

UNITED STATES V. ATLANTIC RESEARCH: OF SETTLEMENT AND VOLUNTARILY INCURRED COSTS

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INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”, or “Superfund Act”)¹ to address the growing number of toxic and hazardous waste sites around the United States. CERCLA empowers the Environmental Protection Agency (“EPA”) to carry out Congress’ dual goals of providing for cleanup of hazardous substances released into the environment and holding responsible parties liable for the cost of the cleanups.² Congress reauthorized CERCLA with substantial amendments in 1986 as part of the Superfund Amendments and Reauthorization Act (“SARA”).³ SARA included provisions intended to fine-tune major components of CERCLA, address limitations of the Act, focus on human health problems posed by hazardous waste sites, and attend to funding.⁴ Few statutes have generated more litigation than CERCLA.⁵ Not surprisingly, one of the primary sources of CERCLA-inspired litigation is the assessment of costs for cleanup of toxic and hazardous waste sites.⁶ In particular, whether—and under which CERCLA provision—a party potentially responsible for at least a portion of a site’s total cleanup cost (a potentially responsible party or “PRP”) has a cause of action against another PRP for recovery of cleanup expenses has been the subject of much litigation.⁷

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¹ 42 U.S.C. §§ 9601-9675 (2000).

² Lucia Ann Silecchia, *Judicial Review of CERCLA Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339, 339 n.3 (1996).

³ Pub. L. No. 99-499, 100 Stat. 1613 (1986).

⁴ Silecchia, *supra* note 2, at 341-42.

⁵ Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 83 (1997).

⁶ *Id.* at 83-84. See also Barry Kellman, *Symposium on the Seventh Circuit as a Commercial Court: The Seventh Circuit on Environmental Regulation of Businesses*, 65 CHI.-KENT. L. REV. 757, 795 (1989) (noting that allocation of liability has generated the most CERCLA litigation).

⁷ See, e.g., *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004) (holding that a private party who had not been sued in a CERCLA administrative or cost recovery action was not authorized to seek contribution from another PRP under CERCLA section 113(f)); *Consolidated Edison Co. of N.Y. v. UGI Utils.*, 423 F.3d 90 (2d Cir. 2005) (holding that a utility may recover environmental response costs related to soil and groundwater contamination from the former operator of a manufactured gas plant under CERCLA section 107(a)); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (finding that “any other necessary costs of response” and “any other person” language in CERCLA section 107(a) provides authority to allow private suits under section 107(a)(4)(B)).

Last term, in *United States v. Atlantic Research Corporation*,⁸ the Supreme Court held that, under CERCLA section 107(a),⁹ a PRP has a cause of action against another PRP for recovery of cleanup costs where the party seeking recovery voluntarily remediated a contaminated site without having been previously subject to a CERCLA civil action. This decision ensures that PRPs who voluntarily clean up contaminated sites have a cause of action against other PRPs—a right left on questionable footing by *Cooper Industries, Inc. v. Aviall Services, Inc.*¹⁰ Although correct in its interpretation and application of section 107(a), the Court failed to appreciate the extent to which *Atlantic Research* may discourage settlement of environmental contamination cases involving multiple PRPs. Furthermore, the Court left undecided an important question: whether direct costs involuntarily incurred pursuant to section 106 or section 107(a) are recoverable under section 113(f) or section 107(a). This question should be decided in light of whether or not the costs are incurred as a result of a civil action initiated pursuant to section 106 or section 107(a) of CERCLA.

PRE-ATLANTIC RESEARCH BACKGROUND

Enacted in 1980, CERCLA provides for the remediation of contaminated sites by the federal government, state governments, Indian tribes, or private parties.¹¹ CERCLA includes provisions that seek to ensure that responsible parties, rather than taxpayers, bear the costs of environmental cleanups.¹² To achieve this end, Congress included in CERCLA provisions that “effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others.”¹³ In particular, section 107(a)(4)(A) authorizes the federal government, state governments, or Indian tribes to recover cleanup costs from liable parties. Courts also found authority in the language of section 107(a)(4)(B) for recovery by private parties.¹⁴ CERCLA section 107(a)(4) provides that covered parties are liable for, among other things:

⁸ 127 S. Ct. 2331 (2007).

