

# CERCLA Comes Full Circle in *ARC*

by Scott H. Reisch and Jennifer E. McClister

*On June 11, 2007, the U.S. Supreme Court held in U.S. v. Atlantic Research Corp. (ARC) that potentially responsible parties may bring cost recovery actions under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This article examines the case law leading up to ARC, the rationale behind the Court's decision, and how ARC may affect CERCLA actions in the future.*

Prior to December 2004, one of the few consolations available to a party caught in the joint and several liability scheme established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also referred to as Superfund)<sup>1</sup> was the knowledge that CERCLA offered a broad statutory right to contribution against other potentially responsible parties (PRPs).<sup>2</sup> In *Cooper Industries v. Aviall*,<sup>3</sup> the U.S. Supreme Court removed much of that comfort by construing CERCLA in a way that dramatically limited parties' rights to sue for contribution under section 113 of CERCLA.

The Court revisited CERCLA's liability provisions last term in *Atlantic Research Corp. v. United States (ARC)*.<sup>4</sup> In an opinion that hearkens back to some of the earliest court decisions construing CERCLA, the Court held that a PRP who was barred from seeking contribution under section 113 of CERCLA following *Aviall* instead could sue other PRPs for cost recovery under section 107 of CERCLA. Recent lower court decisions generally had reserved section 107 cost recovery actions for government agencies and innocent private parties, and barred PRPs performing voluntary cleanups from bringing such actions.

This article summarizes the jurisprudence leading up to the *ARC* decision and examines the basis for the Court's holding in *ARC*. It also describes some of the likely practical impacts of *ARC* on clients and practitioners.

## Pre-ARC Claims Among PRPs

The principal causes of action available to private parties under CERCLA are for: (1) cost recovery under section 107(a); and (2) contribution under section 113(f). The scope of these claims was the subject of debate in the courts well before the *ARC* case.

### Section 107(a) Claims

As originally enacted in 1980, CERCLA did not explicitly authorize contribution actions among PRPs. Instead, section 107(a) authorized causes of action against the parties enumerated in section 107(a)(1) through (4)—that is, current and former owners and operators, generators, and transporters—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. . . .<sup>5</sup>

Many courts interpreted section 107(a)(4)(B) as authorizing a PRP who had incurred cleanup costs to bring a cost recovery action against other PRPs.<sup>6</sup> In addition, because courts construed section 107(a) as imposing joint and several liability,<sup>7</sup> they found that section 107(a) included an implied right to contribution, so that a PRP who otherwise might bear too high a burden could off-

## Article Editors:

Melanie Granberg (Environmental), Denver, Gablehouse Calkins & Granberg, LLC—(303) 572-0050, mgranberg@gcgllc.com; Kevin Kinnear (Water), Boulder, Porzak Browning & Bushong LLP—(303) 443-6800, kkinneer@pbblaw.com; Joel Benson (Mineral), Denver, Davis Graham & Stubbs LLP—(303) 892-7470, joel.benson@dgsllaw.com



## About the Authors:

Scott H. Reisch is a partner with Hogan & Hartson LLP, where he specializes in environmental law—(303) 899-7300, shreisch@hhllaw.com.

Jennifer E. McClister is an associate with Hogan & Hartson LLP, where she specializes in environmental law—(303) 899-7300, jemclister@hhllaw.com.

Natural Resource articles are sponsored by the CBA Environmental Law, Water Law, and Mineral Law Sections. The Sections publish articles of interest on local and international topics.

set its liability by obtaining recovery from joint tortfeasors.<sup>8</sup> Despite the fact that district courts first addressed these issues shortly after CERCLA's enactment, the scope of the private cause of action under section 107(a)(4)(B) and the existence of an implied right to contribution continued to be debated in the courts for the next twenty years.

### Section 113(f) Claims

In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA).<sup>9</sup> SARA added section 113 to CERCLA and thereby explicitly authorized a PRP to sue another PRP for contribution:

(1) 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. . . . 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. . . .

