Commentary

The Supreme Court's Decision In *Cooper Industries, Inc. v. Aviall Services, Inc.* — What Do We All Do Now?

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On December 13, 2004, the U.S. Supreme Court decided Cooper Industries, Inc. v. Aviall Services, Inc. ("*Aviall*").[1] In brief, the Court essentially held that parties who are liable under CERCLA cannot sue other liable parties in contribution unless they themselves have been sued under CERCLA, or they have settled with the government. This holding applies to landowners who clean up their own property and, most likely, to recipients of Section 106 administrative cleanup orders who comply with the order.

This decision could well represent a sea change for CERCLA litigation. Then again, it may not amount to much of a change at all. This commentary will discuss the significance of the decision, as well as a number of viable options available to those parties undertaking CERCLA cleanups who want to preserve their contribution rights. It first discusses the background of the decision, including a remarkable about-face taken by the U.S. Justice Department, and what the Supreme Court did and did not decide.

Background, Cost Recovery And Contribution

Aviall dealt with an important aspect of the CERCLA liability scheme. When Congress enacted CERCLA in December 1980, it created a very broad liability scheme, imposing liability for the costs of cleanup on specified categories of site owners and operators, generators and transporters. The statute itself does not specify whether that liability is joint and several, *i.e.*, whether some of the contributors can be held liable for the entire costs. The federal government vigorously and mostly successfully pursued a broad joint and several liability scheme, so that it would not be burdened with having to sue all potentially responsible parties (or "PRPs") at a site. In response to the assertion that joint and several liability was unfair, the government regularly responded that any unfairness was substantially mitigated by the right of one PRP to sue another in contribution.

Like joint and several liability, a right of contribution was not explicitly included in CERCLA as originally enacted. However, PRPs and the government supported the right to contribution. And CERCLA in its original form did provide, in Section 107(a), that liable parties were not only liable for governmental response costs, but for the response costs incurred by "any other person." This provision had been interpreted to allow a PRP that undertook cleanup to sue other PRPs.[2] And in 1994, the Supreme Court in the Key Tronic case[3] held that Section 107 provided a right of recovery for private parties that undertook cleanup.

But while Section 107(a) appeared to allow for PRPs to recover their costs in cases where they undertook cleanup themselves, it did not provide an explicit remedy in cases where PRPs were made to pay governmental response costs in amounts that exceed their allocable contribution to the site. To address this problem, Congress in the 1986 SARA amendments created an explicit right of contribution in Section 113(f), which was at issue in Aviall. This right of contribution is spelled out in two subsections. Section 113(f)(1) is the principal provision and provides in relevant part as follows: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or under section 9607 of this title." Section 113(f)(3) separately provides a right of contribution for parties that settle with the government. It provides that "any person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to [the] settlement . . . ."

The Aviall case focused on the words "during or following any civil action" in Section 113(f)(1) and whether those words were meant to exclude the situation where a party had undertaken a cleanup *before* it had been sued. Since EPA has long encouraged voluntary cleanups, government and private attorneys working in the Superfund area had long assumed that those words were not exclusive, and that of course someone who had stepped forward prior to litigation and undertook cleanup would be able to sue for contribution. That assumption was bolstered by the last sentence of Section 113(f)(1), which appeared to confirm that contribution claims would still exist in the absence of a civil action against the contribution plaintiff. No other reading appeared to make sense. Why would someone who performed a cleanup only after being sued have more rights than someone who had acted prior to suit?

As a result of this assumption, PRPs engaged in many voluntary cleanups, believing that their contribution rights would be preserved. And the availability of a contribution remedy under Section 113(f) was crucial to such parties, even though Section 107(a)'s cost recovery provision pretty clearly seemed to grant them a cost recovery remedy as well. That is because many courts had ruled that a PRP who undertook cleanup and appeared to have both a Section 107 cost recovery remedy and a Section 113 contribution remedy could only sue in contribution under Section 113.[4] These pre-Aviall cases seemed to focus on the question of which remedy would be used, not whether there would a remedy at all.

The Aviall Facts

Aviall Services, the CERCLA contribution plaintiff, owned and operated an aircraft engine maintenance business in Texas throughout the 1980s. Aviall had purchased the business, including three separate maintenance facilities, from Cooper Industries in 1981. Both Aviall and Cooper used similar materials in their engine maintenance businesses, and each of the three facilities was found in the early 1990s to be contaminated by leaking underground storage tanks and surface spills.