⁹ CERCLA section 107(a) and other sections discussed in this case comment, sections 106 and 113(f), have been codified at 42 U.S.C. §§ 9607(a), 9606, and 9613(f). For convenience, these sections are referred to as designated in CERCLA, rather than as later codified.

¹⁰ *Aviall*, 543 U.S. 157. At a time when many Circuit Courts required PRPs seeking reimbursement to proceed under section 113(f), the *Aviall* Court held that a PRP was not authorized to seek contribution under section 113(f) when a CERCLA administrative or cost recovery action had not been initiated against it. *See id.* at 168.

¹¹ 42 U.S.C. §§ 9604(a), 9604(d), 9606(a).

¹² Silecchia, *supra* note 2, at 340.

¹³ *Atlantic Research Corp. v. United States*, 459 F.3d 827, 830 (8th Cir. 2006).

¹⁴ *Id.* at 831.

- (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[.]¹⁵

SARA describes two additional circumstances during which private parties can recover cleanup costs. The first recovery provision, section 113(f)(1), authorizes parties to proceed against other PRPs for contribution “during or following” a CERCLA civil action. The second provision, section 113(f)(3)(B), provides for recovery where one or more parties have entered into a settlement agreement. Section 113(f)(1), titled “Contribution,” states that:

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) of this title, during or following any civil action under section 106 or section 107(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.¹⁶

Sections 107(a) and 113 both allow for the recovery of cleanup costs, but in different ways. Section 107(a) has a six-year statute of limitations and allows a plaintiff to recover one hundred percent of its response costs from all liable parties, including those that have settled their CERCLA liability with the Government. Section 113’s right to contribution, on the other hand, is subject to a three-year statute of limitations, limits plaintiffs’ recovery to costs in excess of their equitable share, and bars plaintiffs from recovering from previously-settled parties.¹⁷ As a result of the limited nature of section 113’s contribution right, “[c]ourts saw that CERCLA, as amended, created a situation where litigants might ‘quickly abandon section 113 in favor of the substantially more generous provisions of section 107,’ thus rendering section 113 a nullity.”¹⁸ In response, courts steered PRPs away from section 107(a) by requiring them to use section 113: “[R]egardless of which CERCLA section a plaintiff invoked, courts typically analyzed section 107 and 113 together, aiming to distinguish one from the other [C]ourts gradually steered liable parties away from section 107 and required them to use section 113; section 107 was reserved for ‘innocent’ plaintiffs.”¹⁹ The purpose of this judicial limitation on section 107(a) was to prevent plaintiffs

¹⁵ 42 U.S.C. § 9607(a).

¹⁶ *Id.* § 9613(f)(1). Section 106 of CERCLA authorizes the federal government to issue an administrative order requiring parties to take action to address an actual or threatened release of a hazardous substance from a facility. The same section authorizes the federal government to bring a civil action to enforce such an administrative order. *Id.* § 9606.

¹⁷ *Id.* § 9613(g)(2).

¹⁸ See *Atlantic Research*, 459 F.3d at 832 (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997)).

¹⁹ *Id.* at 832.

from using section 107(a) to evade section 113's constraints.²⁰ During this period, most courts expanded the meaning of section 113 to allow all PRPs to seek contribution even in the absence of a CERCLA civil action under section 106 or section 107.²¹

It was in this climate that Aviall Services, Inc. ("Aviall") brought suit against Cooper Industries, Inc. ("Cooper"). In 1981, Aviall purchased Cooper's aircraft engine maintenance business, including several industrial facilities in Texas. Several years later, Aviall discovered extensive contamination at the facilities it had acquired from Cooper. Although the facilities had been polluted when Aviall purchased them from Cooper, pollution of the sites had continued under Aviall's management. Aviall voluntarily performed a decade-long environmental cleanup and in 1995 contacted Cooper for the first time to seek reimbursement.²² Aviall sued Cooper in 1997.

