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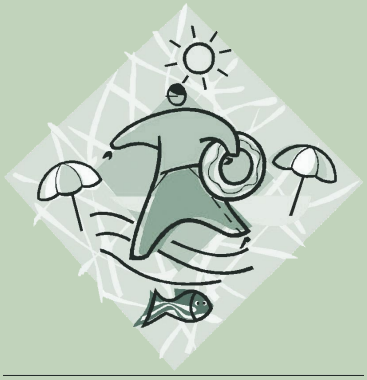

The United States Supreme Court Restricts The Right Of Contribution Under CERLA For Voluntary Cleanup Costs

*James A. Langlais**

Introduction

More than seven years ago, Aviall Services ("Aviall") filed suit against Cooper Industries ("Cooper") to recover cleanup costs at several contaminated properties. Cooper did not dispute that it contributed to the contamination, but instead argued that Aviall did not have standing to bring a contribution claim under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), commonly known as Superfund.[1]

On December 13, 2004, the United States Supreme Court held that private parties who undertake voluntary cleanups are barred from seeking contribution from other potentially responsible parties ("PRPs") under § 113(f)(1) of CERCLA in the absence of a prior or pending CERCLA § 106 administrative action or § 107(a) cost recovery action by the government.[2] The Court's decision alters a nearly universal understanding about how CERCLA operates with respect to private party cost recovery actions. This article reviews the Supreme Court's decision and examines the implications that the court's decision has for PRPs at contaminated sites across the country.

Case Overview

During the course of operating an aircraft engine maintenance business, Cooper contaminated several properties in Texas with "petroleum and other hazardous substances."[3] In 1981, Aviall purchased Cooper's business, along with the contaminated properties.[4] Aviall later discovered that both it and Cooper had caused soil and groundwater contamination.[5] Aviall reported this discovery to the Texas Natural Resource Conservation Commission ("TNRCC"), the predecessor agency to the Texas Commission on Environmental Quality.[6] TNRCC directed Aviall to clean up the properties, but neither the TNRCC nor the Environmental Protection Agency ("EPA") took any judicial or administrative action to compel Aviall to perform the cleanup. Under the threat of enforcement and despite not being solely liable for the contamination, Aviall initiated a cleanup.[7] Aviall ultimately sold the properties, but retained contractual responsibility for further cleanup, which may ultimately cost approximately $21 million.[8]

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Message From the Chair

Greetings Section Members!

I would like to express my thanks to the Section for providing me the opportunity to serve as your Chair for the upcoming year – I am honored and energized to accept this responsibility, particularly knowing that you have also selected excellent, qualified individuals to round out the Board. Andrea Rimer and David Meezan continue their service to the Section as Secretary and Chair-Elect, respectively, while Martin Shelton joins the Board as Treasurer and Mark Watson joins as Member-At-Large. I must also thank outgoing Chair Susan Richardson for setting a great example during her tenure on the Board. Hers will be a difficult act to follow.

In any event, we hope you find this latest edition of our Newsletter informative and relevant to your practice. Please also mark your calendars for our annual Summer Seminar, to be held August 4-7 at the Hilton Oceanfront Resort in Hilton Head, S.C. We will of course be providing many additional educational and social opportunities throughout the year, and will be announcing a more expanded agenda in the near future.

Please do not hesitate to contact me or any of our Board members with your comments, criticisms, and most importantly – offers to volunteer – as your participation is paramount to the ongoing success of the Section.

Thanks again,

Jeff Dehner

Supreme Court Restricts the Right of Contribution

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In 1997, Aviall filed suit against Cooper to recover a portion of its cleanup costs.[9] The original complaint asserted a claim for cost recovery under CERCLA § 107(a), a separate claim for contribution under CERCLA § 113(f)(1), and state-law claims. Thereafter, Aviall amended its complaint by combining its § 107(a) and § 113(f)(1) claims into a single claim, which alleged that pursuant to § 113(f)(1), it was entitled to seek contribution from Cooper as a PRP under § 107(a).[10] Both parties moved for summary judgment.[11] The district court held that party must have first been subject to a CERCLA § 106 administrative abatement action or a § 107(a) cost recovery action before it may bring a § 113(f)(1) claim for contribution.[12] Aviall was not party to any prior or pending CERCLA claims at the contaminated properties.[13] As a result, the district court dismissed the § 113(f)(1) contribution claim without prejudice.[14]

Aviall appealed to the Fifth Circuit. After initially affirming the district court's holding, the Fifth Circuit, sitting en banc, held that § 113(f)(1) permits a contribution claim *whenever* a PRP decides to pursue such a claim.[15]