During its ownership of the facilities, Aviall discovered some of this contamination and ultimately reported it to the Texas Natural Resource Conservation Commission ("TNRCC"). In response, the TNRCC compelled Aviall through a series of letters threatening enforcement action and a directive to investigate groundwater contamination at the facilities and submit cleanup plans. As part of this process, Aviall entered one of the facilities in the Texas Voluntary Cleanup Program, a state-run program offering TNRCC oversight of voluntary cleanups as an alternative to enforcement action. EPA had no involvement in the cleanup, and Aviall was neither the recipient of a Section 106 order nor a defendant in a Section 107 cost recovery action. Aviall sold the facilities in 1995 and 1996 but retained the obligation to remedy environmental contamination existing before the sale.

In 1997, Aviall filed a complaint in federal court in Texas, seeking to recover from Cooper costs associated with cleanup of the facilities purchased from Cooper in 1981. The complaint sought recovery under Section 107, as well as several state-law tort and contract theories. Apparently recognizing the evolution of the Section 107 vs. Section 113 controversy,

Aviall subsequently amended its complaint to drop a stand-alone Section 107 claim, substitute a claim for contribution under Section 113 that also referred to Section 107, and add a statutory contribution claim under the Texas Solid Waste Disposal Act. The district court dismissed the CERCLA contribution claim, finding that where a plaintiff cannot allege any prior or pending CERCLA enforcement action against it, it is precluded from seeking contribution in federal court pursuant to Section 113(f)(1). With no remaining federal claims, the district court exercised its discretion to dismiss the state statutory and common law claims without prejudice.

Appeal To The Fifth Circuit

Aviall appealed the district court's dismissal of its CERCLA contribution claim. After reviewing the legislative history of SARA, a divided Fifth Circuit panel ruled that the language of the statute permitted contribution actions only "during or following" an action under Section 106 or 107.[5] Aviall argued that the savings clause found in the final sentence of Section 113(f)(1), providing that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or 107]," demonstrated that Congress had not intended to limit Section 113 plaintiffs to parties who were sued themselves under CERCLA. However, the majority reasoned that the addition of the contribution provision in the SARA amendments was intended only to clarify the right of parties subject to government or private cost recovery actions under CERCLA to seek contribution from other potentially responsible parties. The savings clause was meant to confirm that parties not subject to such actions still could seek contribution under *state* law.

To the majority of the Aviall panel, this reading was clear from the plain language of CERCLA and its legislative history. As they saw it, if the savings clause means that the existence of a civil action under Section 106 or 107 is irrelevant, then the words "during or following" would be rendered meaningless.

The panel majority reached its conclusion in the face of substantial contrary authority. There have been numerous appellate decisions permitting CERCLA contribution claims in the absence of a pending or completed civil action under Sections 106 or 107.[6] Although no appellate court had expressly considered the question presented in Aviall, CERCLA contribution actions brought in the wake of voluntary cleanups had been a regular aspect of cost recovery litigation for many years.

The panel was clearly concerned about the effect of its holding on one of the two primary scenarios in which the Aviall issue matters, *i.e.*, for recipients of unilateral Section 106 administrative orders (the other scenario being landowners doing voluntary cleanup). Because EPA often issues such orders to fewer than all of the PRPs at a site, it had long been taken for granted that order recipients, if they complied with the order and performed cleanup, could sue other PRPs for contribution. But under the panel's analysis, one would have thought they could not sue in contribution, because an administrative order is not a civil action. The panel, presumably sensing the inequity of such a result, declared an administrative order to be a civil action, a point the dissent took sharp issue with.

Rehearing En Banc

On November 14, 2002, sitting *en banc*, the Fifth Circuit Court of Appeals reversed the earlier rulings, by a 10-3 vote.[7] Following oral argument *en banc*, the Fifth Circuit took the unusual step of ordering the United States to file an *amicus* brief setting out the government's position on the issue. After what was reported to be protracted internal debate concerning both the substance of the government's position and the constitutional propriety of the Fifth Circuit's order, and to the great surprise of many observers who expected the Department of Justice to support Aviall and broad contributions right, DOJ filed a brief supporting the reasoning of the original panel decision and narrow contribution rights. The Justice Department brief relied primarily, as had the panel majority, on the language of Section 113 and concluded that the important CERCLA policy implications were irrelevant in the face of this language. The position of the Justice Department was inconsistent with longstanding EPA practice of encouraging voluntary cleanups, and EPA reportedly had urged DOJ to support this position in its brief. It was also inconsistent with prior briefs filed by DOJ in other cases in which the United States had argued that a civil action or settlement was not a prerequisite to a contribution claim.[8]