Aviall's suit was initially based on section 107(a) and state law.²³ Aviall later amended its complaint, replacing its section 107(a) cost recovery claim with a section 113(f)(1) contribution claim.²⁴ The U.S. District Court for the Northern District of Texas granted Cooper's motion for summary judgment, holding that "Aviall could not assert a section 113(f)(1) contribution claim unless it was subject to a prior or pending CERCLA action involving either section 106 (federal administrative abatement action) or section 107(a) (cost recovery action by the government or a private party)."²⁵ On appeal, a panel for the Fifth Circuit initially affirmed,²⁶ but on rehearing en banc, the Court of Appeals reversed the District Court's decision.²⁷ On certiorari, the Supreme Court reversed again.²⁸ The Supreme Court held that contribution under section 113(f) may only be sought "during or following" a CERCLA civil action.²⁹ The Supreme Court remanded the case without deciding whether Aviall could pursue recovery under section 107(a).

In the wake of the Supreme Court's *Aviall* decision, it was not clear if courts would continue to interpret section 107(a)'s cost recovery provision as narrowly as they had pre-*Aviall*. In the first circuit court case to address this issue post-*Aviall*, the Second Circuit held in *Consolidated Edison Co. of New York v. UGI Utilities* that a PRP may seek recovery of cleanup costs under section 107(a).³⁰ However, eleven months later, the U.S. District Court for the Northern District of Texas, deciding the *Aviall* case on remand from the Supreme Court, held that CERCLA does not authorize Aviall to bring a cost

²⁰ *Id.*

²¹ *Id.*

²² *Aviall Servs., v. Cooper Indus.*, 263 F.3d 134, 136 (5th Cir. 2001).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*, citing *Aviall Servs. v. Cooper Indus.*, No. 3:97-CV-1926-D, 2000 U.S. Dist. LEXIS 520 (N.D. Tex. Jan. 13, 2000).

²⁶ *Id.*

²⁷ *Aviall Servs. v. Cooper Indus.*, 312 F.3d 677 (5th Cir. 2002) (en banc).

²⁸ *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004).

²⁹ *Id.* at 165-66.

³⁰ 423 F.3d 90 (2d Cir. 2005).

recovery or contribution action under section 107(a) against Cooper.³¹ In July 2007, the Fifth Circuit remanded the case to the District Court for reconsideration in light of the Supreme Court's *Atlantic Research* decision.³²

THE ATLANTIC RESEARCH CASE

Atlantic Research Corporation retrofitted rocket motors from 1981 through 1986 for the United States Government on property leased at the Shumaker Naval Ammunition Depot, a Department of Defense facility in Camden, Arkansas.³³ The retrofitting process involved using a high-pressure water spray to remove pieces of propellant from the motors.³⁴ The pieces of propellant were then burned.³⁵ Soil and groundwater at the site were contaminated by the wastewater and burned fuel.³⁶

Atlantic Research investigated and cleaned up the site at its own expense. It then sued the Government in the U.S. District Court for the Western District of Arkansas under CERCLA sections 107(a) and 113(f) to recover the Government's share of the cleanup cost.³⁷ While the lawsuit was underway, Atlantic Research and the Government entered into negotiations to determine the Government's share of the costs.³⁸ However, negotiations ended after the Supreme Court's *Aviall* decision, in light of which Atlantic Research no longer had a cause of action for contribution against the Government under section 113(f) because no CERCLA civil action had ever been filed against Atlantic Research as a result of its operations at Shumaker Naval Ammunition Depot. Consequently, Atlantic Research amended its complaint, relying solely on section 107(a) and federal common law.³⁹ Pointing to *Dico, Inc. v. Amoco Oil Co.*,⁴⁰ an Eighth Circuit case that held that a PRP is not authorized to bring a direct recovery action under section 107(a) because "PRPs are limited to actions for contribution" under section 113(f),⁴¹ the Government moved to dismiss the case.⁴² The District Court granted the Government's motion. At the same time, the District Court recognized that its order was "patently unfair to [Atlantic Research], because

³¹ *Aviall Servs. v. Cooper Indus.*, No. 3:97-CV-1926-D, 2006 WL 2263305 (N.D. Tex. Aug. 8, 2006).