In January 2004, Cooper's petition to the U.S. Supreme Court for writ of certiorari was granted.[16] On December 13, 2004, in a 7-2 decision, the Court held that a private party who has not been sued under CERCLA § 106 or § 107 cannot obtain contribution under CERCLA § 113(f)(1) from other liable parties.[17]

CERCLA Framework

CERCLA was enacted to impose the costs to clean up contaminated properties on those parties responsible for the contamination, and to encourage prompt, effective and voluntary cleanup.[18] The statute shifts cleanup costs from taxpayers to those allegedly profiting or benefiting from the contamination.[19] Prior to CERCLA's amendment in 1986, CERCLA contained no explicit provisions allowing PRPs to recover response costs from other PRPs.[20] Instead, the § 107(a) cost recovery provision was the primary mechanism to compel polluters to pay for environmental remediation costs.[21] Many courts held that within § 107 was an implied right to contribution.[22] Other courts held that a PRP's right to contribution arose instead as a matter of federal common law.[23]

In 1986, Congress amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA)[24] by adding § 113 to provide an express right for private party contribution, to clarify and confirm the federal common-law right to seek contribution from other potentially liable parties,[25] and to re-emphasize the necessity of voluntary cleanups.[26]

Section 113 of CERCLA creates two express rights of contribution in § 113(f)(1) and in § 113(f)(3)(B). Section 113(f)(1) states, in pertinent part, that:

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Rights of the Remediation Contractor Under CERCLA's Cost Recovery and Contribution Provisions and Potential Pitfalls for the Unwary Client

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It is a lazy Thursday afternoon in the office during the holidays and not much exciting is happening. The phone rings and one of your best clients has panic in her voice. Her company is a potentially responsible party ("PRP") under sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[1] This you knew. What you did not know was that your client, who had been responsible in retaining a solvent and talented remediation contractor, just received notice that it was being sued by that contractor under CERCLA. It seems your client and the contractor had a falling out and there are numerous and substantial outstanding invoices which hang in the balance. Preposterous you think. A remediation contractor is not an innocent party entitled to seek a recovery under CERCLA. Think again. Typically, the only "innocent party" in a CERCLA cleanup action is the governmental agency that is forced to clean up the hazardous site. However, there are instances when a private party, such as a remediation contractor, qualifies as an "innocent party" and is thus able to bring a cost recovery action against PRPs under section 107(a).

In *Blasland, Bouck & Lee, Inc. v. City of North Miami,*[2] Blasland, an environmental engineering firm, was hired by the City of North Miami, a PRP, to clean up a hazardous site. After Blasland had completed part of the work, the City terminated the contract, alleging Blasland had performed the work in a negligent manner. Blasland sued the City, asserting theories of breach of contract and CERCLA cost recovery.[3] The court considered the availability of equitable defenses to CERCLA liability.

The contract between the City and Blasland contained a "pay-when-paid" clause, which provided that the City's payment to Blasland was dependent on the Florida Department of Environmental Regulation ("DER") approving the cleanup and reimbursing the City. In other words, the City's obligation to pay Blasland was contingent on the City being reimbursed by the DER for Blasland's fees, costs, and expenses. The district court held that the pay-when-paid clause provided the City with a valid defense to CERCLA liability to the extent the City did not receive funding from the DER.[4]

The issue was not whether Blasland was an "innocent party," which he was, or whether he had proved his prima facie case under CERCLA, which he had; rather, the issue was the availability of defenses.[5] Section 107(b) provides PRPs with three defenses to liability in a cost recovery action by an innocent party. The PRP will not be liable if the r elease of the hazardous substance was caused by "(1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . ."[6] Section 107(a) states that these three defenses are the only defenses to PRP liability; however, the court in *Blasland* noted that other sections of CERCLA provide for defenses such as indemnification or hold harmless agreements with the plaintiff,[7] statutes of limitations,[8] and proving that the defendant has already settled its liability with the government.[9] Although the other sections of CERCLA that provide for defenses to liability contradict section 107(a), the court found that the pay-when-paid clause did not fall into any of the CERCLA defenses.[10]

Considering the City's argument that its contract with Blasland released it from CERCLA liability, the court found that,

> the pay-when-paid clause did not purport to release CERCLA liability, or any liability other than contractual liability; it speaks of the City's obligation to pay "compensation" under the contract not of liability for contribution under CERCLA. It therefore is not one of the defenses based on release of liability enumerated in CERCLA itself.

