiate cleanup on its own using monies from the “Hazardous Substances Superfund,” which was established by CERCLA and funded through appropriations, fees, and taxes.<sup>30</sup>

To facilitate timely cleanup of contaminated sites, CERCLA encourages parties to voluntarily “pursue appropriate environmental response actions.”<sup>31</sup> Accordingly, the law contains three provisions in which liable parties may be reimbursed for their efforts from other like-situated parties: (1) Section 107(a) allows for the recovery of cleanup and prevention costs;<sup>32</sup> (2) Section 113(f)(1) creates a contribution right for parties liable or potentially liable under CERCLA sections 107(a)(1)-(4);<sup>33</sup> and (3) Section 113(f)(3)(B) creates a contribution right for parties that have resolved their liability by settlement.<sup>34</sup> Sections 107(a) and 113(f)(1) constitute the focus of the instant decision.

#### A. Statutory Background and Application

Section 107(a) imposes liability on various parties for “all costs of removal or remedial action incurred by the United States Government or a State ... not inconsistent with the national contingency plan.”<sup>35</sup> The EPA regularly brings suit under section 107(a) to recover costs incurred restoring the polluted area and preventing future contamination.<sup>36</sup> Actions instituted under section 107(a) hold responsible parties strictly, jointly, and severally liable which allows for cost recovery in full from any responsible party, regardless of their comparative fault.<sup>37</sup> Additionally, section 107(a) allows private parties to pursue such actions for “cost

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Consolidated*, 423 F.3d at 94 (citing H.R. REP. NO. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120).

<sup>32</sup> 42 U.S.C. § 9607(a) (2006).

<sup>33</sup> 42 U.S.C. § 9613(f) (2006).

<sup>34</sup> 42 U.S.C. § 9613(f)(3)(B).

<sup>35</sup> 42 U.S.C. § 9607(a)(4)(A) (2006).

<sup>36</sup> *Consolidated*, 423 F.3d at 94. *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997, 999 (2nd Cir. 1991).

<sup>37</sup> *Metro. Water Reclamation Dist. of Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007).

recovery”<sup>38</sup> by holding responsible parties liable for “any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.”<sup>39</sup>

As drafted in 1980, CERCLA failed to include an express provision granting parties against whom liability had been or could be imposed (PRPs)<sup>40</sup> a means for recovering cleanup costs from fellow PRPs. Notwithstanding the absence of specific language granting a right to contribution, certain courts held that as a matter of common law section 107(a) provided PRPs a right to sue other parties to recover voluntarily incurred response costs.<sup>41</sup> Courts began to split on this issue in 1986 when Congress amended CERCLA with the Superfund Amendment and Reauthorization Act (SARA)<sup>42</sup> and enacted section 113(f)(1), which created an expressed contribution right for parties liable or potentially liable under CERCLA.<sup>43</sup>

Section 113(f)(1) states “any person may seek contribution from any other person who is liable or potentially liable under section 107(a) during or following any civil action under section 106 or under section 107(a).”<sup>44</sup> Following the implementation of section 113(f)(1), certain courts concluded PRPs capable of being sued under section 107(a) could not subsequently seek reimbursement from other potentially responsible

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<sup>38</sup> *Consolidated*, 423 F.3d at 94.

<sup>39</sup> 42 U.S.C. § 9607(a)(4)(B) (2006) (emphasis added). *See also* Key Tronic Corp. v. United States, 511 U.S. 809,818 (1994) (noting that § 107(a) “unquestionably provides a cause of action for private parties to seek recovery of cleanup costs”).

<sup>40</sup> *Consolidated*, 423 F.3d at 97.

<sup>41</sup> *Consolidated*, 423 F.3d at 95; *see* Sand Springs Home v. Interplastic Corp., 670 F.Supp. 913, 916-917 (N.D. Okla. 1987) (holding that a CERCLA contribution right existed as a matter of federal common law); *United States v. New Castle County*, 642 F.Supp. 1258, 1262-69 (D. Del. 1986); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 227-29 (W.D. Mo. 1985) (holding that a CERCLA contribution right was implied in the statute’s language).

