No.

In The Supreme Court of the United States

ATLANTIC RESEARCH CORPORATION,

v.

UNITED STATES OF AMERICA, PETITIONER.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ATLANTIC RESEARCH CORPORATION'S BRIEF IN SUPPORT OF GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601, *et seq*., may bring a contribution action against another potentially responsible party under § 113(f) of CERCLA, 42 U.S.C. 9613(f), after having established, by virtue of declaratory judgment, the other party's liability under § 107(a), 42 U.S.C. 9607(a).

2. Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under CERCLA, 42 U.S.C. 9601, *et seq*., but that does not satisfy the requirements for bringing an action for contribution under § 113(f), may bring an action against another potentially responsible party under § 107(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

STATEMENT

Respondent Atlantic Research Corporation ("ARC") supports the government's Petition for a Writ of Certiorari. Needless to say, ARC does not agree with the government's claim that the holding below is incorrect (Pet., pp. 15-23); however, the government correctly asserts that the issue presented is important and warrants review at this time (Pet., pp. 2-6, 8-14, 24-26).

While ARC agrees that review is warranted, ARC disagrees with the government's characterization of the "issue" to be decided. The government identifies the issue as one "left open" by this Court in ***Cooper Industries, Inc. v. Aviall Services, Inc.***, 543 U.S. 157 (2004) – whether a PRP may bring a cost recovery action against another PRP under § 107(a) of CERCLA, 42 U.S.C. 9607(a), despite having no right to bring such an action under § 113(f), 42 U.S.C. 9613(f) (Pet., p. 2). While there is no dispute but that ***Aviall*** left this issue "open," and while the government correctly observes that the issue has received inconsistent treatment by the lower courts (Pet., pp. 9-13), this is not the sole issue to be resolved. Indeed, the issue identified by the government need not be resolved at all because ARC has a viable § 113(f) claim in this case.

ARC's action against the government consists of two separate and distinct claims. First, ARC seeks a declaration that the government, along with ARC, has CERCLA liability for contaminating the Camden, Arkansas site. Second, ARC seeks recovery of an equitable share of the monies it has expended to remediate the Camden site. While the second issue has triggered the current debate over the existence of a statutory or common law source for awarding ARC the monetary relief it seeks, the issue is moot if ARC has a

viable claim for declaratory relief. This is because ARC's claim for declaratory relief is, by necessity, a § 107(a) civil action triggering ARC's right to seek contribution under § 113(f).

ADDITIONAL REASONS FOR GRANTING THE PETITION

ARC acknowledges that while ***Aviall*** held that the "natural meaning" of § 113(f)(1) is that "contribution may be sought subject to the specified conditions, namely, 'during or following' a specified civil action," *i.e.*, "during or following any civil action under § 9606 … or under § 9607(a) …," 543 U.S. at 160, 166-67, the Court apparently limited that right to cases where the PRP seeking contribution had itself been sued under § 106 or § 107(a):

> Section 113(f)(1) specifies that a party may obtain contribution 'during or following any civil action' under CERCLA § 106 or § 107(a). The issue we must decide is whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. We hold that it may not. …
>
> Section 113(f)(1), … authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a), and it is undisputed that Aviall has never been subject to such an action. Aviall therefore has no § 113(f)(1) claim. (emphasis added)

Aviall, 543 U.S. at 160, 167.

Although the Court seemingly held that the PRP seeking contribution under § 113(f) must first have been sued in a § 107(a) action, nothing in CERCLA supports that holding. Section 113(f) unequivocally provides that "any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) … during or following any civil action under … § 9607(a)." (emphasis added) This provision raises the question whether absent being sued under § 9607(a), a person may nevertheless bring an action for declaratory relief seeking an adjudication of another's joint liability or

potential joint liability under § 9607(a) and, if so, is such an action a "civil action under section 9607(a)?" If a viable declaratory judgment action is a "civil action under § 107(a)," and if the declaratory judgment action establishes the liability or potential liability of another, then, by definition, the person may seek contribution under § 113(f). That is, if ARC has stated a viable claim for declaratory relief, and if its claim constitutes a § 9607(a) civil action, then ARC's action was "pending" when ARC also sought contribution (partial cost recovery) from the government. Because ARC has stated a viable claim for declaratory relief, and because such a claim is a § 9607(a) civil action, ARC is entitled to seek contribution from the government under § 9613(f)(1).

