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CLIENT ADVISORY

CERCLA Developments

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Next month, CERCLA turns 26 years old. Like many others in their twenties, CERCLA has been in a period of interesting and sometimes surprising change. This advisory discusses three recent developments relating to CERCLA. First, it provides an update on the aftermath of the Supreme Court's 2005 *Aviall* decision, which launched a torrent of new litigation and raised issues that appear to be heading back to the Supreme Court this term. Second, it discusses EPA's "All Appropriate Inquiry Rule," which becomes effective yesterday, November 1, 2006, and is potentially of great significance to those acquiring possibly contaminated real property.

The third development may not have the national significance of the first two, but it is one we are especially proud of: the publication last month by the ABA's Section on Environment, Energy and Resources of a new book about CERCLA, entitled *Amending CERCLA: The Post-SARA Amendments to the Comprehensive Environmental Response, Compensation and Liability Act*. It was written by two Partners at Arnold & Porter, Michael Gerrard and Joel Gross. We thought you would be interested in hearing why anyone thought there was the need for another CERCLA book, and how you might obtain a copy.[1]

1. ANALYZING *AVIALL'S* AMBIGUOUS AFTERMATH—AN "OTHER"WORDLY DEBATE

On December 13, 2004, the Supreme Court decided *Cooper Industries, Inc. v. Aviall Services, Inc. ("Aviall")*.[2] In brief, the Court essentially held that parties who are liable under CERCLA cannot sue other liable parties in contribution under Section 113(f) of CERCLA unless they themselves have been sued under CERCLA, or they have settled with the government. The Court interpreted the language of Section 113(f) literally and narrowly, focusing on the phrase that contribution actions could be brought "during or following any civil action" under Section 106 or 107 of CERCLA.

1 Hint—just ask us.

2 125 S. Ct. 577. Arnold & Porter filed an amicus brief in *Aviall* on behalf of a number of clients, which argued for a broad right of CERCLA contribution.

One of the big surprises in the *Aviall* saga was that the Department of Justice, which had long been on record as supporting broad contribution rights as a means of mitigating the potential harshness of joint and several liability, argued in the Supreme Court, successfully in the end, for a narrowing of contribution. It did so from all accounts over the objections of the Department's central CERCLA client, the Environmental Protection Agency. Some have speculated that DOJ was looking to protect its federal PRP clients, who are often sued in contribution. DOJ officials have denied this, and have maintained that the government's position was based on DOJ's best reading of the words of the statute.

A central issue left undecided by *Aviall* is whether PRPs seeking contribution can sue directly under Section 107(a), which provides that liable parties are not only liable for governmental response costs, but for the response costs incurred by "any other person." 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. Dissenting in *Aviall*, Justice Ginsberg, joined by Justice 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 section was available in these circumstances. 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."

Lo and behold, less than two years after *Aviall*, there is already a split in the circuits as to whether PRPs can sue under Section 107, and there are two pending petitions for certiorari in the Supreme Court including one filed last week by the United States. The Second Circuit and the Eighth Circuit have allowed PRPs to sue under Section 107: *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006), and *Atlantic Research Corporation v. United States*, 459 F.3d 827 (8th Cir. 2006). The Third Circuit has not: E.I. *DuPont de Nemours & Co. v. United States*, 460 F.3d 515 (2006), petition for rehearing pending, No. 04-2096 (filed Oct. 13, 2006).

The Second Circuit case involved a suit among private parties, and the losing party sought cert last term. At the beginning of this term, on October 3rd, the Supreme Court invited the Solicitor General to file a brief in that case, which the SG has yet to do. Subsequently, on October 24th, the United States sought cert in the Eight Circuit case. Given all of these events, we think it is highly likely that the Supreme Court will take at least one of these cases, and in time for it to be argued this term.

Two aspects of the United States' cert petition bear special mention. First, while in *Aviall* the United States essentially argued only "read the words," and not policy, here it argues policy. It expresses the concern that if PRPs can sue under Section 107, that could provide a disincentive to CERCLA settlements, because while a settling party gets contribution protection, that protection might not cover claims brought directly under Section 107.

The United States also addresses the statutory words in its petition. The key words in *Aviall* were "during or following an action." Here, there will be one key word—"other." The issue will be what the word "other," highlighted in green (and underlined) in the passage below from Section 107, refers to:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

1. *the owner and operator of a vessel or a facility,*
2. *any person who at the time of disposal of any hazardous*

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

substance owned or operated any facility at which such hazardous substances were disposed of,

3. *any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and*
4. *any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person*, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

   a. all costs of removal or remedial action incurred by the **United States Government or a State or an Indian tribe** not inconsistent with the national contingency plan;

   b. any *other* necessary costs of response incurred by any other person consistent with the national contingency plan.

So here is the CERCLA question of the year: does the "other" highlighted in underlined green mean "other" than the list in *italicized red* (the list of liable parties) or "other" than the list in **bolded blue** (persons who can sue under (A) and have a lower burden with respect to NCP consistency). We think it fair to say that most long-time CERCLA practitioners have always assumed that it meant the **bolded blue** list in (a), just as the *italicized orange* "other" in (b) clearly refers to (a). But the final word on this issue will likely come sometime next year from the grammarians at the Supreme Court, and not before hundreds of thousands of other words are written on the subject.