(3)(B) 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 may seek contribution from any person who is not party to a settlement referred to in paragraph (2).<sup>10</sup>

The enactment of an explicit statutory right to contribution under section 113 quelled interest in an implied right of contribution under section 107, but led to additional litigation over whether section 107(a)(4)(B) or section 113 was the appropriate basis for a PRP to obtain recovery of its cleanup costs from other PRPs. Ultimately, a string of circuit court decisions held either that section 113 set forth the exclusive cause of action for a PRP seeking recovery from another PRP, or that a plaintiff's claim under section 107 against another PRP was "governed by" section 113.<sup>11</sup>

The pre-SARA cases holding that a PRP can bring a cost recovery action under section 107, as distinct from a contribution action, were largely ignored in the case law that evolved after SARA. Instead, courts directed PRPs to section 113, and reserved section 107(a)(4)(B) for "innocent landowners" and other private parties who were not PRPs.<sup>12</sup> At the same time, courts read section 113 broadly, so that it was available to any PRP seeking to recover cleanup costs, regardless of whether those costs were incurred voluntarily by the PRP, pursuant to a settlement agreement with the Environmental Protection Agency (EPA) or a state, or in connection with litigation under section 107.<sup>13</sup> However, much of this changed with the *Aviall* decision.

### The Aviall Decision

In *Aviall*,<sup>14</sup> the Court considered whether a plaintiff PRP can bring a statutory claim for contribution under section 113(f) in the absence of a civil action under sections 106 or 107 of CERCLA. Lower courts had read section 113 as permissive, because the statute says "[a]ny person *may* seek contribution" under the conditions set forth in section 113, and because the savings clause at the end of section 113(f)(1) appeared to prohibit an interpretation of section 113 that would diminish the right of contribution in the absence of a civil action.<sup>15</sup> Justice Clarence Thomas, writing for a seven-to-two majority, found instead that the plain language of section 113(f)(1) barred statutory claims for contribution without a

qualifying civil action.<sup>16</sup> In *dicta*, the Court also construed a separate statutory provision—section 113(f)(3)(B)—as authorizing a section 113 contribution action following a qualifying settlement with the United States or a state.<sup>17</sup> Thus, after *Aviall*, the broad statutory right to contribution evaporated and the Court interpreted the statute as reserving section 113 contribution actions only for parties who had been sued or parties who had entered into a qualifying settlement agreement with the government.

The breadth of *Aviall*'s impact became clear as the lower courts started to apply the Supreme Court's rationale. Courts rejected CERCLA contribution claims by a variety of parties that did not fall squarely within the language of sections 113(f)(1) and 113(f)(3)(B), including a party that had entered into a cleanup settlement under state law rather than CERCLA,<sup>18</sup> a party that performed a cleanup pursuant to an EPA order,<sup>19</sup> and a party that performed a cleanup voluntarily prior to any litigation or settlement with the government.<sup>20</sup> In light of such rulings, these parties and other PRPs that arguably were fulfilling CERCLA's purpose by performing cleanups in the absence of litigation potentially were left without a means—at least under federal law—of recovering from recalcitrant parties. Consequently, several lower courts faced a question that *Aviall* declined to decide—whether the same PRPs that were barred from bringing a claim for contribution under section 113 might have a private right of action under section 107.<sup>21</sup>