Instead, the pay-when-paid clause at issue in this case is, or at least is closely akin to, an equitable defense.[11]

Although CERCLA allows PRPs and innocent parties to enter into settlement, release, and indemnification agreements, the court rejected the City's argument that "Blasland should not be allowed to conduct an end-run around the contract using CERCLA."[12] After finding that the City's invocation of the pay-when-paid clause was essentially an equitable defense, the court held that "107(a) bars defendants in CERCLA suits from raising equitable defenses to liability."[13] The court based its decision on (1) the plain language of section 107(a), which limits defenses to those three enumerated in section 107(b), and (2) "the Congressional intent behind the statute, which was to have pollution cleaned up as quickly as possible and to see that the responsible polluters are made to pay for the cleanup."[14] Amazingly, the court upheld a recovery even in the face of malpractice by the contractor.

The genesis for the authority of a remediation contractor as an innocent party for purposes of CERCLA recovery appears to be the Fifth Circuit's decision in *OHM Remediation Services v. Evans Cooperage Co.*[15] OHM was hired by Louisiana Oil to contain a release of hazardous substances and recover the spilled materials. OHM's relationship with Louisiana Oil was purely contractual, and OHM "never had any ownership or leasehold interest in the Louisiana Oil facility."[16] Because Louisiana Oil went out of business and was

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unable to pay OHM's $3 million response costs, OHM sued one of the major PRPs under section 107(a). The district court dismissed OHM's claims, holding that a party must have a "protectable interest" in the clean-up site to recover response costs.[17] The court of appeals rejected the district court's interpretation of section 107(a), reasoning that,

> According to this interpretation of section 107(a), OHM would presumably have a cause of action sounding in contract against Louisiana Oil, who in turn could recover from potentially liable parties ("PRPs") under CERCLA. Such a reading of CERCLA would effectively bar independent contractors such as OHM from recovering response costs under section 107(a).

This protectable interest requirement is nowhere in the statute, and we decline to assert it.[18]

The court looked to the legislative history and congressional intent behind CERCLA when making its decision.[19] The court determined that it would make little sense to allow the government to recover response costs without having a protectable interest, while private parties were required to show such an interest.[20]

The court also rejected the PRP's argument that OHM's contract with Louisiana Oil, not the spill, caused OHM's response costs.[21] The court held that CERCLA "does not adopt such a cramped view of causation . . . . [I]f no release had occurred, OHM would not have had to incur response costs cleaning up the site. In that respect, the spill 'caused' OHM's response costs."[22]

Following a lengthy discussion of statutory interpretation, the court held that only PRPs could bring actions for contribution under section 113(f).[23] Interestingly, the court determined that although OHM claimed it was innocent, it could bring an action under section 113(f) because it was also named as a third-party defendant.[24] Being sued under the statute made OHM a "potentially liable party" under section 1 13(f). Emphasizing the policy considerations behind its determination, the court stated that by "allowing parties to bring contribution claims before any finding or stipulation of liability, CERCLA makes possible the joinder of all potentially responsible parties in a single case," and provides for "an early identification of potentially responsible parties for purposes of settlement."[25]

PRP Liability Considerations

In addition to understanding when and under what section of CERCLA parties can bring an action to recover response costs or a contribution action, PRPs should become familiar with the available defenses to liability.

A. Remediation Contracts

After being ordered to clean up a hazardous site, PRPs typically form a group and hire a remediation contractor to conduct a cleanup of the site. If the remediation contract is for a fixed amount, the parties to the contract should clearly state the risks assumed by each party. Otherwise, problems develop when the remediation contractor begins working on the site and realizes the amount or condition of the hazardous substances are not what the PRP group represented. For example, in *IT Corp. v. Motco Site Trust Fund,*[26] the PRP group created a fund for the remediation work and prepared a Request for Proposal ("RFP"), which described the site, summarized the waste characteristics and volumes, and disclosed the underlying studies used to formulate the RFP. The RFP was then sent out to contractors who bid on the project. IT Corporation ("ITC"), an environmental contractor, visited the site, obtained some samples, and performed some tests before submitting its lump sum bid. Shortly after beginning the remediation work, ITC realized that the amounts and composition of the wastes as represented in the RFP were inaccurate. ITC then asserted a cause of action based on breach of contract, negligent and fraudulent misrepresentation, and gross negligence. The PRP group argued that it was unaware of the misrepresentations in the RFP and that ITC had inspected the site and assumed the risk of the site conditions.[27]