Whatever the source of DOJ's position, it was rejected by the majority of the Fifth Circuit. The *en banc* majority

concluded that there is nothing clearer about the panel's narrow interpretation of the statute than a broader interpretation of the same language. Essentially, in order for the panel's view to make sense, the word "only" had to be implied in the statutory language notwithstanding the failure of Congress to use the word itself. Moreover, the decision of the panel to stretch the language further to sweep in Section 106 orders, even though issuance of an order manifestly does not constitute a civil action, reflects the contortions that the panel had to go through in order to fashion something workable out of a stricter interpretation.

The *en banc* majority also relied on the long line of case law that supports a more expansive view of Section 113. The court noted that there have been many previous contribution actions in which "talented attorneys" have had plenty of opportunity to make creative arguments of statutory construction, but nowhere in the history of these cases had the panel majority's view made any headway. The *en banc* majority likened this history to "the dog that didn't bark," suggesting that if the panel's reading was so "plain" and "clear," some court would have accepted the argument earlier.

Finally, the *en banc* majority accepted the key policy arguments asserted in dissent to the panel decision, especially the weakness of the argument that contribution plaintiffs should rely on state law. Noting that the argument requires a jump from the statute itself, the majority stressed with respect to state law actions that "[t]his is surely an inferior and questionable remedy for Congress to have embraced."

The Supreme Court's Decision

After the Fifth Circuit reversal, Cooper appealed to the United States Supreme Court. Aviall was supported by numerous *amici curiae*, including by the attorneys general of 23 states and trade associations, corporations and an environmental group who collectively filed a total of five briefs. Cooper was supported only by the Unites States, which made principally the same arguments it had unsuccessfully made to the Fifth Circuit. The United States acknowledged that it had previously taken different positions in what it characterized as "errant statements."

The Supreme Court reversed the Fifth Circuit's *en banc* decision by a vote of 7-2. Writing for the Court, Justice Clarence Thomas explained that the plain reading of Section 113(f) of CERCLA did not allow a party to bring a contribution action unless it was "during or following" an action under Section 107. The Court recognized that Aviall might have a claim directly under Section 107, but since that issue had not been briefed, declined to address it. Among the issues which the Court felt had not been briefed was whether Aviall "may pursue a 107 cost recovery action for some form of liability other than joint and several." The Court remanded the case to the Fifth Circuit for further proceedings on this issue.

Another issue explicitly left open by the Court (in its footnote 5) is whether unilateral administrative orders trigger contribution rights. The Fifth Circuit panel had held that they did, but that holding was persuasively negated by the dissent and the *en banc* court. The United States in its brief argues that an administrative order is *not* a civil action and does not trigger contribution. And although this issue was left open by the Court, it is hard to see how an administrative order can be characterized as a civil action.

In her dissent, Justice Ruth Bader Ginsberg, joined by Justice John Paul Stevens, did not take issue with the Court's interpretation of Section 113(f), but stated that to avoid lingering confusion, the Court should have addressed the Section 107 issue and should have held that that section was available in these circumstances to Aviall. She asserted that there "was no cause for protracting this litigation by requiring the Fifth Circuit to revisit a determination it has essentially made already." She noted that prior to the enactment of Section 113(f)(1), federal courts had allowed PRPs to sue under Section 107 and nothing in Section 113 "retracts that right."

Is Section 107 The Answer?

The key issue left undecided by Aviall is whether Section 107 cost recovery is available to Aviall and other PRPs in the same predicament of not having been sued by or settled with the government. If a Section 107 claim were available, then Aviall may turn out to be much ado about nothing. PRPs that perform cleanups could sue other PRPs under Section 107. And that liability will undoubtedly be interpreted as an equitable, proportioned liability, either because the courts decide not to apply joint and several liability in such cases (as Justice Thomas had hinted at), or

because the defendants will, having been the subject of a civil action under CERCLA, have a contribution counterclaim under Section 113(f)(1) against the plaintiff.

