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December 2004

The Supreme Court's Decision in *Cooper v. Aviall*

How Will It Affect Environmental Site Investigations, Cleanups and Litigation?

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On December 13, 2004, the United States Supreme Court issued a landmark decision concerning the contribution provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court ruled 7-2 that under Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), a potentially responsible party (PRP) that cleans up a contaminated site must be (or have been) the subject of an enforcement action under either Section 106 or Section 107(a) of CERCLA before it can commence an action for contribution against other PRPs.

The case arose after Aviall purchased several aircraft engine maintenance facilities from Cooper and subsequently discovered that they were contaminated with hazardous substances. Aviall was directed by the Texas Natural Resource Conservation Commission to clean up the property or otherwise face a state enforcement action. Aviall complied with the directive and, after incurring over $5 million in costs to investigate and remediate the site, sued Cooper for contribution. In an *en banc* decision, the Fifth Circuit Court of Appeals ruled that Aviall could pursue a contribution claim against Cooper under Section 113(f)(1).

The Supreme Court, reversing, held that the express language of Section 113(f), which states that a contribution action may be brought "during or following any civil action" under Sections 106 or 107(a), precluded the filing of an action for contribution unless the predicate civil action had been filed against the party seeking contribution. The Court gave short shrift to the public policy argument that its holding would undermine the purpose of CERCLA by discouraging voluntary cleanups, stating that the express statutory language, and not the presumed intentions of the legislators, was controlling.

Impact on Voluntary Cleanups

The likely impact of *Aviall* will be a reluctance, in certain circumstances, on the part of PRPs to undertake voluntary cleanups of contaminated sites. Previously, the ability of one liable party to assert a contribution claim under Section 113(f)(1)—in the absence of a governmental enforcement action—was a "stick" that encouraged other liable parties to share the costs of a voluntary cleanup. The removal of that threat will mean that parties that might otherwise have come forward to conduct (or share the costs of) voluntary cleanups may be less willing to do so.

Parties must now resolve their liability with the federal or a state government under Sections 106 or 107(a) of CERCLA in order to exercise their statutory contribution rights. At many sites this extra step will delay the cleanup, escalate transaction costs and compel otherwise unnecessary litigation. Alternatively, liable parties may prefer to wait and have the government clean up a site. This too will delay the cleanup process, as well as impose additional administrative and financial burdens on EPA and state agencies.

Despite the *Aviall* decision, liable parties will continue to undertake voluntary cleanups in situations where in large part the motivation is that the PRP is the site's current owner and wants to eliminate the stigma of contamination, preserve property value, prevent off-site migration and the tort liability that could ensue, appease a landlord or lender, or prepare the property for sale. These motives will remain post-*Aviall*.

Furthermore, in the modern environmental era, transactional documents generally address responsibility for ameliorating environmental conditions. In most cases, for property transferred within the past twenty years, indemnity rights for one party's undertaking a voluntary cleanup will be specified contractually, so that the decision to undertake a voluntary cleanup is less likely to hinge on the viability of statutory contribution rights.

In any event, PRPs currently performing voluntary cleanups must re-evaluate their strategy if they have not yet sought contribution from other PRPs, and PRPs planning to undertake a voluntary cleanup must now factor the *Aviall* decision

into the timing of and approach to cleaning up their sites.

Impact on State Voluntary Cleanup Programs

An unfortunate consequence of the *Aviall* decision may be to reduce the number of parties willing to participate in state voluntary cleanup programs, such as brownfield programs, through which contaminated and potentially contaminated sites are cleaned up and redeveloped. Before *Aviall*, PRPs typically relied upon their federal right to recover cleanup costs from other PRPs when deciding to purchase and/or voluntarily clean up contaminated property through a brownfield program. That is, they would undertake the costs of participating in a state program, knowing they could recoup their costs from third parties. PRPs may now decline to participate in such programs if they have no right to seek contribution from other PRPs.

The decision will also put PRPs on the horns of a dilemma in those states, including New York, which deny participation in brownfields programs to sites that are the subject of a federal or state enforcement action. In such states, PRPs may have to choose between the benefits of being in such a program, and the value of being able to pursue contribution rights that flow from having been sued by federal or state authorities under Sections 106 or 107(a).

An additional irony is that recent federal brownfields legislation generally precludes the United States from bringing a civil enforcement action against a PRP that agrees to participate in a state voluntary cleanup program. As a result, those participating in such programs may have to affirmatively drop out of them in order to avail themselves of contribution rights against other PRPs.

Impact on Multi-party Sites

The *Aviall* decision may have the least long-term effect at the typical Superfund site at which there are hundreds and potentially thousands of PRPs. Over the short term, however, it may delay the process by which PRP groups coalesce. If the government continues to negotiate settlements with a manageable number of major waste contributors, one could expect non-notified parties to continue to "lie in the weeds" until the major PRPs have resolved their liability with the government, either through a settlement agreement or an acceptance of a Section 106 Administrative Order. That is, non-notified parties may delay coming to the settlement table until the settlers' or respondents' contribution claim is ripe.