³² *Aviall Servs. v. Cooper Indus.*, No. 06-10996, 2007 WL 1959147 (5th Cir. Jul. 2, 2007).

³³ *Atlantic Research* 127 S. Ct. at 2335.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ A party may sue the Government in a CERCLA related action pursuant to its waiver of sovereign immunity under 42 U.S.C. § 9620(a)(1), which provides: "Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act." 42 U.S.C. § 9620(a)(1) (2000).

³⁸ See *Atlantic Research*, 459 F.3d at 829.

³⁹ *Id.*

⁴⁰ 340 F.3d 525 (8th Cir. 2003).

⁴¹ *Id.* at 531.

⁴² *Atlantic Research* 127 S. Ct. at 2335.

[Atlantic Research] voluntarily cleaned up environmental contamination, yet it [was] left without a CERCLA remedy against the United States, another PRP."⁴³ The District Court then expressed hope that the Eighth Circuit would revisit *Dico* on appeal.⁴⁴

The Court of Appeals for the Eighth Circuit reviewed the decision and reversed the District Court's order.⁴⁵ Recognizing that *Dico*'s reasoning had been undermined by *Aviall*,⁴⁶ the Eighth Circuit, joining the Second and Seventh Circuits, held that section 107(a) authorizes PRPs to recover cleanup costs.⁴⁷ The Court concluded that allowing Atlantic Research to recover costs under section 107(a) was entirely "consistent with the text and purpose of CERCLA."⁴⁸

The Court of Appeals' decision relied on logical and textual analyses of sections 107(a) and 113(f). Based on the Court's logical analysis, denying a responsible party authorization to bring a cost recovery suit against another PRP pursuant to section 107(a) was reasonable only where, as in *Dico*, the party seeking recovery was authorized to seek contribution under section 113(f).⁴⁹ Otherwise, CERCLA's goal of holding responsible parties liable for cleanup costs would be thwarted. Because *Aviall* foreclosed the use of section 113(f) to recover costs by a party in Atlantic Research's position, the Court of Appeals reasoned that PRPs like Atlantic Research should have a cause of action against other PRPs under section 107(a). This conclusion is supported by a close reading of the relevant CERCLA provisions. In particular, CERCLA section 107(a)(4)(B) provides that covered parties, such as the Government in *Atlantic Research*, are liable for, among other things, "any other necessary costs of response incurred by any other person consistent with the national contingency plan."⁵⁰

The Court's analysis of the provisions shows that CERCLA does not prevent PRPs from proceeding against other PRPs under section 107(a). In particular, the Court found that CERCLA's reference to "any other person" includes parties such as Atlantic Research.⁵¹ As an alternative basis for liability, the Eighth Circuit held that its decision to allow Atlantic Research to proceed under section 107(a) is supported by an implied right to contribution in the statute.⁵² The Court observed that "[u]nlike some other statutes,

⁴³ *Atlantic Research Corp. v. United States*, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484, at *8 (W.D. Ark. May 31, 2005).

⁴⁴ *Id.*

⁴⁵ *Atlantic Research v. United States*, 459 F.3d 827.

⁴⁶ *Id.* at 830.

⁴⁷ *Id.* See also *Consolidated Edison Co. of N.Y. v. UGI Utils.* 423 F.3d 90 (2d Cir. 2005); *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824 (7th Cir. 2007).

⁴⁸ *Id.* at 835.

⁴⁹ *Id.* at 834-35.

⁵⁰ 42 U.S.C. § 9607(a)(4)(B) (2000).

⁵¹ *Atlantic Research*, 459 F.3d at 835.