This issue will be addressed on remand in *Aviall*, although the court will first have to decide whether Aviall waived its Section 107 argument by not withdrawing its claim. Such a waiver appears far-fetched. As Justice Ginsberg observed in her dissent, it is hard to find waiver when a party pled in accordance with the state of the law at the time. Whatever happens in Aviall itself, the issue will certainly be dealt with in numerous other cases pending around the country.

The opponents of a Section 107 claim will argue that the cases had uniformly rejected such a claim by a PRP, and that the issue has already been decided by Courts of Appeals around the country. Proponents of a Section 107 claim will have a number of powerful rejoinders to this argument, all premised on the fact that Aviall has changed the contours of the CERCLA landscape.

First, they can point to the fact that this issue was explicitly left undecided by the Supreme Court, and the only two Justices to address the issue would have found that there was a Section 107 claim. In other words, the issue needs to be readdressed in light of Aviall and the score so far is two to nothing in favor of a Section 107 PRP claim.

Second, the Supreme Court's decision in Key Tronic strongly supports the Section 107 arguments. There, the Court held that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs . . . ."[9] The Court allowed a private party not only to seek contribution for costs it paid the government, but for costs it had itself incurred in locating other potentially liable parties. Although the opinion of the Court was that this private right of action was implied, Justice Antonin Scalia argued in dissent, based on "the plain language of these provisions," that private litigants clearly have an express cause of action under Section 107.[10]

The dissent in Aviall relied on supportive language in Key Tronic which Justice Thomas characterized as dicta. But in the lower courts it is hard to ignore Supreme Court dicta. And should the case get back to the Supreme Court, there will be two Justices (Ginsberg and Stevens) who have found that there is a Section 107 claim, two others (Scalia and Thomas) who have found an explicit right of private party cost recovery under CERCLA (in Key Tronic, a case brought by a PRP albeit where the PRP status was not an issue), and four others (Chief Justice William Rehnquist, and Justices David Souter, Anthony Kennedy and Sandra Day O'Connor) who have found (in Key Tronic) an implied private right of action under Section 107.

Third, Justice Thomas's opinion is premised on the simple notion that the words of CERCLA are what controls, not policy issues or programmatic goals. If the words are what controls, it is hard to read the words "any other person" in Section 107 as excluding a whole class of persons — those themselves liable — from "any other person". The statute does not say "any other person except those who are liable" — it says "any other person." Moreover, an interpretation that excludes PRPs is essentially interpreting Section 107 as saying "any other person except almost every other relevant person." That is because the class of persons undertaking CERCLA cleanups consists almost in its entirety of parties who are compelled to do so because they are liable, or those who want to clean up their own property. And property owners are generally liable under Section 107. It is true that in 1986 Congress added a defense for so called "innocent landowners" and more recently added "a bona fide prospective purchaser" defense. But those defenses did not exist when the phrase "any other person" was crafted in 1980. There is a compelling argument that if the words "during or following" are interpreted literally, then "any" has got to mean "any."

Fourth, although the cases excluding PRP Section 107 claims have varying explanations for their holdings, their analysis is generally premised on the relationship of Sections 107 and 113, and the fact that Section 113 is the more specific remedy available to PRPs. The cases hold that in such circumstances Section 113 is the proper remedy. But they never address the possibility that a party would be left without a remedy at all if Section 113 proved unavailable. To the contrary they often assume that a Section 113 remedy would be available.[11]

And the briefs filed in those cases also often assumed that a Section 113 remedy would be available if a

Section 107 claim were precluded. In one case, for example, the United States asserted that a liable party could not sue under Section 107. The liable party had received a Section 106 administrative order from EPA, but it had not been sued in a civil action. The United States, while asserting that there should be no Section 107 cost recovery action for such a party, acknowledged that there would certainly be a contribution action under Section 113. In its brief, the United States framed the question before the court of appeals as "the nature of the action available to a potentially responsible party that has incurred CERCLA response costs pursuant to an uncontested CERCLA § 106(a) Administrative Order."[12] The answer to this question, as the United States saw it then, was that "such parties are limited to an action for contribution governed by CERCLA § 113." The argument that the cases precluding Section 107 claims by PRPs are still good law is in essence one of bait and switch. The United States and other parties had argued that Section 107 claims should not be available to PRPs because there was a remedy available under Section 113. Now that Section 113 has proven unavailable, the issue cries out for reexamination.