<sup>42</sup> Jeannette Paull, *Neither Innocent Nor Proven Guilty: The Aviall Services v. Cooper Industries Dilemma*, 13 BUFF. ENVTL L.J. 31 (2005); *see generally* Act to Extend and Amend the Comprehensive Environmental Response, Pub. L. No. 99-499, 100 Stat. 1613 (2005).

<sup>43</sup> 42 U.S.C. § 9613(f)(1) (2006).

<sup>44</sup> *Id.*

parties under the same provision.<sup>45</sup> Rather, the claims were “necessarily actions for contribution, and [were] therefore governed by the mechanisms set forth in section 113(f).”<sup>46</sup> In addition, SARA added section 113(f)(2)<sup>47</sup> which encourages parties to “settle with the government by insulating any party that settles from being sued in a contribution action.”<sup>48</sup>

*B. Summary of Relevant Case Law*

In 2004, the United States Supreme Court provided further confusion in its interpretation of section 113(f)(1) with the decision of *Cooper Indus., Inc. v. Aviall Serv., Inc.*<sup>49</sup> In *Cooper*, a purchaser discovered that he and the prior owner contaminated their property when hazardous substances leaked into the ground.<sup>50</sup> Despite notifying appropriate federal and state officials about the contamination, neither party took judicial measures compelling the purchaser to clean the area.<sup>51</sup> The purchaser thereafter engaged in voluntary cleanup and subsequently sought contribution from the previous owner under section 113(f)(1).<sup>52</sup> The Court reversed the decision of the Fifth Circuit that allowed the purchaser relief under section 113(f)(1), holding the language of section 113(f)(1) allowed contribution claims only “during or following” a civil action under sections 106 or 107(a).<sup>53</sup> Because the purchaser was never subject to action under sections 106 or 107(a), he was not authorized to seek contribution under section

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<sup>45</sup> *Consolidated*, 423 F.3d at 95; see *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997) (“[W]hile § 107 created the right of contribution, the ‘machinery’ of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107.”).

<sup>46</sup> *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998).

<sup>47</sup> 42 U.S.C. § 9613(f)(2) (2000).

<sup>48</sup> *Metro. Water Reclamation Dist. of Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 828. (7th Cir. 2007).

<sup>49</sup> *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

<sup>50</sup> *Id.* at 163-64.

<sup>51</sup> *Id.* at 164.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 167.

113(f)(1).<sup>54</sup> Additionally, the Court declined to address the issue of whether the purchaser, a fellow PRP, could recover costs under section 107(a) as it was not raised or considered in the lower courts.<sup>55</sup>

*Cooper* held that a PRP could only bring a contribution claim under section 113(f)(1) during or following a civil action under sections 106 or 107(a)<sup>56</sup>. However, *Cooper* failed to establish if, and under what provision, a PRP who is *not* the subject of a civil action under sections 106 or 107(a) may recover voluntary cleanup costs from a fellow PRP. Subsequently, circuits were split on how to treat PRPs seeking to recover voluntarily incurred cleanup costs.

In *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, the Second Circuit held that PRPs may bring an action under section 107(a) for response costs incurred voluntarily.<sup>57</sup> Consolidated Edison sought reimbursement from the operator of one of its power plants for cleanup costs it incurred in cleaning hazardous waste.<sup>58</sup> The complaint sought damages under both section 107(a) and section 113(f)(1). Based on the *Cooper* decision, the court rejected the claim under section 113(f)(1) as Consolidated Edison was not and had not been the subject of litigation under either section 106 or section 107(a).<sup>59</sup> Instead, the court concluded that section 107(a) authorizes PRPs a suit to recover voluntary response costs.<sup>60</sup>

Recently, in *Metro Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.* the Seventh Circuit allowed PRPs a right of action under section 107(a).<sup>61</sup> Metropolitan Waters leased a large parcel of land to Lake River Corporation, a subsidiary of North American Galvanizing and Coatings, Inc..<sup>62</sup> Lake River developed the property by constructing a business to store, mix, and package industrial chemicals for

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2nd Cir. 2005).

<sup>58</sup> *Id.* at 93.

<sup>59</sup> *Id.* at 95.

<sup>60</sup> *Id.* at 100.

<sup>61</sup> 473 F.3d 824 (7th Cir. 2007).