Holding that the parties intended ITC to rely on the site information in the RFP, the court focused on the language in the remediation contract and the fact that "ITC was not in as good a position as defendants to assess the subsurface conditions or the sufficiency of the data provided."[28] Instead of including language in the contract evidencing an intent to place the risk on the contractor, the PRP group did not qualify ITC's use of the data and failed to include language precluding claims for subsurface variances.[29] The PRP group could have protected itself by including language in the contract such as: "the determination of the character of subsurface materials which will be encountered shall be each bidders responsibility," or "the RFP is solely for convenience and is not an assumption of any responsibility for the data as being representative of the conditions and materials which may be encountered."[30] The PRP group also could have required that all bidders visit the site and *fully* inform themselves of all conditions that could affect the cost of cleanup.[31] In addition to the language in the contract, or lack thereof, the court also reasoned that the contractor "did not have the same opportunity or ability as the owner to gather information about [site] and to judge the sufficiency of that information before submitting its bid."[32]

The court went on to find that regardless of clauses that limit PRP liability for site conditions, the PRPs are responsible for inaccurate, positive assertions of fact. Evaluating misrepresentation claims in fixed-price contract case, the court noted that,

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> To overcome the rule that extra compensation is not recoverable when unforeseen difficulties are encountered during the course of performing a fixed-sum contract which is capable of performance, courts have found that an implied warranty by the owner that conditions are as described in plans and specifications may be breached by defective plans. The warranty is not vitiated by standard clauses disclaiming responsibility for the accuracy of data or requiring the contractor to verify the specifications by inspecting the site. This is so because contractors cannot be expected to perform certain investigations such as soil borings. In order to calculate a bid, bidders must be able to rely on representations by the owner as to subsoil conditions and other nonobvious conditions. . . .
>
> . . .
>
> . . . Thus, placing the risk of uncertainty on the contractor does not absolve the owner of the duty not to materially misrepresent conditions.[33]

Because remediation contractors can place the risk of unexpected site conditions on the PRP group, even in a lump sum contract, PRP groups should carefully craft the language of the remediation contract and try to limit the amount of representations made regarding the site conditions.

It is worth mentioning that while PRP groups may not make false representations and then claim that a release clause protects them from liability, courts will uphold a release agreement in the absence of fraud if the language and intent is clear. In *Ball v. Versar, Inc.,*[34] the court enforced a release agreement in a remediation contract between a contractor and a PRP group trust, reasoning that,

> Beyond any reasonable dispute, the parties here were sophisticated businesses working with a custom-tailored multimillion dollar contract for sophisticated environmental remediation services. The legal meaning of a release of "any and all claims from the beginning of time to the date hereof that Contractor may have against the Trustees, whether under the Contract or otherwise" should have been obvious to Versar.[35]

The intent of PRPs to be released from all liability should be unambiguous and clear from the "four corners" of the remediation contract.

B. Settlement Agreements

Section 113(0(2) of CERCLA provides that,

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.[36]

By providing settling PRPs with a cap on their own liability, section 113(f)(2) encourages prompt settlement. PRPs may also seek contribution from non-settling persons for the amounts paid in the settlement. Section 113(f)(3)(B) states that,

> A 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 party to a settlement referred to in paragraph (2).[37]

Due to the fact that "only the amount of the settlement, not the *pro rata* share attributable to the settling party, is subtracted from the aggregate liability of the nonsettling parties, section 9613(f)(2) envisions that nonsettling parties may bear disproportionate liability."[38] The absence of unexpected, excessive liability is one of the primary advantages to settling.

Another issue affecting PRP liability is the recovery of "orphan shares," which are response costs attributable to insolvent or defunct PRPs at a site.[39] "Parties held jointly and severally liable for a site cleanup initially shoulder the burden of orphan shares. Yet when the parties seek contribution from other PRPs, the district court. . . may apportion the amount of the orphan shares among the parties."[40] Section 113(f)(1) allows courts to consider any equitable factors the court deems appropriate when allocating response costs. The issue of allocating orphan shares was addressed in *Pinal Creek Group v. Newmont Mining Corp.,*[41] which involved a PRP group attempting to recover its cleanup costs from other PRPs.[42] After noting that CERCLA claims for contribution create "several-only liability among PRPs," the court rejected the PRP group's argument that it should not be responsible for the orphan shares. The court reasoned that "[i]mmunizing PRPs who have directly paid for cleanup operations from the risk of sharing the cost associated with orphan shares would undermine the ability of courts to allocate costs between all PRPs . . . [43] However, when equitably allocating orphan shares and other response costs among PRPs, courts will consider "the fact that a PRP has itself engaged in cleanup efforts."[44]

Many courts also look to the "Gore Factors," proposed by Senator Albert Gore, which include,

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment.[45]

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> "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 section 9607 of this title."[27]

Section 113(f)(3)(B) provides that a PRP also may seek contribution after it has entered into a settlement with the federal or state regulatory agency.[28] Aviall's contribution claim was brought under § 113(f)(1).