In the meantime, anyone facing the uncertainty presented by *Aviall* and the likely upcoming *Aviall–Part II*, and wanting to ensure the availability of a CERCLA remedy, would be well-advised to look to other tools to bolster their position, such as entering into a qualifying settlement with the government, pushing the government to file a lawsuit, or exploring possible state law remedies. But even state law remedies have gotten tangled in the *Aviall* net, as a Michigan appellate court recently applied *Aviall* to a Michigan state law contribution action.[4]

2. DEFINITIVELY DETERMINING WHAT DILIGENCE IS DUE—EPA'S "ALL APPROPRIATE INQUIRY RULE"

The Small Business Liability Relief and Brownfields Revitalization Act of 2002, the most recent set of amendments to CERCLA, required EPA to adopt rules to address the standards required for "all appropriate inquiry" as an element of three CERCLA liability defenses created by or addressed in those amendments: the bona fide prospective purchaser defense, the contiguous landowner defense, and the innocent landowner defense. The standards will also apply, with slight variations, to those seeking certain federal brownfields grants. The three cited defenses provide important, albeit limited, defenses to CERCLA liability to certain defined persons who purchase or own property contaminated by others. EPA proposed those standards on August 26, 2004; extensive comments were received; and EPA issued the final rule (the "Rule"), on November 1, 2005, effective as of November 1, 2006. In other words, **the Rule is now in effect**.[5]

4 *Hicks Family Limited Partnership v. 1st National Bank of Howell*, Mich. Ct. App., No. 268400, Michigan Court of Appeals, Oct. 13, 2006. In an unpublished per curiam opinion, the Michigan Court of Appeals applied *Aviall* to Michigan's Natural Resources and Environmental Protection Act.

5 *U.S. EPA, Standards and Practices for All Appropriate Inquiries, Final Rule*, 70 Fed. Reg. 66069 (Nov. 1, 2005).

The due diligence standards in the Rule are similar in many respects to the well-known ASTM Phase I standards.[6] But there are differences, and anyone undertaking environmental due diligence before purchasing property would be well-advised to consider those differences, with the goal of meeting the standards set forth in the Rule. Meeting the standards in the Rule does not guaranty a defense—each defense has other elements. However, not meeting the standard will very likely preclude reliance on the specified defenses. The differences depend mostly on how the inquiry is conducted, but one crucial aspect that bears special emphasis is who performs the inquiry. If it is to meet the new standard, the study must be performed or supervised by an "environmental professional." Under the Rule, a person meets this status if he or she fits within any of four categories: (1) holds a current professional engineer's or professional geologist's license, and has three years of full-time relevant experience; (2) is licensed by the federal government, or a state or tribe, to perform environmental inquiries and has three years of experience; (3) has at least a baccalaureate degree in a relevant discipline, and has at least five years of experience; or (4) has at least ten years of experience. All these people must stay abreast of developments in the field through continuing education or the like.

Anyone acquiring potentially contaminated property and wanting to preserve any viable defenses to CERCLA liability should therefore (i) ensure that the person conducting or supervising the environmental due diligence is a qualifying "environmental professional", (ii) require that professional to conform to the standards of the Rule, and (iii) take additional steps required to meet the other elements of potentially applicable defenses. The text of the Rule, an overview, and an analysis of the requirements of all the relevant defenses is contained in *Amending CERCLA*.

3. THE BOOK

One might question the need for another CERCLA book. As noted in *Amending CERCLA*, an enormous amount has already been written about CERCLA—"so much so, that one observer, with a modicum of hyperbole, has suggested that there has been more written about CERCLA than about the Civil War, but then again 'the Civil War was not as contentious.'"[7]

Still, the 1986 Superfund Amendments and Reauthorization Act (SARA) remains the only comprehensive set of amendments to CERCLA. Following SARA, three amendments resulting from narrowly targeted legislation were enacted to make further reforms. *Amending CERCLA* addresses how these amendments narrowed the CERCLA liability scheme by focusing on specific policy objectives:

- The Asset Conservation, Lender Liability, and Deposit Insurance Act (1996)
- The Superfund Recycling Equity Act (1999)
- The Small Business Liability Relief and Brownfields Revitalization Act (2002)

An overview explains why each amendment was enacted, what each provides, and how each has been interpreted by EPA and the courts. Following this analysis, the book includes CERCLA text annotated to show the language added by each amendment, the main EPA guidance documents for the amendments, and key excerpts from the legislative histories, including the full text of each amendment.

It would be our pleasure to provide you with a copy of this book (while supplies last) if you would like one. Please let any attorney in our group know, or contact Mary Light at Mary.Light@aporter.com. If we do send you one, we hope you will find it useful and only ask that you not give away the ending!

6 American Society of Testing and Materials, E 1527: Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Practice.

7 *Amending CERCLA*, p.1 n.1