<sup>62</sup> *Id.* at 825.

personal and commercial use.<sup>63</sup> The business involved the acceptance of large amounts of chemicals that were stored on the property in large, above-ground containers which eventually leaked over 12,000 gallons of chemicals into the soil and groundwater.<sup>64</sup> The industrial chemicals were deemed “hazardous substances” by CERCLA standards and posed “imminent danger” to the environment.<sup>65</sup> Metropolitan Waters voluntarily cleaned the area and subsequently sought to recover costs from Lake River Corporation and North American under section 107(a) and section 113(f)(1).<sup>66</sup> The Seventh Circuit held that PRPs who voluntarily undertake cleanup actions have an implied right to contribution under section 107(a) from other responsible parties.<sup>67</sup>

Contrary to Second and Seventh Circuit holdings, the Third Circuit reached a different conclusion in *E.I. Dupont De Nemours & Co. v. United States*.<sup>68</sup> In *E.I. Dupont*, the company owned property which was “owned or operated by the United States at various times during World War I, World War II, and/or the Korean War, during that time the United States was responsible for some contamination.”<sup>69</sup> The company voluntarily incurred cleanup costs in absence of a section 106 or section 107(a) action and thereafter sought contribution from the United States.<sup>70</sup> The District Court and Third Circuit rejected the company’s claim. The Third Circuit determined it was bound by precedent and held that “a PRP seeking to offset its cleanup costs must invoke contribution under section 113 . . . .”<sup>71</sup> The court reasoned that under CERCLA, “Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement.”<sup>72</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 825.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 460 F.3d 515, 547-548 (3d Cir. 2006).

<sup>69</sup> *Id.* at 525.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 528.

<sup>72</sup> *Id.* at 541.

#### IV. INSTANT DECISION

In the instant case, the Supreme Court determined “the parties’ dispute centers on what ‘other persons’ may sue under section 107(a)(4)(B).”<sup>73</sup> Applying rules of statutory interpretation and reviewing the statute as a whole, the Court determined “[I]t is natural to read the phrase ‘any other person’ by referring to the immediately preceding section 107(a)(4)(A) which permits suits only by the United States, a State, or an Indian Tribe.”<sup>74</sup> The phrase ‘any other person’ therefore means any person other than those three.”<sup>75</sup> Accordingly, the Court determined “the plain language of [section 107(a)(4)(B)] authorizes cost-recovery actions by any private party, including PRPs.”<sup>76</sup>

Further, the Court noted that if they were to accept the Government’s argument that section 107(a)(4)(B) provides relief for innocent parties, specifically excluding those described in section 107(a)(1)-(4), section 107(a)(4)(B) would be rendered moot as nearly all parties involved in the ownership or use of the land fall within the purview of these sections.<sup>77</sup> Under the Government’s approach, the Court noted, it is unclear who would classify for relief under section 107(a)(4)(B), rendering it “a dead letter.”<sup>78</sup> The Court rejected the Government’s theory noting “[w]e must have regard to all words used by Congress, and as far as possible give effect to them.”<sup>79</sup>

The Government also argued the Court’s reading of section 107(a) will cause friction between sections 107(a) and 113(f)(1) by allowing PRPs a choice between the two provisions.<sup>80</sup> The Government claimed

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<sup>73</sup> *Atl. Research Corp.*, 127 S.Ct. at 2335.

<sup>74</sup> *Id.* at 2336.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2236-37

<sup>78</sup> *Id.* at 2337.

<sup>79</sup> *Id.* at 2337 (citing *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 475 (1911)).

