

U.S. Supreme Court Finishes Rerouting Traffic on the CERCLA Highway

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With its opinion in *United States v. Atlantic Research Corp.*, U.S., No. 06-562, 6/11/07, the United States Supreme Court silenced the Circuits' feud over whether, and how, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as Superfund, allows private parties that voluntarily clean up contaminated properties to file cost recovery claims. With this decision, the court finished rerouting CERCLA cost recovery lawsuits away from Section 113 and toward Section 107.


Three years ago, the Supreme Court sent shockwaves through the world of environmental litigation with *Cooper Industries Inc. v. Aviall Services Inc.*, 543 U.S. 157 (2004) ("*Aviall*"), in which it overturned 20 years of case law explaining how CERCLA worked in such cases. After the *Aviall* decision, companies warily ventured into remedial actions, unsure of what their rights were to recover costs because the court blocked the road that had been traveled for the past 20 years without providing for a detour route. Now, the Court's ruling in *Atlantic* provides the new roadway parties are to follow when bringing CERCLA cost recovery action.

Center stage of this controversy stood Atlantic Research Corp. ("Atlantic") which had removed rocket propellants at a Camden, Arkansas, government facility – a retrofitting process that contaminated soil and groundwater. Atlantic voluntarily cleaned up the site, and in 2002, it sought recovery of a segment

of those costs from the federal government under CERCLA. At that time, courts agreed that parties such as Atlantic could only recover costs by invoking Section 113 of CERCLA. Just before a cost recovery agreement was to be signed between the parties, the Supreme Court released its decision in *Aviall*, holding that parties such as Aviall (and, by extension, Atlantic) did not have standing to invoke Section 113's contribution claims because they themselves had not first been sued by another party for cost recovery, nor were they the target of a federal CERCLA enforcement action. Because Atlantic could no longer make a cost recovery claim under Section 113 and because 20 years of case law said that it could not make a similar claim under Section 107, the government reneged on its agreement to settle Atlantic's claims. Not giving up, Atlantic continued its lawsuit, seeking recovery under CERCLA Section 107(a) because in *Aviall*, the court specifically reserved deciding whether private parties, such as Aviall and Atlantic, had a viable 107(a) claim.

The viability of Atlantic's CERCLA cost recovery claim pivoted on the interpretation of Section 107(a)(4)(b) that states that potentially responsible parties are liable for all government-incurred costs and "other necessary response costs incurred by any other person[.]" But just who was "any other person"? Atlantic argued that they were "any other person." The government, citing old case law, argued that "any other person" now refers solely to innocent landowners. Rejecting the government interpretation, the Supreme Court adopted a plain and natural reading of 107(a) ruling that the phrase "any other person" means just what it says, and does not exclude potentially responsible parties such as Atlantic.

This unanimous opinion demonstrates once again the Supreme Court's tendency to concentrate on the "plain language" of a statute. Under CERCLA Section 107, the term "any other person" means exactly that—"any other person" can sue under CERCLA to recover costs incurred in cleaning up contaminated properties. There is no requirement that parties be sued by anyone else before seeking such relief.

The Courts rulings in *Atlantic* and *Aviall* clarify that the rights and remedies under CERCLA 113 and 107(a) create two separate causes of action for parties in distinctive procedural postures. While Section 113 provides a contribution claim to secure an equitable apportionment among jointly liable parties for costs incurred, it is only available once a party has first been sued or the subject of an enforcement action. Conversely, Section 107(a) provides a claim for parties who incurred cleanup costs themselves, not for expenses others incurred. 

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