Fifth, the proponents of a Section 107 PRP claim can argue that that is the only way to effectuate the policies of encouraging cleanup, facilitating fairness and avoiding litigation that were spelled out in the *en banc* Fifth Circuit decision in Aviall and in numerous EPA pronouncements over the years. One can debate the issue of whether Congress intended for the right of recovery for PRPs who undertake cleanup without suit or settlement to be under Section 107 or Section 113. But the Supreme Court has now determined it is not under Section 113, and it is unfathomable that Congress intended for such parties, especially administrative order recipients, to have no right of recovery at all against other PRPs.

Those are the arguments that will be made, or at least some of them. The many creative lawyers practicing in this area will surely think of more. The issue will percolate up through district courts to the courts of appeals, and at some point, in Aviall itself or some other case, the Supreme Court may again address the issue, years from now, and there will again be some measure of certainty about the world of Sections 107/113. Until then, what Aviall has brought us is more litigation and less certainty, and perhaps fewer voluntary cleanups.

Options For Sailing The Aviall Seas

1. Settlement

One option available to parties looking to perform a cleanup and preserve contribution in light of Aviall, and not put all their eggs in the Section 107 basket, is to enter into a settlement with the United States or a state. As noted above, Section 113(f) (3) allows anyone "who has resolved its liability to the United States or a State for some or all of a response action . . . in an administratively or judicially approved settlement" to seek contribution.

The statute does not specify any particular language or provisions such a settlement must contain, and it would appear that as long as the settlement addresses the response action at issue in some manner, there should be a predicate for contribution. In that regard, the Assistant to the Solicitor General who presented argument to the Supreme Court on behalf of the United States clearly expressed the Government's view that an administrative order on consent would be sufficient to trigger contribution rights. He stated as follows:

> So if, for instance, the Government issues an administrative order and the party agrees to comply with that administrative order through an administrative order on consent, that would entitle the party to contribution.[13]

In most cases, it will be easier to approach a state about settlement than EPA, both because of EPA's reluctance to get involved in sites not its radar screen, and also because EPA is fairly strict about wanting to pigeon-hole any settlement into one of its model documents, which often contain many bells and whistles that may be unattractive to a party simply wanting to perform a cleanup. A state settlement may be easier and less costly to obtain. In his Aviall argument, the Assistant to Solicitor General suggested that seeking a state settlement is exactly what Aviall should have done.

> . . . and we assume that the State officials would have happily entered into a settlement agreement what would have obligated Aviall to clean

> up the site. There's nothing in the record that indicates the State that took notice of this site would not have been willing to do so. And under 113(f)(3)(B), an administrative settlement or a judicial settlement with the State would entitle them to contribution.

The settlement route does present obvious challenges. First, states have increasingly tight budgets and may be resistant to investing resources in crafting a settlement for a site that it has not fully investigated. But the state may be encouraged to help out in this process by one or all of the following pleas. First, states have strong interests in encouraging cleanups and avoiding litigation. Facilitating contribution claims through settlements is a way of encouraging such cleanups. Second, states may well recognize the inequities in the Aviall holding, and 23 states in fact submitted an amicus brief urging affirmance of the Fifth Circuit's *en banc* decision. Third, a state's reluctance to expend the resources to negotiate a settlement could be overcome by proposing a settlement under which the state essentially gives up nothing.

Such a settlement could be modeled on EPA's Model Administrative Order on Consent for Removal Actions.[14] In that form of order, EPA gives the performing party a covenant not to sue that is limited to the "Work," which is defined as the work required to be performed under the Order. And EPA reserves the right, among other things, to pursue the respondent for "liability for performance of response action other than the Work." In other words, EPA is saying "agree to this order, and do the work we want you to do, and if you do it, we won't make you do precisely that work in the future, but we can make you do any other work." Such a covenant is little more than a receipt, and a state that agreed to a similar order would be giving up nothing. If it wanted more work down the road, it could get it. All it would be doing is, in essence, facilitating a contribution claim by a party willing to perform a cleanup. That said, a state would undoubtedly want some assurance that a cleanup it is putting its imprimatur on is a reasonable and appropriate one, and some level of state review will help the performing party establish the consistency of its costs with the National Contingency Plan. But the overall burden on a state from entering into such a bare bones settlement should be minimal.