<sup>80</sup> *Id.* at 2337.

parties will choose section 107(a) over section 113(f)(1) in order to evade section 113(f)(1)'s more restrictive statute of limitations, to seek joint and several liability under section 107(a) rather than equitable distribution under section 113(f)(1), and to disregard the settlement bar set forth in section 113(f)(2).<sup>81</sup> The Court rejected each contention in turn.<sup>82</sup>

The Court began by reviewing the procedural differences between sections 107(a) and 113(f)(1). "Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under section 106 or section 107(a). And section 107(a) permits cost recovery by a private party that has itself incurred clean-up costs."<sup>83</sup> Procedurally, a PRP who seeks recovery under section 113(f)(1) has already incurred costs as a result of its liability and now seeks to recoup from other liable parties.<sup>84</sup> Because the PRPs were reimbursing cleanup costs already paid, they did not incur their own personal costs and were therefore ineligible for recovery under section 107(a).<sup>85</sup> In contrast, recovery under section 107(a) arises when parties voluntarily incur cleanup costs and then seek financial assistance from liable parties.<sup>86</sup> Parties eligible under section 107(a) have not been the subject of government action under sections 106 or 107.<sup>87</sup>

The Court found that the provisions provide for recovery in two distinct situations, therefore eliminating the scenario one may choose section 107(a) over section 113(f)(1) for the less restrictive statute of limitations period.<sup>88</sup> For the same procedural reasons, the Court also rejected the Government's contention that PRPs could avoid the equitable

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<sup>81</sup> *Id.* at 2337; the settlement bar refers to section 113(f)(2) which provides "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2) (2000). The Government contends recovery under both sections 107(a) and 113(f)(1) will result in fewer settlements for fear of recovery under both a settlement agreement and section 107(a). *Atl. Research Corp.*, 127 S.Ct. 2331, 2337.

<sup>82</sup> *Atl. Research Corp.*, 127 S.Ct. 2331, 2337.

<sup>83</sup> *Id.* at 2338.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2338.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

apportionment of costs under section 113(f)(1) for joint and several liability under section 107(a).<sup>89</sup> Additionally, the Court noted that “the choice of remedies simply does not exist.”<sup>90</sup> Regardless, a defendant PRP under a section 107(a) claim could avoid an inequitable distribution of costs by filing a section 113(f)(1) counterclaim.<sup>91</sup> In doing such, “the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”<sup>92</sup>

Finally, the Court rejected the argument that allowing PRPs to recover under section 107(a) will result in a disregard for the settlement provisions provided in section 113(f)(2).<sup>93</sup> First, the Court noted that section 113(f)(2) only prohibits contribution claims against “[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . . .”<sup>94</sup> The United States argued that the provision does not protect against liability under section 107(a) making parties hesitant to enter into settlement agreements for fear they will be held additionally liable under section 107(a).<sup>95</sup> However, the Court doubted the provision would discourage settlement as defendant PRPs can still file section 113(f)(1) counterclaims for equitable apportionment.<sup>96</sup> Further, the Court stated “applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus.”<sup>97</sup>

Accordingly, the Court affirmed the judgment of the Court of Appeals and held “[b]ecause the plain terms of section 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action.”<sup>98</sup>

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<sup>89</sup> *Id.* at 2338-39.

<sup>90</sup> *Id.* at 2339.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; section 113(f)(2) is codified in 42 U.S.C. sec. 3613(f)(2) (2000).

<sup>94</sup> 42 U.S.C. § 9613(f)(2) (2006).

<sup>95</sup> *Id.* at 2339.

<sup>96</sup> *Id.*

<sup>97</sup> *Atl. Research Corp.*, 127 S.Ct. 2331, 2338 (citing RESTATEMENT (SECOND) OF TORTS § 886A(2) (1977) (“No tortfeasor can be required to make contribution beyond his own equitable share of the liability.”))

<sup>98</sup> *Id.* at 2339.

## V. COMMENT

Through the application of basic statutory interpretation, the United States Supreme Court reached a decision in *Atlantic* that single-handedly serves to promote the dual aims of CERCLA—encouraging the voluntary clean-up of contaminated sites and holding polluters liable for their actions.<sup>99</sup> By allowing PRPs who voluntarily incur cleanup costs a cause of action under section 107(a), the Court eased fears of a chilling effect on voluntary cleanup under *Cooper* and furthered long-term benefits to the environment.<sup>100</sup>

Following the *Cooper* decision, proponents of voluntary cleanup worried PRPs would refuse to undertake voluntary remediation for fear they would not recover response costs from other contributing, liable parties.<sup>101</sup> PRPs were forced to weigh the benefits of voluntary cleanup with the concern against the possibility of recovering costs.<sup>102</sup> This analysis included consideration of “[t]he relative speed and cost-effectiveness of a voluntary cleanup...balanced against the risk that costs will not be recoverable. These risks must be further balanced against the risk of inviting enforcement from state environmental officials.”<sup>103</sup> Parties choosing to forego voluntary cleanup to await government action allowed contaminated sites to deteriorate further and response costs to escalate.<sup>104</sup> By providing a cause of action for non-innocent parties under section 107, *Atlantic Research* encourages swift and voluntary cleanups

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<sup>99</sup> H.R. REP. NO. 96-1016 (1980).