⁵² *Id.*

CERCLA reflects Congress's unmistakable intent to create a private right of contribution."⁵³

The Supreme Court unanimously affirmed the Eighth Circuit's decision. Writing for the Court, Justice Thomas concluded that the statute provides Atlantic Research with a cause of action because the "plain terms of section 107(a)(4)(B) authorize a PRP to recover costs from other PRPs."⁵⁴ The Court agreed with Atlantic Research's contention that the reference in section 107(a)(4)(B) to "any other person" includes any person who is not the Government, a State, or an Indian Tribe.⁵⁵ According to Justice Thomas, CERCLA, like all statutes, must be read as a whole.⁵⁶ Reading CERCLA as a whole, Justice Thomas identified structural and logical links that showed that subparagraph (B) of section 107(a)(4) can be understood only in light of subparagraph (A).⁵⁷ The structural links consist of the adjacency and similarity of structure of the two subsections and the reference by section 107(a)(4)(B) to the previous subsection. The logical links consist of the reference by each subparagraph to costs incurred by certain entities and that bear a specified relationship to the national contingency plan.⁵⁸ Reading section 107(a)(4)(B) with reference to subparagraph (A), the Court thus held that the language "any other person" in section 107(a)(4)(B), which identifies persons who may recover under that section, refers to parties such as Atlantic Research.⁵⁹

The Court then addressed the Government's interpretation of the statute. In response to the Government's argument that the Eighth Circuit's interpretation was flawed because it required the language "any other person" to duplicate work done by the "any other necessary costs" language in section 107(a)(4)(B), Justice Thomas wrote that the language provides clarity and that even if the language is redundant, it provides a tolerable degree of surplusage.⁶⁰

The Court also addressed the Government's argument that by offering PRPs a choice between sections 107(a) and 113(f), Atlantic Research's interpretation of the statute enables PRPs to circumvent section 113(f)'s shorter statute of limitations, eschew equitable apportionment under section 113(f) in favor of joint and several liability under section 107(a), and avoid the settlement bar set forth in section 113(f)(2).⁶¹ Justice Thomas explained that sections 107(a) and 113(f) provide two clearly distinct remedies: section 107(a) provides a right to cost "recovery" whereas section 113(f) authorizes

⁵³ *Id.* at 835-36.

⁵⁴ *Atlantic Research*, 127 S. Ct. at 2339.

⁵⁵ *Id.* at 2335-36.

⁵⁶ *Id.* at 2336 (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)) (internal quotation marks omitted).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2337.

⁶¹ *Id.* at 2337-39.

a right to "contribution."⁶² According to the Court, section 113(f) authorizes suit for *contribution* during or following the establishment of common liability where a section 106 or section 107(a) suit has been initiated and the section 113(f) claim is contingent upon an inequitable distribution of liability among liable parties. Section 107(a), on the other hand, permits *recovery* for cleanup costs "without any establishment of liability to a third party" where the party seeking recovery has incurred cleanup costs.⁶³

Based on these differences, the Court held that section 107(a) is only available to plaintiffs seeking recovery for directly-incurred cleanup costs, whereas "[s]ection 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under section 106 or section 107(a)."⁶⁴ As a result, "a PRP who pays money to satisfy a settlement agreement or a court judgment may pursue section 113(f) contribution" but cannot recover under section 107(a) because he reimbursed response costs paid by others and did not incur costs directly.⁶⁵ The Court raised, but declined to decide, the question of whether a PRP may use section 107(a), section 113(f), or both to recover costs when it has involuntarily incurred direct cleanup costs as a result of situations such as a consent decree compelling cleanup.⁶⁶

Finally, the Court addressed the Government's arguments concerning the settlement bar under section 113(f)(2). The settlement bar prohibits section 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."⁶⁷ The Government argued that permitting PRPs to seek recovery under section 107(a) would eviscerate section 113(f)(2) because "[c]onsent agreements would no longer provide protection . . . and settling parties would have to endure additional rounds of litigation to apportion their losses."⁶⁸ The Court explained that permitting PRPs to seek recovery under section 107(a) does not eviscerate section 113(f)'s settlement bar:

First, . . . a defendant PRP may trigger equitable apportionment by filing a section 113(f) counterclaim. . . . Second, the settlement bar continues to provide significant protection from contribution suits by PRPs that have inequitably reimbursed the costs incurred by another party. Third, settlement carries the inherent benefit of finally resolving liability as to the United States or a State.⁶⁹

⁶² *Id.* at 2337-38.