The logic behind this amendment was articulated by the U.S. Supreme Court as follows:

> "Congress did not think it enough...to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties."[29]

In 1990, the EPA also recognized the logic (and importance) of allowing private parties to recover cleanup costs from other PRPs, by adding a new Subpart H to the National Contingency Plan ("NCP").[30] The purpose of EPA's amendment was to clarify how private parties should perform cleanups, as well as remove unnecessary obstacles to the recovery of cleanup costs during contribution litigation.[31] EPA also used the NCP amendment to reemphasize its position that private parties should not have to wait until the completion of a cleanup before filing suit to recover cleanup costs.[32]

For the last two decades, it has generally been understood that private parties can voluntarily clean contaminated sites, and then seek response costs through contribution under CERCLA. The Supreme Court's decision in *Aviall* has, however, changes all of that.

Aviall Decision

In brief, the *Aviall* Court held that the word "may" in § 113's enabling clause authorizes contribution actions that satisfy the subsequent specified condition, and no other contribution actions, *i.e.*, those contribution actions that occur "during or following" a specified civil action, and no others.[33] The majority refused to read § 113(f)(1) as authorizing contribution actions at any time because it would render the "during or following" condition superfluous, as well as render § 113(f)(3)(B) meaningless.

The Court further concluded that § 113(f)(1)'s saving clause does nothing to "diminish" any cause of action for contribution that may exist independently of § 113(f)(1) since it does not, in and of itself, establish a cause of action, does not expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action, and does not specify what causes of action for contribution, if any, exist outside § 113(f)(1). The Court held that Aviall has no right to bring a § 113(f)(1) claim because the company, which had never been subject to a civil action under § 106 or § 107(a), did not satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).[34]

Case Ramifications

The *Aviall* decision significantly alters the nearly universal understanding about how CERCLA operates with respect to private party cost recovery actions. Prior to the decision, most federal courts agreed that private parties who voluntarily clean up contaminated sites are entitled to bring contribution suits under § 113(f)(1) against other PRPs to recover their response costs. Although parties may still have a cause of action under state law for voluntary cleanups, the Supreme Court's decision is not only likely to discourage voluntary cleanups, but may have several additional consequences.

First, the Court's decision may discourage private parties from complying with state or federal directives to "voluntarily" clean a Superfund site, even in the face of threatened legal action, since there is no guarantee that they will ever be able to recoup any of their response costs from other responsible parties. Likewise, private parties with sites under the corrective action program of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA")[35] might be reluctant to proceed with cleanups pursuant to permits or administrative orders for fear that they may foreclose their right of contribution under CERCLA since neither a RCRA permit nor a RCRA administrative order on consent would appear to qualify as a "civil action" brought under sections 106 or 107 of CERCLA.

Second, private parties may be discouraged from cleaning up Brownfield sites. Since many Brownfield sites do not pose an imminent enough threat to human health or the environment to trigger a state or federal legal action, the only realistic potential is that such sites will get cleaned through voluntary action. The Court's decision, however, may affect parties' willingness to clean such sites, given that they apparently no longer have the right to seek contribution under CERCLA. This result is at odds with Congress' more recent amendment to CERCLA, *i.e.*, the Small Business Liability Relief and Brownfields Revitalization Act, whose goal is encourage voluntary cleanup programs at state and local levels and to provide *some* funds for such cleanups.[36]

Third, the decision may provide private parties that are cleaning sites under EPA-issued unilateral administrative orders ("UAOs") with an incentive to halt cleanup activities. Section 106 authorizes EPA to issue UAOs to PRPs when releases of hazardous substances pose an

imminent and substantial endangerment. Failure to comply with these UAOs can result in severe penalties and treble damages. In briefing to the Supreme Court, the federal government declared its position that a UAO does *not* constitute a "civil action" for purposes of § 113(f)(1).[37] The Supreme Court declined to address this issue.[38] Therefore, despite the strong incentive to comply with UAOs to avoid penalties, in light of uncertainty left by the government's position and the Supreme Court's refusal to address the issue, a PRP operating under a UAO may have incentive to halt cleanup activities until the government files suit in order to preserve its contribution rights.

Fourth, the decision could relieve the federal government of liability at several thousands of sites owned by them or where they have contributed hazardous substances. Conceivably, since a private party cannot sue the federal government for contribution under the Court's ruling unless it has first been sued under sections 106 or 107(a), the Department of Justice could shield the United States from liability by choosing not to sue the private party. The federal government, through the Department of Agriculture, Department of Defense, Department of Energy, and Department of Interior, is a PRP in more that 60,000 sites across the country.[39] The conservative estimate to clean these contaminated sites is at least $230 billion.[40] To allow the United States to avoid liability not only raises obvious questions of conflict of interest, but is completely inconsistent with Congress' intent to treat the federal government "like any private party" by waiving sovereign immunity.[41] The purpose of this waiver of sovereign immunity is to create a level playing field between private parties and the United States Government. The *Aviall* decision seems to tilt the playing field in the federal government's favor.