Where a critical mass will not form to conduct an Remedial Investigation/Feasibility Study (RI/FS) or Remedial Design/Remedial Action (RD/RA), then the *Aviall* decision might force the government to use its enforcement authorities against a much larger group of PRPs than it might otherwise have. Where "recalcitrants" have been plentiful, or a small portion of the overall "waste in" is accounted for by the cooperating PRPs, PRP groups have sometimes prevailed upon the government to issue notices of liability or, in more dire circumstances, orders under Section 106 to a wider circle in order to induce PRPs to form a group.

Impact on Successive Owners

The *Aviall* decision may make it more difficult to convince past owners to shoulder environmental cleanup costs where the claimant/current owner has not resolved its liability with the government under Sections 106 or 107(a) of CERCLA. The threat of Superfund liability (implicitly by means of a contribution action) has been an effective tool to persuade prior owners to cooperate in undertaking a cleanup. This is especially so in situations in which the governing contracts pre-date CERCLA.

In the past, if a current owner discovered contamination, it might have cajoled past owners to share cleanup costs, under the implicit or explicit threat of a CERCLA contribution action. Now, unless the current owner has resolved its liability with the government under Sections 106 or 107(a), the threat will not be credible, and past owners may not be so readily persuaded to contribute.

Impact on Transactional Due Diligence

The Supreme Court's decision should not materially alter the manner in which transactional diligence is performed on assets with environmental sensitivity.

It is no doubt true that the vigorous environmental assessment of real property conditions that is a hallmark of business transactions today can be traced to CERCLA's unforgiving liability regime and the safe harbor afforded by the "innocent purchaser" defense. That being said, it seems unlikely that buyers or lenders will be less diligent because of a heightened predicate to a party's bringing a contribution action.

Most environmental diligence into real property conditions before a property or business acquisition—even if modeled on the ASTM Phase I standard or statutory "all appropriate inquiry" standard—is conducted for reasons independent of qualifying for the CERCLA innocent owner defense. Buyers and lenders want to know that the asset they are acquiring, or taking as collateral for a loan, possesses the value they expect it to have. They also want to know that the profit they make from operating the buyer's business will not be diminished by cleanup costs. In addition, there are common law theories (e.g., nuisance, trespass) that give rise to tort liability for property damage and personal injury against which they want to protect themselves.

Thus, it is widely expected that buyers' searching inquiries into real property conditions will continue, even if there is a lower possibility of their bringing, or being subjected to, a statutory contribution action.

Contribution Rights Now Available to PRPs

In *Aviall*, the Supreme Court declined to address the issue of whether a PRP can recover its cleanup costs pursuant to a Section 107(a) cost recovery action. A majority of circuits preclude PRPs from recovering their cleanup costs under Section 107(a) and instead have ruled that under Section 107(a), only the government (and, in certain circuits, private parties who are not responsible for a site's contamination) may recover cleanup costs from PRPs. Several of these circuit court decisions expressly relied upon the availability of Section 113(f)(1) as the vehicle to recoup cleanup costs from other PRPs. However, that vehicle no longer is available. Thus, in jurisdictions where courts have ruled that Section 107 does not create an implied right of contribution, no federal remedy to recover cleanup costs from other PRPs is available to potentially responsible parties who undertake a voluntary cleanup.

At least in the short term, PRPs that undertake voluntary cleanups will be forced to resort to state contribution actions, or other state statutory or common law remedies, to recover their cleanup costs. Though some states have adopted general rules of contribution among tortfeasors, others do not allow contribution actions before the party seeking contribution has been subjected to a judgment or settlement.

The Beneficiaries of the *Aviall* Decision

While PRPs willing to undertake a voluntary cleanup of contaminated sites may be adversely affected by the obstacles created by the *Aviall* decision, one group stands to benefit from the Supreme Court's interpretation of Section 113(f)(1): recalcitrant PRPs. The *Aviall* decision essentially shields such PRPs from liability for their share of the equitable costs if another PRP has voluntarily cleaned up a site prior to any enforcement action. PRPs that are currently defendants in Section 113(f)(1) contribution actions in which the plaintiff PRP conducted a voluntary cleanup will no doubt cite the *Aviall* decision in pending or to-be-filed motions to dismiss.

Another major beneficiary of the decision is the U.S. government, particularly the military. There are thousands of sites across the country where the government is a PRP but where, for political or other reasons, a federal enforcement action has not been and is unlikely to be brought. Those who are current owners of such sites may have to depend on the cooperation of state agencies in bringing enforcement actions in order to force the federal government to pay its fair share of cleanup costs.

Prospects for Statutory Amendment

Before the *Aviall* decision was handed down, it was widely speculated that a reversal of the Fifth Circuit decision would lead to prompt Congressional action to amend the statute to reinstate the right of contribution absent an enforcement action. As of this writing, that scenario is still a very plausible one. If such an amendment is enacted and given retroactive effect, the impact of the *Aviall* decision could be short-lived. Nonetheless, in the interim, parties who are involved in pending contribution litigation, or are considering voluntarily cleaning up sites which were contaminated by other parties, will have some difficult tactical and legal decisions to make.

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