The settlement route will be harder, although not impossible, for a party that did its cleanup in the "good old" pre-Aviall days. But there is nothing in Section 113(f)(3) that says the cleanup has to come after the settlement. Even if the cleanup had been done some time ago, it might still be possible to persuade a state or EPA to enter into a settlement that covers the already completed response action. The bona fides of such a settlement would be increased if there were other provisions of the settlement under which the PRP that performed the clean up agreed to some additional consideration. For example, a PRP that preformed a cleanup pursuant to a unilateral administrative order under Section 106 might try to persuade EPA to enter into a settlement whereby the PRP agreed to release EPA from any claim for reimbursement of its cleanup costs under Section 106(b) of CERCLA, and in turn EPA covenanted not to sue for the work already performed, but reserved claims for additional cleanup. If EPA or a state still has a claim for its past costs, the settlement of that claim could well be tied to the settlement of claims for work already performed.

Some might well argue that this is all an exercise in form over substance. And they would be absolutely right. These are precisely the sorts of contortions that will now be necessary in light of Aviall (unless the right to use Section 107 directly is established) and they will only serve to increase the transactions costs of a program already burdened with high transaction costs.

The settlement option may be harder in the case of administrative order recipients. In those cases, EPA has typically tried before issuing the order to reach a settlement embodied in an administrative order on consent for removal actions and a judicial consent decree, as required by Section 122 of CERCLA, for remedial actions. But those settlements come with a price. EPA typically insists on agreement to the various provisions of its model documents — its model Administrative Order on Consent for removal actions and its Model Consent Decree for remedial actions. Those provisions include such things as stipulated penalties, payment of past costs, agreement to do additional work, and others. PRPs have often preferred to perform under unilateral orders than to agree to the many settlement provisions demanded by EPA, some of which are perceived by PRPs to be onerous. Aviall changes that dynamic, by giving PRPs another reason to go the settlement route rather than the unilateral

order route — preservation of contribution rights. That is surely not what Congress intended and perhaps not even what the Supreme Court intended, but it is now a fact of CERCLA life. Unless the Section 107 PRP claim is established.

2. Force A Lawsuit

A second option to consider for parties facing an Aviall problem is to wait until the government files suit before undertaking the cleanup. Although this may be a potential option in certain cases, it has a number of clear drawbacks.

First, the party contemplating cleanup has no control over when such a lawsuit is brought. Thus, waiting for litigation can delay cleanup, possibly increasing its costs. And if a landowner is seeking to cleanup its own property so it can productively use it, delaying cleanup can be problematic.

Second, in the administrative order context, refusing to comply with the order until litigation ensues can subject the respondent to daily penalties and treble damages, which can be quite substantial. The respondent could argue that it had "sufficient cause" for not complying with the order (so as to avoid penalties and damages) because to do so would have resulted in a loss of contribution rights. But there is no precedent for such an argument, and a respondent would be taking a very large risk in hanging its hat on its success.

Third, forcing a lawsuit can be dangerous from any number of perspectives. Once in court, the government may decide to seek more than the cleanup the PRP wanted, and could sue for past costs, natural resource damages, and other relief as well. Litigation often brings in another government office, such as the Department of Justice or a State Attorney General's office, and officials who may take more of an adversarial view of the situation than EPA or a state environmental agency may take. There may well be cases where a PRPs want to encourage a suit against it, but those are likely to be much the exception rather than the rule.

One part of that exception may be cases headed toward settlement, in which a PRP may well prefer a judicial settlement than an administrative one. Since a judicial settlement is preceded by the filing of a complaint, a party to such a settlement would have two bases for a *contribution* claim: the civil action under Section 113(f)(1) and the settlement under Section 113(f)(3). The first provision may well be broader and entitle the settlor to contribution not just for the matters addressed in the settlement, but for any claims related to the site.

3. State Claims

Clearly, one potential road around Aviall is reliance on state remedies. There appears to be no dispute that whatever the last sentence — the so-called savings clause — of Section 113(f)(1) does, it preserves state remedies. Most states have some sort of contribution provision, although the precise scope of it varies greatly.

Contribution is not readily available in many states, as illustrated by a review of the three states impacted by the Fifth Circuit's original panel decision in Aviall. In Texas, where the Aviall case arose, the right to contribution provided under state statutes is fairly broad.[15] The situation is not as favorable in the other two states in the Circuit. Louisiana has a more restrictive statute allowing certain parties to bring private cost recovery actions against parties who fail to respond to a state order, and Mississippi has no express statutory right of contribution for cleanup costs.[16] Nationally, a 2002 survey by the Environmental Law Institute found that of 36 states employing a joint and several liability scheme similar to that of CERCLA, only 11 provided an explicit right to allocate cleanup costs to other liable parties.[17] Whether a given state statute is a real alternative to CERCLA's contribution remedy depends on the particular state law and the robustness of the case law under the statute in question. The bottom line is that in many states, the answer is far from clear, and CERCLA may offer the only real opportunity for responsible parties to bring a contribution claim for cleanup costs.

