

**CERCLA COST RECOVERY AND CONTRIBUTION RIGHTS:
SIGNIFICANT CASE LAW DECISIONS POST-AVIALL
(As of August 1, 2007)**

NOTE: This list is not an exhaustive list of all cases that cite to *Aviall* and/or all cases that discuss the scope of cost recovery and contribution rights under CERCLA §§ 107(a) or 113.¹

SUPREME COURT

***Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).** Private party who incurs response costs in cleaning up contaminated property, but has not been sued under sections 106 or 107, cannot bring a contribution action under section 113(f)(1) against other liable parties.

***Atlantic Research Corp. v. United States*, 127 S.Ct. 2331 (2007).** CERCLA § 107(a) allows potentially responsible parties (PRPs) in Atlantic Research's position to recover cleanup costs from other PRPs where there is no corresponding legal action (suit or settlement) by EPA or a state under CERCLA §§ 106 or 107.

SECOND CIRCUIT:

***Consol. Edison Co. of NY. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005) ("Con Ed").** "[S]ection 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment."

***Seneca Meadows, Inc., v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279 (W.D.N.Y. 2006).** State consent orders qualify as contribution-conferring agreements for purposes of CERCLA § 113(f)(3)(B).)

THIRD CIRCUIT:

***E.I. DuPont de Nemours and Co. v. United States*, 460 F.3d 515 (3rd Cir. 2006)** PRPs cannot seek contribution under CERCLA § 107.)

FIFTH CIRCUIT:

***Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005).** PRP could bring CERCLA § 107 cost recovery claim for voluntary cleanup costs.)

¹ Cases that were effectively overturned by the Supreme Court's holding in *Atlantic Research Corp. v. United States*, 551 127 S.Ct. 2331 (2007) are not included within this list.

SIXTH CIRCUIT:

Carrier Corp. v. Piper, 460 F. Supp. 2d 827 (W.D. Tenn. 2006). Unilateral administrative order (UAO) qualifies as a civil action for purposes of a PRP's contribution claim under CERCLA § 113(f)(1) and PRP can also seek cost recovery under section 107.

ITT Indus., Inc. v. BorgWarner, Inc., 2006 U.S. Dist. LEXIS 59877 (W.D. Mich. Aug. 23, 2006). Administrative order on consent (AOC) at issue was an "interim" agreement that did not resolve plaintiff's liability and did not fall within description of agreements in section 113(g)(3)(B) and thus did not confer contribution rights under section 113(f)(3)(B).

SEVENTH CIRCUIT:

Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, 473 F.3d 824 (7th Cir. 2007). PRP has right of cost recovery under CERCLA § 107 for voluntary cleanup costs.

Pharmacia Corp. v. Clayton Chem. Acquisition, 382 F. Supp. 2d 1079 (S.D. Ill. 2005). AOC with EPA was an "order" not a settlement that would confer contribution rights under CERCLA § 113(f)(3)(B) and EPA-issued UAO was not a civil action that would confer contribution under section 113(f)(1).

NINTH CIRCUIT:

ASARCO Inc. v. Union Pacific R.R. Co., 2006 U.S. Dist. LEXIS 2626 (D. Ariz. Jan. 24, 2006). A memorandum of agreement between PRP and state did not give rise to a right of contribution under section 113(f)(3)(B).

City of Rialto v. United States Dept. of Defense, 2005 U.S. Dist. LEXIS 25179 (C.D. Cal. Sept. 23, 2005) (Rialto II). Plaintiffs were eligible for entry of a separate judgment on their CERCLA § 107 contribution claim, which had been dismissed previously by the court.

D.C. CIRCUIT:

Viacom, Inc. v. United States, 404 F. Supp. 2d 3 (D.D.C. 2005). A PRP that cannot bring a contribution claim under section 113 may bring a claim to recover cleanup costs under section 107.