### The ARC Case

Atlantic Research Corporation (Atlantic) contaminated its facility in Camden, Arkansas in the course of performing work for the Department of Defense (DOD).<sup>22</sup> Atlantic voluntarily investigated and cleaned up the contamination prior to being sued or entering into a settlement agreement and sought to recover some of its costs from the United States.<sup>23</sup> However, negotiations with DOD ended after the Supreme Court issued its decision in *Aviall*.<sup>24</sup> The *Aviall* decision precluded Atlantic from recovering from DOD under section 113(f), because there had been no prior litigation or settlement with EPA. In addition, existing precedent in the Eighth Circuit arguably prevented Atlantic from making a claim under section 107 because it was a PRP.<sup>25</sup> Atlantic nevertheless sued the United States to recover some of its costs under section 107, but the district court dismissed its claim, citing pre-*Aviall* case law.<sup>26</sup> The Eighth Circuit Court of Appeals reversed, distinguishing its prior case law in light of *Aviall*'s limitation on section 113 actions and stating that it "no longer makes sense to view section 113(f)(1) as the exclusive route by which liable parties may recover cleanup costs."<sup>27</sup>

The Eighth Circuit was not the only court to reconsider whether a PRP could sue under section 107 in light of the Supreme Court's narrow reading of section 113 in *Aviall*. Three courts held that there was such a right<sup>28</sup> and one held that there was not.<sup>29</sup> In light of the circuit split on the issue, the Supreme Court granted *certiorari* on January 19, 2007.

### The Supreme Court Decision

In a unanimous decision authored by Justice Thomas, the Supreme Court held that a PRP may maintain a cause of action under section 107 against other PRPs. In analyzing the issue, the Court concentrated, as in *Aviall*, on the text of the statute, in particular subparagraphs 107(a)(4)(A) and (4)(B), which outline, re-

spectively, the rights of government plaintiffs and those of “any other person.”

In their briefs and at oral argument before the Court, the parties presented dramatically different interpretations of the phrase “any other person” in section 107(a)(4)(B). The United States argued that the phrase “any other person” refers to section 107(a), which outlines the different categories of PRPs. Under this interpretation, subparagraph (a)(4)(B) refers to parties other than PRPs listed in section 107(a)(1) through (4) and thereby authorizes a cost recovery suit under section 107(a) only by parties other than PRPs. By contrast, Atlantic argued that the phrase “any other person” refers to subparagraph (4)(A) and thereby authorizes suit by any party other than the government—a class that certainly would include PRPs.

The Court agreed with Atlantic’s construction, finding it “natural” to read section 107(a)(4)(B) with reference to the immediately preceding subparagraph (A).<sup>30</sup> The Court noted that because the categories of PRPs are so broad, excluding PRPs from the class authorized to bring claims under section 107 would “reduce the number of potential plaintiffs to almost zero.”<sup>31</sup> Accordingly, the Court held that PRPs may bring cost recovery claims under section 107, just like the government and innocent parties. Notably, the Court expressly did not decide the issue left open by *Aviall*—whether section 107 also contains an implied right for contribution.<sup>32</sup>

In explaining its ruling, the Court addressed the concern that its decision had rendered section 113 a nullity because a PRP always would prefer to bring a cost recovery action under section 107, which offers potentially broader liability (joint and several liability rather than equitable apportionment) and a longer statute of limitations.<sup>33</sup> The Court first mentioned that the government and several courts had incorrectly concluded that an action between PRPs was necessarily one for contribution.<sup>34</sup> According to the Court, “the remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action to persons in different procedural circumstances.”<sup>35</sup> The Court elaborated that section 107 and section 113 provide “clearly distinct” remedies: (1) a cost recovery action under section 107 to recover response costs that a party has incurred by voluntarily performing a cleanup; and (2) a contribution action under section 113 for reimbursement of money paid by a party, for example, pursuant to a settlement agreement.<sup>36</sup> According to the Court, if a party only reimbursed response costs paid by other parties, either through a settlement or a

court judgment, it may not bring a section 107 cost recovery action; its only possible CERCLA remedy is a section 113 contribution action.<sup>37</sup>

The Court also addressed the government’s concern that recognizing a private cause of action under section 107 for PRPs would provide a windfall to the first PRP to the courthouse, because that PRP would obtain a judgment for joint and several liability against the other PRPs.<sup>38</sup> The Court concluded that, assuming liability under section 107(a)(4)(B) is in fact joint and several, a defendant PRP still would be able to counter-claim against the plaintiff PRP under section 113, and a court then would be required to equitably

allocate liability among the PRPs in accordance with the terms of section 113(f).<sup>39</sup>

## Open Questions

Although *ARC* clarified some of the issues left open by *Aviall*, it raises at least as many questions as it answers. Some of the most important questions facing practitioners are discussed below.

