



THE ADMINISTRATIVE WATCH

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U.S. SUPREME COURT CLARIFIES PRPs' ABILITY TO RECOVER SUPERFUND CLEANUP COSTS

This week, the United States Supreme Court resolved one of the more troubling issues that has confronted parties who clean up contaminated property and seek to recover their costs from other potentially responsible parties ("PRPs"). In *United States v. Atlantic Research*, the Court unanimously held that a PRP may recover its cleanup costs using Superfund's Section 107 cost recovery provisions. The Court's opinion resolves a circuit court conflict ignited by the Court's 2004 decision in *Cooper Industries v. Aviall Services*. In *Aviall*, the Court upset years of accepted Superfund practice by holding that persons who have not themselves been sued under Sections 106 or 107 of the CERCLA are ineligible to obtain contribution under Section 113. At the time, the Court expressly declined to determine whether a PRP could bring a cost recovery claim under Section 107. The availability of a Section 107 cost recovery claim to private parties promptly rose to the circuit court level and generated conflicting opinions. Ultimately, the Court granted *cert.* in *United States v. Atlantic Research*, and affirmed the Eighth Circuit's holding that "the plain terms of [Section 107] allow a PRP to recover costs from other PRPs."

In explaining its decision, the *Atlantic Research* Court clarified the distinction between claims under Sections 107 and 113. The Court described a "complementary yet distinct nature of rights" established by Section 107 and Section 113, and held that the two sections provide causes of action to "persons in different procedural circumstances." The Court found that Section 107 provides a remedy for parties that have directly incurred costs to clean up sites. In contrast, the Court explained that Section 113 allows a party to obtain contribution from other PRPs toward payments it has made to satisfy a judgment or settle a claim.

In response to concerns that making Section 107 actions available to PRPs would "eviscerate" the settlement protection provided to settling parties under Section 113, the Court acknowledged that settlement protection does not by its terms protect against Section 107 cost recovery claims. However, the Court noted that a defendant in a Section 107 action retains the option to counterclaim for contribution pursuant to Section 113 against the plaintiff for any costs equitably attributable to the plaintiff, and that in such a circumstance, the trial court could apply equitable allocation principles, taking the earlier settlement into account. Notwithstanding the Court's discussion of this issue, however, the precise effects of the *Atlantic Research* opinion on settlements and contribution protection remains to be seen, and BCCZ will be tracking this issue closely.

Although *Atlantic Research* resolved much of the uncertainty regarding a PRP's ability to recover Superfund costs under Section 107, the decision did not resolve all of the nuanced issues associated with cost recovery, and, as a result, is likely to generate more litigation regarding the interplay between Sections 107 and 113. If you have any questions regarding the application of *United States v. Atlantic Research* to issues confronting your organization, please contact Steven Baicker-McKee at (412) 394-5499 or sbaicker@bccz.com, Lindsay P. Howard at (412) 394-5444 or lhoward@bccz.com or Emily T. Lewis at (412) 394-5451 or elewis@bccz.com.