⁶³ *Id.*

⁶⁴ *Id.* at 2338.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2338 n.6.

⁶⁷ 42 U.S.C. § 9613(f)(2) (2000).

⁶⁸ Brief for the United States at 31, *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562), 2007 WL 669263 (citing *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997)) (internal quotation marks omitted).

⁶⁹ *Atlantic Research*, 127 S. Ct. at 2339.

ANALYSIS

The Court in *Atlantic Research*, although correct to affirm the Eighth Circuit's decision, failed to appreciate the extent to which its opinion may discourage settlement of environmental contamination cases. Also, the Court declined to decide the question of whether direct costs involuntarily incurred under section 106 or section 107(a) are recoverable under section 113(f) or section 107(a). This question should be decided using a structural approach that turns on whether the costs were incurred as a result of a CERCLA civil action and whether the party incurred the costs directly.

The Court's affirmation of the Eighth Circuit's decision is supported by a careful reading of sections 107(a) and 113(f). Interpreting section 107(a) as authorizing Atlantic Research to recover also gives effect to CERCLA's cost recovery mechanisms in a manner that is consistent with CERCLA's goal of holding responsible parties liable for cleanup costs and with *Aviall*'s holding that a party may not make a section 113(f) contribution claim unless it has been subject to a section 106 or section 107 civil action.⁷⁰ As discussed previously, prior to *Aviall*, private parties such as Atlantic Research had a cause of action against other PRPs for contribution under section 113(f) even before a section 106 or section 107 action was initiated against them.⁷¹ After *Aviall*, private parties no longer had this option. This result contravened one of CERCLA's primary goals: that of holding responsible parties liable for cleanup costs.⁷² The *Atlantic Research* decision resolves this paradox.

Furthermore, the *Atlantic Research* decision avoids discouraging polluters from voluntarily cleaning up contaminated sites. As a result of the *Aviall* decision, PRPs against whom no section 106 or section 107 action had been initiated had little incentive to voluntarily clean up contaminated sites where there were other parties potentially responsible for contamination at the site. This is because the party who voluntarily cleaned up the site was understood to have no cause of action against the other PRPs. The legal regime thus provided a disincentive for parties to unilaterally and voluntarily clean up contaminated sites in such circumstances. The *Atlantic Research* decision, in recognizing the right of PRPs who voluntarily clean up contaminated sites to bring suit against other PRPs under section 107(a), removes this disincentive.

Although *Atlantic Research* is fundamentally correct, one of its drawbacks is that it may nonetheless discourage settlement of some environmental contamination cases. Section 113(f) of CERCLA creates a settlement bar, designed to promote timely and voluntary settlement with EPA, the government agency most likely to bring contribution actions under sections 106 or 107. The settlement bar insulates settling parties from liability to other

⁷⁰ *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004).

⁷¹ See *supra* notes 20–22.

⁷² Silecchia, *supra* note 2, at 339 n.3.

non-settling PRPs for matters that are the subject of the settlement agreement between the PRP and EPA. Prior to the *Atlantic Research* decision, after a party and EPA settled an action concerning a particular site, the party was shielded from section 113(f) liability for that site from other PRPs. Furthermore, the party would not face section 107(a) actions from other PRPs because courts at that time limited the use of section 107(a).⁷³ The *Atlantic Research* decision, by expanding the allowable use of section 107(a), leaves PRPs who have settled with EPA open to a finding of liability under section 107(a). As the Court pointed out, “[t]he settlement bar does not by its terms protect against cost-recovery liability under section 107(a).”⁷⁴ Thus, settling a CERCLA action with EPA now provides less protection to settling parties than it did prior to the *Atlantic Research* decision. A PRP may now clean up contamination at a site and then use section 107(a) to proceed against co-PRPs who have settled with EPA.