Finally, the Court's decision to restrict a private party's contribution rights will also likely lead to unnecessary litigation expenses and increased cleanup costs, and divert already scarce governmental resources,[42] but could also result in the lost opportunity to return contaminated properties back to the marketplace and the forfeiture of tax dollars to the community. And although parties may still have a cause of action under state law for voluntary cleanups, states with Superfund statutes modeled after CERCLA may similarly restrict a private party's right to contribution.

Conclusion

For the past several decades, private parties had incentive to perform voluntary cleanups. By restricting contribution rights, the Supreme Court has, at least for the moment, taken away much of that incentive. The Fifth Circuit could, on remand, rule that Aviall still has an implied right of contribution under § 107 or Congress could amend Section 113(f)(1) to expressly allow contribution actions "at any time", but that waits to be seen. In the meantime, private parties facing cleanup decisions must act prudently and should, therefore, seek the advice of a qualified environmental lawyer.

(Endnotes)

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The views expressed in this article reflect those of the author alone and do not necessarily reflect the views of Alston & Bird LLP or its clients.

[1] 42 U.S.C. §§ 9601 *et seq.* Sections 106 and 107 are codified at 42 U.S.C. §§ 9613 and 9607. However, for the sake of clarity and brevity, throughout this article I refer, for the most part, to sections of CERCLA rather than the U.S. Code.

[2] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 125 S. Ct. 577 (2004).

[3] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 136 (5th Cir. 2001), *reh'g en banc granted*, 278 F.3d 416 (5th Cir. 2001).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* The Court also dismissed Aviall's state law claims because it no longer had jurisdiction.

[15] 263 F.3d at 135 (emphasis added).

[16] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 540 U.S. 1099 (2004).

[17] 125 S. Ct. 577 (2004).

[18] *See, e.g.,* S. Rep. No. 96-848, at 31 (1980)(The strict liability standard is "intended to *induce* potentially liable persons to *voluntarily* mitigate damages rather than simply rely on the government to abate hazards.")(emphasis added); 126 Cong. Rec. 26338 (Sept. 19, 1980) (statement of Rep. Florio) (Section 107 "assures that the costs of chemical poison releases are borne by those responsible for the releases", and "creates a *strong incentive* both for prevention of releases and *voluntary* cleanup of releases by responsible parties."); 126 Cong. Rec. 26,784 (1980)(House Representative Albert Gore stated that the ability to seek contribution from other responsible parties "is one of the prime considerations underlying the use of joint and several liability" in CERCLA suits); 99th Cong. 51 (1985)(emphasis added)(Assistant Attorney General Habicht has stressed that "[t]he fairness of a joint and several liability scheme *depends* upon the clear availability of contribution") (emphasis added); *see, also Colorado v. ASARCO, Inc.,* 608 F. Supp. 1484 (D. Colo. 1985); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("[I]t is clear that the statute was designed primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes."); *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997); *United States v. Township of Brighton,*.153 F.3d 307, 313 (6th Cir. 1998)(The availability of contribution actions under CERCLA mitigates any inequity arising from the statute's strict liability scheme; *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 347 (D.N.J. 1999) (Congress sought "to ensure the prompt and thorough

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cleanup of contaminated sites largely through the enactment of Section 113(f)."

[19] *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 894 (5th Cir. 1993).

[20] *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995).

[21] *Compaction Sys. Corp.*, 88 F. Supp. 2d at 346-47 (discussing the history of CERCLA contribution).

[22] *See, e.g., Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1190 (10th Cir. 1997); *Wickland Oil Terminals v. Asarco, Inc.,* 792 F.2d 887, 890-892 (9th Cir. 1986); *Walls,* 761 F.2d at 317; *United States v. New Castle County,* 642 F. Supp. 1258, 1263-1269 (D. Del.1986); *Wehner v. Syntex Agribusiness, Inc.,* 616 F. Supp. 27, 31 (E.D. Mo.1985).

[23] *Id.*; *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *United States v. A & F Materials Co.,* 578 F. Supp. 1249 (S.C. Ill. 1984).

[24] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[25] CERCLA § 113(f)(1); 42 U.S.C. § 9613(f)(1); *see, also* S. Rep. No. 99-11, at 43-44 (1985).

