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HIGH COURT RESCUES CERCLA VOLUNTEERS LEFT DANGLING AFTER *AVIALL*

On June 11, 2007, the Supreme Court in *United States v. Atlantic Research Corporation*, 2007 WL 1661465, number 06-562 (2007), ruled that a potentially responsible party (PRP) or defendant under CERCLA as plaintiff can recover response costs from other potentially responsible parties under 42 U.S.C. §9607, the cost recovery section. Previously, the United States Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), held that parties who voluntarily clean up do not have a cause of action under CERCLA for contribution under Section 9613 from other potentially responsible parties. In *Aviall*, the Court did not rule whether such volunteers had a cost recovery action under Section 9607, and the Court left that issue open until this new case.

Atlantic Research Corporation was the lessee of Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. Atlantic Research retrofitted rocket motors for the United States at the facility. In doing so, some resulting waste water and burned fuel contaminated soil and groundwater at the site, which required Atlantic Research to voluntarily clean up. Atlantic Research later sought cost recovery and contribution from the United States. Being a volunteer, Atlantic Research pursued its cost recovery action rather than contribution action following the Supreme Court's decision in Aviall.

The Supreme Court in *Atlantic Research* ruled that the "any other person" who can sue for cost recovery under Section 9607 of CERCLA was not restricted to innocent parties or governments, but included the potential responsible parties who are listed as liable under Section 9607, e.g., owners, operators, arrangers, transporters, etc.

The Court ruled the plain language of Section 9607 allows such potentially responsible parties to seek cost recovery actions.

Although the Court found that there was some overlap between Section 9607, cost recovery, and Section 9613, contribution, it did not find that friction overwhelming. Potentially responsible parties really do not have an effective choice between Sections 9607 and 9613 (which have different liability standards, settlement protections from future litigation, and statutes of limitation periods– contribution has three years from judgment or order, while cost recovery has three years from completion of a short term removal action or usually six years after completion of a longer term remedial action), as the Court held that these sections deal with different circumstances. Volunteers can use Section 9607 cost recovery if they expend response costs, but other parties who do not expend response costs and who reimburse the government for clean-up costs either via settlement or a prior CERCLA action have the right to contribution only.

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The court also did not find that the equitable apportionment remedies in Section 9613, contribution, were undermined by potential joint and several liability in Section 9607. The Court felt that the party sued under Section 9607 could always bring a counter-claim against plaintiff under Section 9613 for contribution or an equitable distribution. The Court impliedly holds, however, that the private party can seek joint and several liability under Section 9607.

Finally, the Court did not feel the contribution bar awarded to a settling party under Section 9613, contribution, was undermined. First, the Court felt that a settling party later sued for cost recovery by another potentially responsible party could always bring a Section 9613 counter-claim against the plaintiff, bringing in equitable principles. Second, the Court felt that the settlement protected the settling party under Section 9613 by resolving its liability to the United States or the State.

This holding, of course, does not obviate the need for a trial on the merits for a new Section 9607 claim brought against the settling party by another potentially responsible party. Formerly, the contribution bar would have simply resulted in dismissal of the private claim. Therefore, settlement of government CERCLA claims do not ultimately protect a settling party from a future trial, although the settlement may be viewed by a court after such a trial as the equitable limits of the settling parties' CERCLA liability, but maybe not.

It appears that the Supreme Court has resolved the volunteer issue but only by opening up more issues in cost recovery actions.

–*Stanley A. Millan*