In light of the Court’s current interpretation of the settlement bar under section 113(f)(2), one can expect that parties will be discouraged from settling in some cases, despite the Court’s confidence that this is not likely to happen. The *Atlantic Research* Court concludes that settlement will not be discouraged because the decision leaves parties the option to trigger equitable apportionment by filing section 113(f) counterclaims, protects against suits by PRPs who have inequitably reimbursed costs incurred by other parties, and resolves liability vis-à-vis the Government or a State.⁷⁵ Admittedly, these benefits will encourage some parties to settle. The ability to trigger equitable apportionment by filing a section 113(f) counterclaim becomes a valuable weapon in the arsenal of any party who settles with EPA. Likewise, protection against suits by PRPs who have inequitably reimbursed costs incurred by other parties and protection against claims by the Government or a State are important considerations that may encourage parties to settle.

Notwithstanding these benefits, as a result of *Atlantic Research*, a party who previously might have settled unilaterally with EPA may be discouraged from doing so if the party is one of several parties potentially responsible for cleaning up a site. This is because settling may still leave the party exposed to section 107(a) suits if one or more of the other parties performs the cleanup and does not settle with EPA.⁷⁶ Such a suit is not an unlikely scenario. In a number of cases prior to *Atlantic Research*, PRPs used section 113(f) to sue other PRPs who had already settled with EPA to recover costs.

⁷³ See *Atlantic Research Corp.*, 459 F.3d at 832.

⁷⁴ *Atlantic Research*, 127 S. Ct. at 2339.

⁷⁵ *Id.*

⁷⁶ See John M. Hyson, CERCLA Settlement, Contribution Protection and Fairness to Non-Settling Responsible Parties, 10 VILL. ENVTL. L.J. 277, 278 (1999) (“Settlement involves the assumption of cleanup responsibilities or cash payments, or both. . . . PRPs will be less likely to assume these burdens - usually quite substantial - if, in settling, they are unable to ‘buy peace’ against claims by other PRPs.”). See also *Metro. Water Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824, 836 (7th Cir. 2007) (featuring argument by appellee and EPA that “the United States may lose valuable settlement leverage if . . . [PRPs] are allowed to bring an action under § 107(a)”).

Many of these plaintiff-PRPs evaded the settlement bar by claiming that the defendant-PRPs' settlement agreements did not cover additional costs for which the plaintiffs were seeking recovery.⁷⁷ Now, parties who have settled with EPA may face liability to co-PRPs not only for such additional costs under section 113(f)'s contribution provision, but also for direct cleanup costs under section 107(a)'s recovery provision. The costs necessary to defend against such a lawsuit may be significant. Although a defendant-PRP who previously settled with EPA may make a section 113(f) counterclaim for equitable apportionment, the settlement agreement will factor into the court's determination of whether apportionment is equitable only to the extent that the agreement is used by the court to offset what it determines is the defendant-PRP's equitable share.⁷⁸ Some parties may be wary of settling with EPA because of this lack of finality – notwithstanding the prospect of finality vis-à-vis liability to the EPA – and the added costs necessary to defend against a section 107(a) suit from another PRP.

An issue explicitly left undecided by the *Atlantic Research* court is whether a party who is compelled to perform environmental cleanup under section 106 or section 107(a) may recover from other PRPs under section 113(f), section 107(a), or both.⁷⁹ In *Atlantic Research*, the Court distinguished between parties who may pursue recovery pursuant to section 113(f) and parties who may do so pursuant to section 107(a). The distinction was based, in part, on whether a party incurs direct expenses for cleanup. That is, *Atlantic Research* held that parties who incur direct costs may seek recovery under section 107(a), whereas parties who “reimburs[e] response costs incurred by other parties” may recover only under section 113(f).⁸⁰ The court recognized, but declined to address, the situation in which a PRP has incurred direct costs, but has done so involuntarily. Such a situation may arise under section 106 and section 107(a), though not necessarily as the result of a verdict for a plaintiff in a civil action. For example, section 106 authorizes EPA (as the President's delegate) to take actions, including issuing orders directly to individuals, when necessary to protect public health, welfare and the environment.⁸¹ Such orders can result in individuals incurring significant costs for environmental cleanup.⁸² Also, parties “may sus-