<sup>100</sup> Jeannette Paull, *Neither Innocent Nor Proven Guilty: The Aviall Services v. Cooper Industries Dilemma*, 13 BUFF. ENVTL. L.J. 31, 56-57 (2005) (stating “[a] second theory is that the [Aviall] decision will have a chilling effect on voluntary cleanup because parties will fear the inability to recover their response costs.”).

<sup>101</sup> Brief of Respondent at 26-27, *Cooper Indus. V. Aviall Services*, 125 S.Ct. 577 (2004) (No. 02-1192) 2004 WL 768554.

<sup>102</sup> *Id.*

<sup>103</sup> Robert Longstreth, *Supreme Court Decision Imperils Voluntary Environmental Cleanups*, Mondaq Business Briefing, Mar. 4, 2005 WLNR 3312112.

<sup>104</sup> JEANNETTE PAULL, *NEITHER INNOCENT NOR PROVEN GUILTY: THE AVIALL SERVICES V. COOPER INDUSTRIES DILEMMA*, 13 BUFF. ENVTL. L.J. 31, 57 (2005).

where parties may recover equitable costs regardless of their status as a PRP.<sup>105</sup>

In addition to encouraging timely and efficient cleanup of hazardous sites, claims under section 107 may lessen the EPA's administrative and financial burdens by reducing the number of sites on the National Priorities List (NPL).<sup>106</sup> The NPL was created by the EPA to ensure that the sites most threatening "human health and the environment" were cleaned before response costs escalated and the environment faced further degradation.<sup>107</sup> Despite the goal of ensuring the most dangerous sites get priority treatment, "the average time between the first listing of a site on the NPL and completion of the site's remedy is twelve years."<sup>108</sup> The more time a site spends on the NPL, the more damage is caused to the environment, and the more expensive it is to remedy such damage. By allowing PRPs an opportunity to recover funds incurred in the voluntary cleanup of contaminated sites, PRPs are more likely to proactively clean contaminated areas instead of waiting for the government to discover the site, place it on the NPL, and expend government money to remedy damage.

Moreover, an increase in the number of voluntary cleanups will maintain the dwindling Superfund balance, from which the government funds its settlements, and reallocate money to other sites with less available means for remediation.<sup>109</sup> Before *Atlantic*, barring PRPs from recovery resulted in a significant apportionment of Superfund monies to those PRPs who awaited government discovery of the pollution before initiating cleanup.<sup>110</sup> Often these parties entered into "mixed funding" agreements whereby they would share a portion of the cleanup costs with the government.<sup>111</sup> These agreements allowed the EPA to "reimburse...parties to the agreement from the [Super]Fund, with interest,

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 58.

<sup>107</sup> *Id.*

<sup>108</sup> KATHERINE N. PROBST, ET. AL, FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND HOW? 18 (The Brookings Institution 1995).

<sup>109</sup> Jeannette Paull, *Neither Innocent Nor Proven Guilty: The Aviall Services v. Cooper Industries Dilemma*, 13 BUFF. ENVT'L. L.J. 31, 57-59 (2005).

<sup>110</sup> *Id.* at 59.

<sup>111</sup> *Id.*

for certain costs of actions under the agreement that the parties have agreed to perform but which the [EPA] has agreed to finance.”<sup>112</sup> While the EPA retains the ability to recover costs from other liable parties under section 107(a),<sup>113</sup> this is little solace when the responsible parties are insolvent and response costs are elevated because contamination is not treated until discovered by the government. The Court’s interpretation prevents the United States from footing the bill for all settlement agreements.