While the government successfully argued in the district court that ARC's request for response costs from the government could not be maintained under § 9607(a), the government never challenged ARC's separate request for a holding "declaring Defendant strictly liable for necessary response costs, consistent with a National Contingency Plan, relating to the Camden Site [and] declaring Defendant liable as a former owner, a former operator, and arranger … pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a) …." Indeed, each of ARC's requests for declaratory relief was based upon the government's actual or potential liability under § 9607(a). Because the government did not oppose ARC's request for declaratory relief, ARC is entitled to seek contribution under § 113(f) because ARC's request for declaratory relief is a civil action under § 107(a).

That § 9607(a) necessarily forms the predicate for ARC's request for declaratory relief flows from the fact that, as most courts have observed, no § 113(f)(1) action for contribution can be maintained absent a viable § 107(a) action to establish liability. For

example, in ***Control Data Corp. v. S.C.S.C.***, 53 F.3d 930, 934-36 (8th Cir. 1995), the Court observed:

> … Recovery of response costs by a private party under CERCLA is a two step process. Initially, a plaintiff must prove that the defendant is liable under CERCLA. Once that is accomplished, the defendant's share of liability is apportioned in an equitable manner.
>
> CERCLA liability is established under 42 U.S.C. § 9607(a) … [I]n order to prove liability, a plaintiff must show that a defendant is within one of the four classes of covered persons enumerated in [§ 107(a)]; that the plaintiff has incurred response costs as a result; and that the costs were necessary and consistent with a national contingency plan. …
>
> …
>
> Once liability is established, the focus shifts to allocation. Here the question is what portion of the plaintiff's response costs will the defendant be responsible for? Allocation is a contribution claim controlled by 42 U.S.C. § 9613(f). …
>
> …
>
> Under CERCLA, if a responsible party, as defined by [§ 107(a)] releases hazardous substances into the environment, and the release causes the incurrence of response costs, then the party is liable … for any other necessary costs of response incurred by any other person consistent with a national contingency plan. … [O]nce a person is liable, it is liable for its share, as determined by § 9613(f). …

Similarly, in ***Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.***, 153 F.3d 344, 350 (6th Cir. 1998), the court held that while § 107(a) exclusively governs claims for full cost recovery or indemnity, contribution claims are predicated upon both § 107(a) and § 113(f) working in conjunction – that the contribution remedy under § 113(f) is available to a PRP who is the defendant in a § 107(a) action, or who can assert a viable claim under § 107(a):

> The government … asserts that CERCLA does not provide two separate causes of action but that the two sections, § 107(a) and § 113(f) work in conjunction. It argues that an action for contribution must be brought pursuant to § 107(a), but is governed by § 113(f). In other words, the government asserts that § 113(f) applies to claims asserted under § 107(a). The government points out that § 107 provides the basis and the elements of a claim for recovery of response costs and lists the parties who are liable, as well as the defenses to liability. Therefore, one must necessarily look to § 107 in contribution actions involving § 113(f). Under such a reading, if § 113(f) is incorporated under § 107,

> then a § 113(f) action is an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be an action for contribution. We agree.
>
> … Section 107(a) clearly establishes the right of parties to seek "necessary costs of response." It does not specify whether those costs will arise from joint and several liability or sound and contribution. … [A]s the government asserts, parties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of the defendants. … [I]t is § 107(a) that establishes the cause of action for contribution. While a party seeking contribution under § 113(f) may not recover under joint and several liability, it is clear that under a plain reading of the statute, the party is seeking to recovery its necessary costs of response as referred to in § 107(a).

See also ***County Line Investment v. Tinney***, 933 F.2d 1508, 1516-17 (10th Cir. 1991) ("Section 107(a) must be the source for any right to contribution. … [Contribution] claims are dependant upon the establishment of a *prima facie* case of liability under § 107"); ***Reynolds Metal Co. v. Arkansas Power & Light Co.***, 920 F. Supp. 991, 996-97 (E.D. Ark. 1996) ("[I]n CERCLA actions between plaintiff and RPs and/or PRPs and defendant PRPs, while the defendant PRP's liability will initially be predicated upon § 107(a), to establish, as a threshold matter, that the defendant PRP can be held liable for response costs under CERCLA, its ultimate liability, i.e., the amount it will be required to pay the plaintiff RP and/or PRP, will be limited by the equitable share requirement of § 113(f)"); ***New Jersey Turnpike Auth. v. PPG Industries, Inc.***, 197 F.3d 96, 104 (3rd Cir. 1999) ("A § 113 plaintiff must demonstrate that the defendants are liable or potentially liable under § 107; the elements for both claims are essentially the same. … However, § 113 does not in itself create any new liability; rather, it confirms the right of a potentially responsible person under § 107 to obtain contribution from other potentially responsible persons"); ***Pinal Creek Group v. Newmont Mining Corp.***, 118 F.3d 1298, 1302, (9th Cir. 1997) ("[W]hile § 107 created the right of contribution, the "machinery" of