⁷⁷ See, e.g., *United States v. Colo. & E. R.R.*, 50 F.3d 1530 (10th Cir. 1995) (holding that a contribution claim by a PRP against another PRP was “not barred” by defendant's prior settlement with EPA, when the consent decree did not address the costs sought in the contribution claim). See also *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004) (holding that settlement agreements with EPA do not immunize a PRP from future section 113 contribution actions for site remediation not yet performed at the time of the settlement). But see *Dravo Corp. v. Zuber*, 13 F.3d 1222 (8th Cir. 1994) (holding that a *de minimus* agreement with EPA settling CERCLA claims protected a PRP from contribution).

⁷⁸ *Atlantic Research*, 127 S. Ct. at 2339.

⁷⁹ *Id.* at 2338 n.6.

⁸⁰ *Id.* at 2338.

⁸¹ See 42 U.S.C. §§ 9606(a), 9615 (2000); Superfund Implementation, 52 Fed. Reg. 2923 (Jan. 23, 1987).

⁸² 42 U.S.C. § 9606.

tain expenses pursuant to a consent decree as a result of a suit under section 107(a) or section 106.”⁸³

Given the requirements of section 113(f) and the Court’s holding in *Atlantic Research* that section 107(a) is only available as a cause of action to parties who incur direct costs, a textually consistent approach to this question is to allow a party to seek recovery pursuant to section 113(f) where the PRP has incurred costs “during or following” a CERCLA civil action (e.g., by a consent decree), and to authorize a suit for recovery under section 107(a) where the PRP has not incurred costs during or following a CERCLA action (e.g., if the PRP incurred costs pursuant to an administrative order compelling a cleanup). This structural approach, with its grounding in the statutory language, ensures consistency between *Atlantic Research* and section 113(f). It reflects the language of section 113(f), which authorizes contribution actions by PRPs “during or following any civil action under section 106 or under section 107(a).”⁸⁴ If a determination is made that a party did not incur costs “during or following” a CERCLA civil action (barring contribution under section 113(f)), the approach then looks to whether a party incurred costs directly, qualifying it to pursue a cost recovery action under section 107(a).

This two-stage structural approach simply recognizes the potential circumstances of a PRP who incurs direct environmental cleanup costs involuntarily. If the cleanup is performed “during or following” a CERCLA civil action, section 113(f) is clearly the appropriate mechanism for contribution. If, however, the party incurs direct costs that are not “during or following” a CERCLA civil action, then the *Atlantic Research* decision should allow the party to proceed under section 107(a). This is because section 107(a) does not distinguish between parties who incur direct costs based on how those costs are incurred.

CONCLUSION

The *Atlantic Research* court correctly affirmed the Eighth Circuit’s decision. The holding is supported by a careful reading of section 107(a). The affirmation gives effect to CERCLA’s cost recovery mechanisms in a manner consistent with CERCLA’s goal of holding responsible parties liable for cleanup costs and avoids discouraging polluters from voluntarily cleaning up contaminated sites. Notwithstanding the correctness of the holding, the Court in *Atlantic Research* failed to appreciate fully the influence its opinion may have on settlement of environmental contamination cases involving multiple PRPs. Further, the Court left undecided the question of whether costs involuntarily incurred under section 106 or section 107(a) are recoverable under section 113(f) or section 107(a). This question may be decided

⁸³ *Atlantic Research*, 127 S. Ct. at 2338 n.6.

⁸⁴ 42 U.S.C. § 9613(f)(1).

using a structural approach that turns on whether the costs are incurred as a result of a CERCLA civil action and whether the party incurred the costs directly. Subsequent cases will likely address this question. However the Court resolves the question, parties can expect that the outcome will be as well grounded in the text of sections 106, 107(a) and 113(f), as was the *Atlantic Research* opinion and its predecessors.

