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Cooper v. Aviall Decision

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A new U.S. Supreme Court decision eliminates contribution actions under the Superfund statute for the costs of voluntary cleanup of contaminated property. Unless Congress responds, the decision will seriously inhibit efforts to redevelop contaminated "brownfields."

On December 13, 2004, the U.S. Supreme Court decided that a private party who has not been sued under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) cannot bring an action to obtain contribution from other potentially liable parties. In a decision that focuses on strict construction of statutory language to the detriment of public policy, Cooper Industries, Inc. v. Aviall Services, Inc., 125 S.Ct. 577 (2004), the Court upset the long-standing and highly effective practice by federal and state regulatory agencies of encouraging voluntary and prompt cleanup of contaminated sites, without waiting for a lawsuit or agency order to do so. Eliminating contribution recovery for voluntary cleanups will substantially inhibit efforts to redevelop "brownfield" properties contaminated as a result of prior industrial use.

The Aviall Case

Aviall Services, Inc. purchased aircraft engine maintenance sites in Texas from Cooper Industries, Inc. in 1981. Aviall later discovered that hazardous substances had been released into soil and groundwater, and alerted the Texas Natural Resource Conservation Commission (TNRCC). TNRCC urged Aviall to clean up the sites and threatened to pursue enforcement action if it did not. However, neither TNRCC nor the U.S. Environmental Protection Agency (EPA) initiated any administrative or judicial

enforcement. Aviall began remediation in 1984 and has incurred approximately $5 million in cleanup costs. In 1997, Aviall sued Cooper under CERCLA to recover its cleanup costs.

CERCLA Section 106 authorizes the federal government to order cleanup actions, while under Section 107(a) a potentially responsible party (PRP) is liable for "all costs of removal or remedial action incurred by the United States Government" and for "any other necessary costs of response incurred by any other person." Section 113(f)(1) in turn provides that any person may seek contribution from a PRP "during or following any civil action" under Sections 106 or 107(a) or, alternatively, following an administrative or judicially approved settlement that resolves liability to the United States or a state. However, a "savings clause" at the end of Section 113(f)(1) also provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under Sections 106 or 107.

In a 7-2 decision authored by Justice Clarence Thomas, the Supreme Court concluded that Aviall had no right to contribution. The Court held that the "natural meaning" of the language in Section 113(f)(1) is that contribution may *only* be obtained "during or following" a Section 106 or 107(a) civil action or following a settlement. The "savings clause" merely preserves other causes of action for contribution that a party may have, independent of Section 113(f)(1). Because the statutory language was clear, there was no need to consult CERCLA's legislative history or to consider its overall purposes.

The decision leaves several critical issues unresolved. First, the Court discussed but declined to decide whether PRPs may bring claims directly under Section 107(a), which provides for recovery of response costs incurred by "any other person." Several Courts of Appeal have concluded that a party that is itself a PRP is limited to contribution actions and may not sue other PRPs under Section 107's joint and several liability scheme. However, that position may be reconsidered in the wake of the *Aviall* decision. The Supreme Court also declined to decide whether a PRP who undertakes voluntary cleanup may have an implied right of contribution, as some lower courts have held. However, citing two of its 1981 decisions prior to the enactment of CERCLA Section 113(f), the Court indicated that an implied right of action was "debatable." Finally, in a footnote, the Court acknowledged but did not address the question whether an EPA administrative cleanup order under Section 106 might qualify as a "civil action" under Section 113(f)(1), triggering the right to contribution. These issues remain to be addressed either on the remand of *Aviall* or in other ongoing cases.

Implications for Voluntary Cleanup Actions

Under *Aviall*, it appears that that a PRP who voluntarily incurs cleanup costs may be out of luck unless and until it is sued by a federal or state agency, or by private parties who have the right to bring claims under CERCLA Section 107(a). For the majority of sites that are moderately contaminated, but pose no imminent threat to the public or the environment, government agencies lack both the inclination and resources to go to court. PRPs are likely to seek to enter into

administratively or judicially approved settlements in order to recover costs of current or future clean-up efforts – however, agency resource constraints may also limit the availability of this option. In other remedies under state law, such as the Polanco Redevelopment Act in California, may be available depending on the particular circumstances of cleanup efforts.

As the Supreme Court noted, Congress enacted Section 113(f)(1) in response to uncertainty as to whether Section 107 provided a right of contribution against other PRPs for response costs. Now that the Court has interpreted Section 113(f)(1) narrowly, PRPs are faced with that same legal uncertainty for voluntary remediation activities. In 2002, Congress enacted the Brownfields Revitalization and Environmental Restoration Act, amending CERCLA to limit liability and encourage developers to voluntarily remediate and redevelop contaminated sites. The Court's decision in *Aviall* effectively negates much of the benefit of these amendments. In light of its recent interest in facilitating voluntary cleanup, Congress will likely respond to the *Aviall* decision. We will continue to keep you apprised of any developments.

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