One drawback of state remedies — and a potentially major one — is that even when available, they do not allow for suits against the federal government, which is a significant contributor at many contaminated sites. While there is a waiver of the federal government's sovereign immunity in CERCLA itself (Section 120), that does not cover analogous state remedies.

A second drawback of state remedies is that absent complete diversity of citizenship among the parties, they do no provide a basis for suit in federal court, which, given the congestion of many state courts, is

often a favored forum for plaintiffs.

And it seems especially strange to require use of a state remedy by a recipient of an administrative order issued by a federal agency under a federal statute. Moreover, if some of the order recipients complied and some did not, and if the United States were to sue the non-compliers in federal court and they were ordered by the court to comply with the Section 106 order and participate in the cleanup, those initial non-compliers — who only performed the cleanup after being sued and ordered by a court to do so — would have a federal contribution claim for their costs against the non-recipients and remaining non-compliers. But the original compliers, who did precisely what EPA wanted them to do, would have no federal contribution claim and would be forced to rely on state law if that were helpful. Of course, this bizarre situation would be avoided if the courts recognize a Section 107 claim by PRPs, so that administrative order compliers can sue other PRPs under CERCLA.

Conclusion

The CERCLA 107/113 world was a better place before Aviall. The rules were clear, we knew how they worked, and they made sense. There were incentives for voluntary cleanups and there were broad contribution rights to facilitate fairness. A wide range of parties asked the Supreme Court to save that world, but the Department of Justice sought its destruction, and succeeded.

If the Section 107 PRP claim is established, we can return to that world, or perhaps one nearby. If not, there will be more uncertainty, more litigation, less fairness, fewer voluntary cleanups and overall damage to the goals of CERCLA. Unless of course Congress were to fix this problem, which it could to be adding just one word to Section 113(f)(1): "*before*, during or following . . . ."

In the meantime, parties facing the obstacles created by Aviall would be prudent to consider the range of options potentially available to them, including those discussed here.

Endnotes

1. 125 S. Ct. 577.

2. City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982).

3. Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

4. *See*, *e.g.*, Pinal Creek Grp. v. Newmont Mining Corp., 118 F.3d 1298, 1306 (9th Cir. 1997); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409, 415 (4th Cir. 1999).

5. 203 F.3d 134.

6. *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610 (7th Cir. 1998); Sun Co., Inc. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997).

7. 312 F.3d 377.

8. See Brief for Atlantic Richfield Company et al at 22-26, 2004 WL 791894.

9. 511 U.S. at 818.

10. *Id*. at 821-22 (J. Scalia dissenting in part, joined by J. Blackmun and J. Thomas).

11. *See*, Bedford Affiliates v. Sills, 156 F. 3d 416, 425 (2d Cir. 1998) ("Bedford instead must rely on a claim for contribution provided for in CERCLA § 113 (f)(1)"); Pinal Creek, 118 F.3d at 1301 ("[t]his duality [between Sections 107 and 113] is best implemented by permitting a PRP who has incurred cleanup costs to assert only a contribution claim against other PRPs"); Axel Johnson, 191 F.3d at 415 (private parties "who are potentially responsible for cleanup costs under § 107 cannot bring § 107 cost recovery actions; rather, such parties 'must seek contribution' under § 113").

12. Brief of Defendants-Appellees Secretary of Defense, Secretary of Veterans Affairs, and Administrator of National Aeronautics and Space Administration at 6, in Centerior Service Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1997).

13. Argument transcript at 24. The transcript is available at http://www.supremecourtus.gov/ oral_arguments/argument_transcripts/02-1192.pdf

14. This is available at http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/ mod-aoc-remove.pdf

15. *See* Tex. Health & Safety Code Ann. § 361.344.

16. *See* La. Rev. Stat. Art. 30:2205; Miss. Code Ann. 17-17-29(4).

17. Environmental Law Institute, *An Analysis of State Superfund Programs*, 34 (2002). ■