§ 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107"); ***Sun Co. v. Browning Ferris Inc.***, 124 F.3d 1187, 1190-91 (10th Cir. 1997) ("Section 113(f) did not create a new cause of action, nor did it create new liabilities. … It is no more than a mechanism for apportioning [CERCLA] – defined costs").

As each of these cases demonstrates, while the remedy of full cost recovery or indemnity is available only under § 107(a), all contribution claims must be predicated upon establishing the liability of another PRP under § 107(a). This is true whether the liability claim is asserted during or following a § 107(a) claim instituted by the government, or whether the liability claim is asserted by a PRP in a declaratory judgment action.[1] The Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, permits a PRP to establish another's CERCLA liability via § 107(a) because that is the only substantive basis for asserting any CERCLA liability claim – a prerequisite for obtaining contribution.[2] ARC is, therefore, entitled to maintain a § 107(a) claim for declaratory

[1] There is a difference between entitlement to contribution in the context of a § 107(a) action for declaratory relief and a § 113(f)(1) contribution claim made by a PRP that is the subject of a § 107(a) action by the government. In order to seek contribution in the context of a declaratory judgment action, the plaintiff PRP must have incurred response costs, which is a condition to asserting any § 107(a) liability claim, whereas a PRP that is the subject of a § 107(a) action by the government may assert a § 113(f)(1) contribution claim even if no response costs have yet been incurred.

[2] That Section 107(a) necessarily forms the predicate for ARC's declaratory judgment flows from the fact that the Declaratory Judgment Act, 28 U.S.C. § 2201, is procedural, and thus cannot provide the substantive basis for any claim – it is underlying federal law that determines whether any legitimate cause of action may be asserted. *See, e.g.*, ***Skelly Oil Co. v. Phillips Petroleum Co.***, 339 U.S. 667, 671, 70 S. Ct. 76, 94 L. Ed. 1194 (1950) (the Declaratory Judgment Act is procedural only); *see also* ***Aetna Life Insurance Co. v. Hayworth***, 300 U.S. 227, 239-40, 57 S. Ct. 461, 81 L. Ed. 617 (1937); ***Caldwell v. Gurley Refining Co.***, 755 F.2d 645, 652 (8th Cir. 1984) (declaratory judgment action is premised upon

relief seeking a determination that the government is jointly and severally liable with ARC for the contamination at the Camden, Arkansas site. *See, e.g.*, ***Wickland Oil Terminals Inc. v. ASARCO***, 792 F.2d 887, 893 (9th Cir. 1986); ***Pinole Point Properties Inc. v. Bethlehem Steel Corp***., 596 F. Supp. 283, 291-92 (N.D. Cal. 1984); ***Jones v. Inmont Corp***., 584 F. Supp. 1425, 1430 (S.D. Ohio 1984); ***Bulk Distribution Center Inc. v. Monsanto Co***., 589 F. Supp. 1437 (S.D. Fla. 1984). This § 107(a) declaratory judgment action triggers ARC's right to seek contribution under § 113(f)(1).

In short, even if, *arguendo*, § 107(a) affords only the remedy of indemnity or full cost recovery, and even if, *arguendo*, ARC has no implied right of contribution under § 107(a) nor any federal common law right to contribution separate from § 113(f), this does not alter the fact that ARC's declaratory judgment action is based entirely upon § 107(a) – because ARC has incurred response costs, and because there is an existing dispute between ARC and the government as to the latter's joint and several liability with ARC under § 107(a), ARC is entitled to seek a declaration that the government is jointly and severally liable with ARC. What this means is that ARC's declaratory judgment action is a § 107(a) civil action, thereby triggering ARC's entitlement to seek contribution from the government under § 113(f)(1).

CONCLUSION

For each of the above reasons, ARC asks the Court to grant the government's Petition for a Writ of Certiorari.

CERCLA liability); ***Gopher Oil Co. v. Bunker***, 84 F.3d 1047, 1048-49, 1051 (8th Cir. 1996) (declaratory judgment action based upon CERCLA liability).

Respectfully submitted.

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