### The Contribution Bar

At the forefront of the unanswered questions is the effect the *ARC* opinion will have on the contribution bar in section 113(f)(2) of CERCLA. The contribution bar provides that a person who has resolved its liability to the United States or a state in an administrative or judicially approved settlement is not liable for claims for contribution regarding "matters addressed in the settlement."<sup>40</sup>

The contribution bar is widely seen as a major incentive for parties to settle with EPA; doing so not only resolves a party's liability to EPA but also precludes other PRPs from suing the settler for contribution, providing the finality that private parties often desire.<sup>41</sup> In *ARC*, the United States argued that allowing PRPs to seek recovery under section 107 would eviscerate the contribution bar and discourage settlement, because the bar specifically applies only to contribution actions and thus would not preclude a private party from suing another party for cost recovery under section 107.<sup>42</sup> The Court rejected this concern, stating "a district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus."<sup>43</sup> The Court also maintained that there still are incentives for settlement in that *ARC* does not affect the protection such a bar provides against contribution actions or the "inherent benefit" of resolving liability with the government.<sup>44</sup>

Whether courts will accept Justice Thomas's invitation to apply equitable principles to effectively extend the contribution bar to cost recovery actions remains to be seen. Although some court de-

isions speak of cost recovery actions as a form of equitable restitution,<sup>45</sup> other courts have rejected attempts to inject equitable principles into section 107 actions.<sup>46</sup> Moreover, a number of courts have resisted efforts to extend the contribution bar so as to insulate settling PRPs from section 107 actions.<sup>47</sup> In addition, many courts that have disallowed section 107 claims by PRPs because of the defendant's contribution bar did so after determining that a claim by one PRP against another actually is a claim for contribution, a conclusion that *ARC* places in doubt.<sup>48</sup>

### Ordered Cleanups: Cost Recovery or Contribution?

Another pressing question left open by the Court is which cause of action is available to a party that does not squarely fit into the two scenarios the Court explicitly addressed in the opinion—that is, a PRP that has not voluntarily incurred costs or paid money pursuant to a settlement agreement or order. The prime example of this is a party who performs a cleanup pursuant to an order or consent decree. In note 6 of the *ARC* opinion, the Court identifies this as an open issue, but says only that it does not decide whether such costs are recoverable "under §113(f), §107(a), or both."<sup>49</sup>

### Implied Right of Contribution

Notably, the Court again declined to decide whether there is an implied right of contribution under section 107. Therefore, this question remains unanswered, although its importance has diminished now that the Court has recognized an explicit private cost recovery action under section 107 for PRPs.

### Joint and Several Liability

Finally, the Court's opinion explicitly assumes but does not decide that liability under section 107 is joint and several.<sup>50</sup> Now that the Court has ruled that liable parties can sue under section 107, lower courts are likely to reconsider whether joint and several liability is always appropriate under that section, particularly where its application would yield an undue benefit to a plaintiff or result in an unfair burden on a defendant.<sup>51</sup> In the wake of *ARC*, a Colorado district court already has ruled that it can consider equitable apportionment in a section 107 action, even in the absence of section 113 counterclaim.<sup>52</sup>

## Practical Impact

The full impact of *ARC* will take years to discern. The decision likely will affect litigation in the short term. In the long term, it may affect brownfields redevelopment and EPA settlements.