[26] *See, e.g.,* H.R. Rep. No. 99-253(V), at 58 (1985), reprinted in 1986 U.S.C.C.A.N. 3124, 3181 ("Voluntary cleanups are essential to a successful program for cleanup of the Nation's…pollution problem); 131 Cong. Rec. 24730 (Sept. 24, 1985)(statement of Sen. Domenici)("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

[27] 42 U.S.C. 9613(f)(1).

[28] 42 U.S.C. 9613(f)(3).

[29] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion), *overruled on other grounds* by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[30] National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 55 Fed. Reg. 8,666, 8,792-93 (Mar. 8, 1990) (codified at 40 C.F.R. § 300.700).

[31] National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 55 Fed. Reg. 8,666, 8,792-93 (Mar. 8, 1990) (codified at 40 C.F.R. § 300.700).

[32] *Id.* at 8,798 ("[R]equiring a party to incur all costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up expeditiously.").

[33] 42 U.S.C. § 9613(f)(1) (emphasis added).

[34] 125 S. Ct. 577 (2004).

[35] 42 U.S.C. §§ 6901 *et seq*. (1976).

[36] Pub. L. No. 107-118, 115 Stat. 2356 (2002). Under the Act, two classes of potentially responsible parties ("PRPs") are newly exempted from liability for National Priority List ("NPL") sites: (1) arrangers and transporters of de micromis amounts of materials, if the amounts of the materials they disposed of are under prescribed quantities, and (2) specified arrangers, i.e., residential property owners or operators, small businesses, and tax exempt institutions, who generated municipal solid waste. These exemptions are conditional; among other things, all or part of the disposal, treatment, or transport of the wastes must have occurred before April 1, 2001.

[37] 263 F.3d at 140, n.5 (Wiener, J., dissenting); United States Amicus Curiae Brief at 22, n.11.

[38] 125 S. Ct. 577 (2004).

[39] Federal Facilities Policy Group, Improving Federal Facilities Cleanup (Oct. 1995), available at http://www.epa.gov/swerffrr/documents/octscan.htm.

[40] *Id.*

[41] 42 U.S.C. § 9620(a); CERCLA § 120(a). Section 120(a) states, in pertinent part, that "…the United States …shall be subject to… [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107…". *See, also FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994)("[W]hen the government engages in activities that would make a private party liable…then the government is also liable. This is true even if no private party could in fact engage in those specific activities"); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)(Interpreting the Federal Tort Claims Act (28 U.S.C. § 2674), the U.S. Supreme Court stated that "[t]he United States shall be liable…in the same manner and to the same extent as a private individual under like circumstances.") *Id.* at 63.

[42] By way of illustration, tight budgetary limits in fiscal year 2005 has forced some EPA regional offices to extend pre-existing hiring freezes and leave open vacant openings to ensure spending caps for the coming year are not exceeded. Tight FY05 Spending Limits Extend Hiring Freeze in EPA Regional Offices, Inside E.P.A. Wkly. Rep., Dec. 24, 2004, at 1,8.

Another incentive for PRPs to conduct cleanup operations promptly is that if the PRP is engaged in business at the site, it will be more likely to "protect its on-going operations and be better able to control its cleanup costs, than if it waited for the government to intervene."[46]

When confronted with cleanup costs at a hazardous site, PRPs may take affirmative steps to limit their liability. Forming a PRP group and settling with the government prevents the PRP from being sued for contribution by other PRPs, and places the PRP in favorable light with the government when the government equitably allocates response costs, such as orphan shares. Also, by understanding that "innocent parties," such as remediation contractors, can recover cleanup costs from PRPs, PRP groups can draft remediation contracts in a manner that clearly states the risks being assumed by each party.

General Cost Recovery Under CERCLA

It is sometimes helpful when considering outlier facts to keep in mind the basic principles that underlie CERCLA liability.

A. Section 107(a)

CERCLA provides two ways for a party to recover monies it spends cleaning up a polluted site: (1) a suit for direct cost recovery based on section 107(a) of the statute and (2) a contribution suit under section 113 of the statute.[47] CERCLA section 107(a) allows for the recovery of "all costs of removal or remedial action" and "any other necessary costs of response" incurred by the government or "any other person" as long as such costs are "consistent with the national contingency plan."[48] Those liable for such response costs are broken down into four classes: (1) present owners or operators of facilities that accepted hazardous substances; (2) past owners or operators of such facilities; (3) generators of the hazardous substances; and (4) transporters of such hazardous substances.[49] Because strict liability is imposed under section 107(a), plaintiffs typically do not have to prove causation, only that defendant is in one of the four classes.[50] When the harm is indivisible, liability is joint and several.[51]

B. Section 113(f)

CERCLA section 113(f) allows a person to "seek contribution from any other person who is liable or potentially liable under section 107(a) during or following any civil action under section 9606 of this title or under Section 9607(a) of this title."[52] The statute also provides that, when resolving contribution claims, courts "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[53] Because section 113(f) was designed to mitigate the harsh effects of joint and several liability imposed by section 107(a), only PRPs may bring an action for contribution under section 113(f).[54] Actions under section 113(f) divide liability among PRPs severally.