Additionally, the Court’s decision contributes to the fiscal health of the PRPs and the Government by preventing all involved parties from rushing into settlement agreements with the EPA to ensure a contribution claim under section 113(f)(1).<sup>114</sup> Prohibiting claims under section 107(a) allows parties only one means of recovering cleanup costs—through contribution claims under section 113(f)(1). Rather than go through expensive litigation with the United States, it is often in a party’s best interest to enter into a settlement that would likely result in a mixed-funding agreement<sup>115</sup> and provide the PRP with a contribution claim under section 113(f)(1). If parties were not allowed a claim under section 107(a), the EPA would be inundated with new claims to process and the Superfund, from which the government funds its settlements, would be further drained from an increase in the number of settlement agreements.<sup>116</sup> By allowing claims under section 107(a), parties are more likely to clean the contaminated area first, and then seek contribution from other liable parties rather than settling with the Government, cleaning the contaminated area, and then seeking contribution.

Opponents argue that allowing claims by fellow PRPs under section 107(a) will result in “disproportionate liability” as a PRP that has not been sued under section 106 or section 107(a) may have an incentive to avoid settlement with the government and seek more generous remedies

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<sup>112</sup> 42 U.S.C. § 9622(b)(1) (2000).

<sup>113</sup> *Id.*

<sup>114</sup> JEANNETTE PAULL, *NEITHER INNOCENT NOR PROVEN GUILTY: THE AVIALL SERVICES V. COOPER INDUSTRIES DILEMMA*, 13 BUFF. ENV’T L. L.J. 31, 56-57 (2005) (stating “[o]ne theory is that the [Aviall] decision will cause a rush on EPA to enter into settlement agreements so that parties will be able to use § 113.”).

<sup>115</sup> *Id.* at 59.

<sup>116</sup> *Id.* at 56.

under section 107(a).<sup>117</sup> The fallacy in this argument is that section 107(a) and section 113(f)(1) provide recovery for two distinct situations.

First, section 113(f)(1) grants PRPs a right to contribution which is defined as the “tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.”<sup>118</sup> Applying this definition of contribution, “a PRP’s right to contribution under section 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties.”<sup>119</sup> To the contrary, section 107(a) does not create a right to contribution but rather permits recovery of cleanup costs.<sup>120</sup> A PRP may recover the costs it incurred in cleaning up a site without establishing liability to another party which is required under a contribution claim.<sup>121</sup> Secondly, the “remedies available in sections 107(a) and 113(f)(1) complement each other by providing causes of action ‘to persons in different procedural circumstances.’”<sup>122</sup> Finally, even if a PRP were to choose the more generous liability under section 107(a), a defending PRP could prevent an inequitable distribution of costs by filing a section 113(f)(1) counterclaim and seeking contribution costs from the PRP.<sup>123</sup>

## VI. CONCLUSION

The Supreme Court’s decision in *Atlantic* put an end to the ambiguity and confusion faced when interpreting sections 107(a) and 113(f)(1) of CERCLA. While it is too soon to feel the effects of the Court’s decision, it will further the dual purpose of CERCLA by encouraging the voluntary clean-up of contaminated sites while holding

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<sup>117</sup> Brief for the United States at 37, *United States v. Atl. Research Corp.*, No. 06-562 (U.S. March 1, 2007).

<sup>118</sup> *Atlantic*, 127 S.Ct. 2331, 2337-38 (citing BLACK’S LAW DICTIONARY 353 (8th Ed. 1999)).

<sup>119</sup> *Id.* at 2338.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2338 (citing *Consolidated Edison*, 423 F.3d at 99).

<sup>123</sup> *Id.* at 2339.

TO CLEAN OR NOT TO CLEAN

polluters liable for their actions.<sup>124</sup> Additionally, by providing a remedy for those who voluntarily comply with state and federal regulations, actions under section 107 have the potential to eliminate the adverse effects from delayed discovery of contaminated sites. Finally, an increase in the number of voluntary clean-ups opens government funds for use on other hazardous areas. Continued developments in environmental law, such as those found in *Atlantic*, can only help improve the quality of the air we breathe, the food we eat, the water we drink, the soil below us, and the sounds around us.

Claire McClintic

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<sup>124</sup> H.R. REP. NO. 96-1016 (1980).