### Litigation

Immediately, practitioners should be looking over their dockets to see how *ARC* may impact their existing cases. In the short term, plaintiffs' counsel whose claims were barred by *Aviall* will be looking for ways to amend their pleadings to bring section 107 cost recovery claims before the courts. For example, a PRP whose section 113 action

was barred by the shorter statute of limitations might have a cause of action under section 107 that still is timely. Similarly, PRPs who have avoided suit because a prospective plaintiff was not able to meet the prerequisites of a section 113 contribution action may need to reevaluate their defenses to section 107 liability.

### Brownfields Redevelopment

More broadly, the *ARC* decision could have a significant impact in two main areas: brownfields redevelopment and cleanup settlements. The *ARC* decision has been widely praised by the brownfields community,<sup>53</sup> which seeks to promote redevelopment of contaminated or potentially contaminated properties.<sup>54</sup> From the standpoint of a brownfields developer, *ARC* means that a party can purchase contaminated property without having to meet the requirements for a defense from CERCLA liability, and then can sue other PRPs for at least some of its costs without meeting section 113's requirements for a qualifying settlement or lawsuit.

Whether the removal of these barriers will have any impact on brownfields cleanups remains to be seen. Many brownfields developers undertake cleanups without intending to sue other liable parties and, more important, without following the National Contingency Plan, the detailed cleanup rules with which parties must comply to obtain any recovery under CERCLA.<sup>55</sup> Moreover, *ARC* actually may hinder brownfields redevelopment, because parties that own contaminated property may "mothball" contaminated property rather than put it on the market and run the risk that the property will end up in the hands of a future CERCLA cost recovery plaintiff who could sue the former owner for joint and several liability.

### EPA Settlements

Beyond the brownfields market, the *ARC* decision's most important implications likely will be in the area of cleanup settlements with EPA. Practitioners representing parties wishing to settle with EPA will want to find some definitive means of foreclosing future CERCLA cost recovery claims, as well as contribution claims against their clients. Although some practitioners may be willing to rely on the Court's expectation that lower courts will apply traditional principles of equity to preclude private cost recovery claims against parties that resolve their liability to EPA, for others that approach may not provide sufficient comfort. One way to extend the "contribution" bar would be for EPA to require settling parties to covenant not to sue any other party that also has settled—for contribution, cost recovery, or any other claim. EPA's model settlement agreements already contain language by which settling parties agree not to make claims against *de minimis* parties—that is, parties that are believed to be responsible only for a very minor portion of cleanup costs.<sup>56</sup> However, this solution will not protect a settling party from cost recovery claims by parties who have not entered into a settlement agreement containing such a covenant.

### Guidance From Case Law

As practitioners evaluate these and other potential impacts of *ARC*, they should look closely at older district court decisions that interpreted section 107(a)(4)(B) before the courts of appeals began redirecting PRPs to section 113(f). Many of the issues left open by the *ARC* decision, including joint and several liability, the implied

right of contribution, and the ability of the courts to consider equitable matters in a section 107 action, were addressed in those early court decisions, which may shed some light on how courts will resolve these issues in the future.

### Conclusion

The scope of a PRP's right to recover under CERCLA from other PRPs has been somewhat of a moving target in CERCLA case law. For all the unanswered questions it raises, *ARC* now makes clear that certain PRPs—those who voluntarily clean up contaminated sites—once again have a powerful tool available to them in section 107.