To establish the elements of the prima facie case under sections 107(a) or 113(f), the plaintiff must show: "1) that the cite is a CERCLA 'facility'; 2) that there was a release or threatened release of a hazardous substance; 3) which caused the plaintiff to incur response costs consistent with the National Contingency Plan; and 4) the defendant is a statutorily liable person. . . [55] Once the plaintiff has established a prima facie case, section 107 only provides three defenses to liability: (1) an act of God; (2) an act of war; or (3) an act of a third party unconnected to the defendant.[56]

Conclusion

This Article has addressed cost recovery and contribution actions by innocent parties, such as remediation contractors, and potentially responsible parties ("PRPs") under sections 107 and 113 of CERCLA. While governmental agencies are typically the only "innocent parties" forced to clean up the land, PRPs should be aware of their liability to and defenses against environmental remediation contractors who assume the clean-up role and seek damages from PRPs. By becoming familiar with the relatively recent decisions interpreting sections 107 and 113 of CERCLA, PRPs can better protect themselves from unexpected liability.

(Footnotes)
[1] 42 U.S.C.A. §§ 9607, 9613 (1995).
[2] 283 F.3d 1286 (11th Cir. 2002).
[3] *Id*. at 1289.
[4] *Id*. at 1301.
[5] *Id*. at 1302.
[6] 42 U.S.C.A. § 9607(b)(1)-(3) (1995).
[7] *Id*. at § 9607(e).
[8] *Id*. at § 9613(g).
[9] *Id*. at § 9613(f).
[10] *Blasland*, 283 F.3d at 1303.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 1304.
[14] *Id*.
[15] 116 F.3d 1574 (5th Cir. 1997).
[16] *Id*. at 1577-78.
[17] *Id*.
[18] *Id*. at 1579.
[19] *Id*. at 1579-80.
[20] *Id*.
[21] *Id*. at 1580.
[22] *Id*.
[23] *Id*. at 1580-82.
[24] *Id*. at 1582.
[25] *Id*. at 1582-83.
[26] 903 F. Supp. 1106 (S.D. Tex. 1994).
[27] *Id*. at 1111-12.
[28] *Id*. at 1126-27.
[29] *Id*. at 1121.
[30] *Id*. (citations omitted).
[31] *Id*. at 1123.
[32] *Id*.
[33] *Id*. at 1126 (quoting Anderson v. Golden, 569 F. Supp. 122, 142-43 (S.D. Ga. 1982)).
[34] 2003 U.S. Dist. LEXIS 6355 (S.D. Ind. Mar. 26, 2003).
[35] *Id*. at *16-17.

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[36] 42 U.S.C.A. § 9613(f)(2) (1995).
[37] *Id*. at § 9613(f)(3)(B).
[38] United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 103 (1st Cir. 1994).
[39] *In re* Kaiser Group Int'l, Inc., 289 B.R. 597, 606 (Bankr. Del. 2003).
[40] *Id*. (quoting Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 354 n.12 (6th Cir. 1998)).
[41] 118 F.3d 1298 (9th Cir. 1997).
[42] *Id*. at 1300.
[43] *Id*. at 1303.
[44] *Id*.
[45] *United States v. Colorado & Eastern R.R. Co*., 50 F.3d 1530, 1536 (10th Cir. 1995).
[46] *Pinal Creek Group*, 118 F.3d at 1305.
[47] Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996).
[48] 42 U.S.C.A. § 9607(a)(4)(A)-(B) (1995). The national contingency plan is a set of guidelines drafted by the Environmental Protection Agency that governs site cleanup and response actions under CERCLA. The plan "sets performance standards, identifies methods for investigating the environmental impact of a release or threatened release, and establishes criteria for determining the appropriate extent of response activities." *OMH Remediation Services*, 116 F.3d at 1579.
[49] 42 U.S.C.A. § 9607(a)(1)-(4) (1995).
[50] *In re Bell Petroleum Servs., Inc*., 3 F.3d 889, 897 (5th Cir. 1993).
[51] *Id*. at 903.
[52] 42 U.S.C.A. § 9613(f)(1) (1995).
[53] *Id*.
[54] *OHM Remediation Services*, 116 F.3d at 1581-82.
[55] *Blasland*, 283 F.3d at 1302.
[56] 42 U.S.C.A. § 9607(b)(1)-(3) (1995).

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