



Seth D. Jaffe

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Private Litigation Under CERCLA after *U.S. v. Atlantic Research Corp*

Cutting the Gordian Knot of Superfund



The Evolution of *Atlantic Research*

- Pre-*Aviall* Jurisprudence
- The Holding in *Aviall*
- Aftermath of *Aviall*
- The Holding in *Atlantic Research*
- Questions left open by *Atlantic Research*
- Cases after *Atlantic Research*

Pre-Aviall Jurisprudence

- Section 113(f) authorizes one PRP to sue another for contribution:
 - Section 113(f)(1): “during or following” a civil action under s. 106 or s. 107(a)
 - Section 113(f)(3)(B): settlement with the government
- Prior to s. 113(f), some courts held that s. 107(a) provided a cause of action for a private party to recover voluntarily-incurred response costs and to seek contribution after having been sued.
- After s. 113(f), several Courts of Appeals directed traffic between s. 113(f) and s. 107(a)
- To avoid s. 107(a) from swallowing s. 113(f), many courts held that s. 113(f) was the exclusive remedy for PRPs; s. 107(a) was reserved for innocent parties

The Holding in *Aviall*

- A potentially responsible party who has undertaken a voluntary site cleanup may not bring claims for contribution under s. 113(f)(1) of CERCLA except “during or following” a civil action under s. 106 or s. 107.
- Basis is textual analysis of CERCLA. “During or following” language of s. 113(f)(1) would be “superfluous” if contribution claims could be brought in the absence of a prior civil action.
- Because plaintiff in *Aviall* had engaged in voluntary site clean-up, rather than awaiting government compelled clean-up, it was foreclosed from seeking to recover costs in an action under s. 113(f)(1).

What's Implied in *Aviall*

- Parties may not bring contribution actions under s. 113(f)(3)(B) unless they really have resolved their CERCLA liability to the United States or a state in an “administrative or judicially approved settlement.”
- Given strict textual analysis of s. 113(f)(1), it is unlikely that s. 113(f)(3)(B) would be read expansively.

The Holding in *Atlantic Research*

- Distinguished s. 107(a) cost recovery from s. 113(f) contribution claims
- “Plain language” of Section 107(a) permits cost recovery by a private party that has voluntarily incurred direct clean-up costs
- Section 113(f) authorizes a contribution action by party that has paid money to a third party to satisfy a settlement agreement or court judgment pursuant to s. 106 or s. 107(a)
- In Footnote 6, the court explicitly left open the issue of whether expenses incurred pursuant to consent decrees can be recovered under s. 113(f) or s. 107(a)

Questions after *Atlantic Research*

- Footnote 6 – Are response costs incurred pursuant to a consent decree recoverable under 107(a) or 113(f)?
 - *Atlantic Research* explicitly did not decide this question
 - Such costs were not incurred voluntarily
 - Claims for response costs would not seem to be subject to section 113, because response costs are not payments to third parties

Questions after *Atlantic Research*, cont.

- Joint and several liability?
 - *Atlantic Research* “assumed without deciding that 107(a) provides for joint and several liability”
 - A PRP can file a 113(f) counterclaim for contribution to ensure fair apportionment
 - Who has burden of proof?

Questions after *Atlantic Research*

- What about the Settlement Bar under 113(f)
 - Can a PRP that voluntarily undertakes clean-up efforts pursue a 107(a) cost recovery claim against PRPs that have settled with the government, given that the settlement bar only protects against suits for contribution?
 - If court allows 107 actions for response costs following consent decrees, plaintiff could argue that the contribution counterclaim would be barred by section 113 contribution protection

Cases after *Atlantic Research*

- Footnote 6 –Claims under section 107 or 113 following plaintiff settlement with government
 - NY v. Solvent Chemical company* (W.D.N.Y. 2008)
Court allowed plaintiff to assert s. 107 claims relating to response costs incurred following settlement
 - Niagara Mohawk Power v. Conrail* (N.D. NY 2008)
Court precludes s. 107 claim based on response costs incurred pursuant to state consent order
 - Champion Laboratories v. Metex Corp.* (D.N.J. 2008)
 - Allows assertion of claim under s. 113(f)(3)(B) in connection with payment to government for NRD.
 - Liberal in allowing pleading of various theories under s. 107 and s. 113

Cases after *Atlantic Research*

- *What is voluntary? Does it matter?*
 - *Reichhold v. U.S. Metals Refining Company* (D.N.J. 2008) -- Costs incurred pursuant to a negotiation with NJDEP are voluntary
 - *Appleton Papers Inc. v. George A. Whiting Paper* (E.D. Wis. 2008) – Proper focus is not whether payments were voluntary. Question is whether a s. 113 claim is available. “107(a) is available to recovery payments only in circumstances where s. 113(f) is not.” (Court notes that payments made under government duress could hardly be described as “voluntary.”)

Cases after *Atlantic Research*

- What settlements trigger s. 113 claims?
 - *ITT Indus. v. BorgWarner* (6 Cir.) - Administrative Order by Consent with the EPA – Settlement with EPA does not trigger s. 113 claim, because it did not resolve plaintiff's liability to EPA, where EPA reserved right to assert further claims if EPA determined that plaintiff's work plan was inadequate

Cases after *Atlantic Research*

■ Joint and Several Liability

- *Reichhold v. U.S. Metals Refining Company* (D.N.J. 2008) – Liability is joint and several unless defendant can prove divisibility
- *NY v. Solvent Chemical company* (W.D.N.Y. 2008) – “[R]egardless of what section of CERCLA is involved, it will make every effort to fairly and equitably apportion liability”
- *Agere Sys. v. Advanced Env'tl. Tech. Corp.* (E.D. Pa. 2008) – Very lengthy allocation decision. Court noted difference between claims under s. 107 and s. 113, but then stated that it would determine “equitable shares”, without determining whether it was acting under s. 107 or s. 113.

Cases after *Atlantic Research*

■ Where Do We Go From Here?

- Is s. 107 available for response costs incurred following consent decree?

A betting man would say yes

- Is liability joint and several?

A betting man will punt, but pray that he is not a defendant to a private suit under s. 107

- Will the s. 113 settlement bar preclude s. 107 claims against either

- 3rd party defendants who settled?

- The s. 107 plaintiff?

A betting man says ...

Cases after *Atlantic Research*

One of these days in your travels, a guy is going to show you a brand-new deck of cards on which the seal is not yet broken. Then this guy is going to offer to bet you that he can make the jack of spades jump out of this brand-new deck of cards and squirt cider in your ear. But, son, do not accept this bet, because as sure as you stand there, you're going to wind up with an ear full of cider.