### Notes

1. 42 U.S.C. §§ 9601 *et seq.*
2. 42 U.S.C. § 9613(f).
3. *Cooper Industries v. Aviall*, 543 U.S. 157 (2004). See Calkins, "CERCLA Contribution Actions After *Cooper v. Aviall*," 34 *The Colorado Lawyer* 99 (Sept. 2005).
4. *Atlantic Research Corp. (ARC) v. U.S.*, 127 S.Ct. 2331 (2007).
5. 42 U.S.C. § 9607(a)(4).
6. See, e.g., *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F.Supp. 283, 291 (N.D.Cal. 1984) (section 107(a)(4)(B)'s reference to "other person" allows suits by persons other than the federal and state government); *City of Philadelphia v. Stepan Chem. Co.*, 544 F.Supp. 1135, 1141-43 (E.D.Pa. 1982) (same).
7. See, e.g., *Colorado v. ASARCO, Inc.*, 608 F.Supp. 1484, 1491 (D.Colo. 1985) (recognizing joint and several liability under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as consistent with CERCLA's purpose of expeditious cleanup of contaminated property). See also 42 U.S.C. § 9601(32) (requiring that the term "liable" "shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act [33 U.S.C. § 1321]").
8. See, e.g., *U.S. v. Conservation Chem. Co.*, 619 F.Supp. 162 (W.D.Mo. 1985); *ASARCO*, *supra* note 7 at 1492.
9. See *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994), citing S. Rep. No. 99-11 at 44 (1985).
10. 42 U.S.C. § 9613(f)(1) and (3)(B) (emphasis added).
11. *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530 (8th Cir. 2003); *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, 350-51 (6th Cir. 1998);

*Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1496 (11th Cir. 1996); *U.S. v. Colo. & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *United Techs. Corp.*, *supra* note 9 at 101; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

12. *See, e.g., Dico*, *supra* note 11 at 531.
13. *See, e.g., Centerior Serv. Co.*, *supra* note 11 at 354-56.
14. *Aviall*, *supra* note 3.
15. *See, e.g., Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 687 (5th Cir. 2002), *revid*, 543 U.S. 157 (2004).
16. *Aviall*, *supra* note 3 at 168.
17. *Id.* at 167.
18. *ASARCO, Inc. v. Union Pac. R.R.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662, 2006 U.S. Dist. LEXIS 2626 (D.Ariz. Jan. 24, 2006).
19. *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F.Supp.2d 1079 (S.D.Ill. 2005).
20. *Consol. Edison Co. of New York v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005), *cert. denied*, 127 S.Ct. 2995 (2007).
21. *Aviall*, *supra* note 3 at 168-71.
22. *ARC v. U.S.*, 459 F.3d 827, 829 (8th Cir. 2006), *aff'd*, 127 S.Ct. 2331 (2007).
23. *Id.*
24. *Id.*
25. *Id.* at 829-30. *See Dico*, *supra* note 11 at 531 (precluding PRPs from suing under section 107 because of overwhelming support in the case law that PRPs are limited to claims for contribution).
26. *ARC*, *supra* note 4 at 830.
27. *Id.* at 834 (internal quotations omitted).
28. *Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 837 (7th Cir. 2007); *ARC*, *supra* note 22 at 837; *Consol. Edison Co.*, *supra* note 20 at 103.
29. *E.I. DuPont de Nemours & Co. v. U.S.*, 460 F.3d 515, 543 (3d Cir. 2006), *vacated*, 127 U.S. 2971 (2007).
30. *ARC*, *supra* note 4 at 2336.
31. *Id.* at 2337. The Court expressed only vague awareness of the various defenses to liability that in fact do create a class of parties that are not PRPs. *See id.* at 2336-37 (describing the innocent landowner defense incorrectly). The Court also did not consider whether Congress may have intended to reserve the benefits of a section 107 action for parties that had gone to the trouble of meeting the requirements for the innocent landowner and related defenses.
32. *Aviall*, *supra* note 3 at 170-71.
33. *ARC*, *supra* note 4 at 2337-39.
34. *Id.* at 2337 (internal citations omitted).
35. *Id.* at 2338 (internal citations and quotations omitted).
36. *Id.* at 2337-38 (internal citations omitted).
37. *Id.* at 2338.
38. *Id.* at 2338-39.
39. *ARC*, *supra* note 4 at 2338-39; 42 U.S.C. § 9613(f)(1) (authorizing courts to allocate liability applying equitable factors). There would be no *Aviall* bar to such a claim, because the defendant PRP would bring the claim "during" a section 107 action as required.
40. 42 U.S.C. § 9613(f)(2). *See also* 42 U.S.C. § 9622(g)(5) (establishing a similar, separate contribution bar for parties that enter into *de minimis* settlements with EPA or a state).
41. *See, e.g., Colo. & E. R.R.*, *supra* note 11 at 1537 (noting that the contribution bar encourages settlement by providing finality).
42. *ARC*, *supra* note 4 at 2337.
43. *Id.* at 2339.
44. *Id.*

45. *See, e.g., U.S. v. Mottolo*, 695 F.Supp. 615, 626 (D.N.H. 1988) (cost recovery claim is a claim for restitution, an equitable remedy).

46. *See, e.g., U.S. v. Kramer*, 757 F.Supp. 397, 424-28 (D.N.J. 1991) (rejecting equitable defenses to section 107 claims on the grounds that Congress explicitly limited the court's equitable discretion when it provided that section 107 applies "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this Section").

47. *See, e.g., Centerior Serv.*, *supra* note 11 at 352 (stating in *dicta* that section 107 cost recovery claims by PRPs would not be barred by settlement agreements); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1242 (7th Cir. 1997) (holding that section 107 cost recovery actions by innocent PRPs are not precluded by a contribution bar); *City of Mishawaka v. Uniroyal Holding Inc.*, No. 3:04-CV-125 RM, 2006 WL 163007 at \*5, 2006 U.S. Dist. LEXIS 4372 at \*17 (N.D.Ind. Jan. 19, 2006) (holding that plaintiff's state law claims were in effect claims for cost recovery and therefore were not barred by defendant's settlement with the government).

48. *See, e.g., U.S. v. ASARCO, Inc.*, 814 F.Supp. 951, 956 (D.Colo. 1993); *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F.Supp. 1132, 1139 (D.R.I. 1992); *Dravo Corp. v. Zuber*, 804 F.Supp. 1182, 1189 (D.Neb. 1992), *aff'd*, 13 F.3d 1222 (8th Cir. 1994).

49. *ARC*, *supra* note 4 at 2338 n.6.

50. *Id.* at 2339.

51. Such a case might arise where a defendant was unable to assert a section 113 counterclaim against a private party plaintiff because the plaintiff had obtained contribution protection from EPA.

52. *Bank One, N.A. v. C.V.Y. Corp.*, No. 01-cv-01807-MSK-MJW, 2007 WL 2288204 at \*1, 2007 U.S. Dist. LEXIS 58214 at \*4-5 (D.Colo. Aug. 9, 2007) (noting that the court would wait until trial to determine if the evidence demonstrates the need for equitable apportionment).

53. *See Pyle*, "Commentary: New Supreme Court Ruling Greenlights Brownfield," *Daily J. of Com.* (June 18, 2007), available at [http://findarticles.com/p/articles/mi\\_qn4184/is\\_20070618/ai\\_n19305967](http://findarticles.com/p/articles/mi_qn4184/is_20070618/ai_n19305967).

54. *See* 42 U.S.C. § 9601(39)(A) (defining "brownfield").

55. Northwest Midwest Institute, "An Assessment of the Impacts of *Cooper v. Aviall* on Brownfields Cleanups" 2 (June 2007), available at <http://www.nemw.org/Cooper%20versus%20Aviall.pdf> ("developers do not factor litigation into their model for redevelopment"). *See* National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (national contingency plan).

56. *See* Revised Model Administrative Settlement Agreement and Order on Consent for Removal Actions (Jan. 30, 2007), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-aoc-remove-mod.pdf>; Model Administrative Order on Consent for Remedial Design (Jan. 6, 2005), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rd-aoc-05.pdf>; Revised Model Administrative Order on Consent for Remedial Investigation and Feasibility Study (Jan. 21, 2004), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-aoc-rifs-mod-04-mem.pdf>. Each of these model agreements contains language pursuant to which:

[r]espondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final *de minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), with EPA with respect to the Site as of the Effective Date.

*See supra* note 55. By their terms, these waivers do not apply "to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent." ■

