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U.S. SUPREME COURT LIMITS PRIVATE PARTY'S RIGHTS TO SEEK CONTRIBUTION FOR CLEANUP COSTS UNDER CERCLA

Reversing two decades of case law, the U.S. Supreme Court yesterday in *Cooper Industries, Inc. v. Aviall Services, Inc.* held that a responsible party under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") cannot bring an action for contribution under § 113(f)(1) of CERCLA unless that party has been sued under CERCLA §§ 106 or 107. While there is much that the Court's opinion does not resolve, it is anticipated that the *Aviall* decision will have seismic ramifications upon litigation and remediation for countless contaminated sites across the nation. At minimum, this landmark decision means that a private party which has incurred investigation and remediation expenses "voluntarily" – even if it has been coerced to do so by threat of legal action by the government – can no longer seek to spread its costs to other responsible parties by suing for contribution under CERCLA § 113(f)(1). Parties who are involved in or anticipating an environmental cleanup or a CERCLA case should re-evaluate their positions and plans in light of this Supreme Court decision.

BACKGROUND OF THE CASE

Aviall Services purchased four sites in Texas from Cooper Industries in 1981. Subsequently, Aviall discovered that the properties were contaminated from the operations of both Cooper and itself. Aviall notified the Texas environmental agency, which advised Aviall that it was in violation of environmental laws and threatened to take legal action unless Aviall undertook remediation. Aviall, not wanting to be sued by the government, proceeded to spend more than \$5 million to clean up the sites, and then sued Cooper under CERCLA.

Section 113(f)(1), since its additions to CERCLA in 1986, has been viewed as the primary authority by which parties liable under CERCLA could seek to shift a portion of their response costs obligations to other responsible parties. Section 113(f)(1), 42 U.S.C. § 9613(f)(1), provides as follows:

(1) Contribution

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. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 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.

The federal district court in Texas, focusing on the language of the first sentence of § 113(f)(1), dismissed Aviall's contribution claim under CERCLA § 113(f)(1) because Aviall had not been the subject of a civil action under §§ 106 or 107 of CERCLA. A Fifth Circuit panel affirmed, but on rehearing the Fifth Circuit *en banc* reversed, allowing Aviall to obtain contribution under § 113(f)(1) even though it had not been sued under CERCLA §§ 106 or 107. The Fifth Circuit *en banc* decision was in accordance with a long line of cases recognizing parties' contribution rights under CERCLA, including many which held that § 113 is the only section of CERCLA under which a responsible party may sue for response costs.

THE SUPREME COURT DECISION

The Supreme Court on December 13, in a 7-2 opinion delivered by Justice Thomas, held that a private party who has not been sued under CERCLA §§ 106 or 107 may not obtain contribution under § 113(f)(1) from other liable parties. The Court rejected the argument that the word "may" in the first sentence of § 113(f)(1) should be read permissively, ruling instead that "during or following" a civil action is the exclusive instance in which a party may seek contribution under § 113(f)(1). In the Court's view, Aviall's reading would render superfluous the first sentence of § 113(f)(1) as well as § 113(f)(3)(b), which authorizes contribution actions after administrative or judicially approved settlements with the federal or state government. The Court also pointed to CERCLA § 113(g)(3), which provides for three-year statutes of limitation for contribution actions beginning with the date of judgment or the date of settlement, whereas § 113(g)(3) provides no express trigger for the contribution limitations period if a judgment or settlement never occurs, such as with a purely voluntary cleanup. The Court rejected the Fifth Circuit's view that the last sentence of § 113(f)(1), the so-called savings clause, provides for a contribution action at times other than during or following a civil action under §§ 106 or 107. The Court also declined to evaluate the purpose of CERCLA to inform its decision-making, ruling that the text of the statute was clear.

The Court did not decide whether a responsible party could bring a CERCLA action for response costs under § 107, CERCLA's main liability provision which has long been held to be the authority for cost recovery actions by the government and innocent private parties. Rather, the Court remanded the case for determination of whether Aviall had waived its right to assert a separate § 107 claim and, if there had been no waiver, whether Aviall, a liable party under CERCLA, can maintain an action for cost recovery under § 107. The dissenting opinion, by Justice Ginsburg with whom Justice Stevens joined, did not deviate from the majority opinion regarding the availability of a § 113(f)(1) contribution action. Rather, the dissent wanted to hold that Aviall had a right to bring its action for response costs against Cooper under CERCLA § 107. The majority, however, chose to decide the issue more narrowly.

The *Aviall* opinion, though, did expressly recognize that a responsible party could maintain an action for contribution under CERCLA § 113(f)(3), if that party had entered into a judicial or administrative settlement under CERCLA.

SOME RAMIFICATIONS (AT FIRST BLUSH)

It is important to recognize that *Aviall* is not a death knell for private actions for response costs under CERCLA. It does not appear to impact the right of a non-labile party to bring an action to recover response costs under CERCLA § 107. It leaves open whether a liable party can bring an action for response costs under § 107. It expressly affirms that a private party which has entered into an administrative or judicially approved settlement with the state or federal government may sue for a contribution under CERCLA § 113(f)(3). Even under the *Aviall* holding, a responsible party which has been sued under CERCLA §§ 106 or 107 can maintain a contribution action under CERCLA § 113(f)(1). (In a footnote, the Court noted that it was not deciding whether a unilateral administrative order under CERCLA § 106, an enforcement tool commonly employed by the U.S. Environmental Protection Agency, would qualify as a "civil action" with the meaning of § 113(f)(1).)

However, this U.S. Supreme Court decision – the first significant CERCLA opinion by the Court since *U.S. v. Bestfoods* in 1998 – will greatly impact both litigation and remediation decisions for sites contaminated with hazardous substances throughout the country, at least pending further court guidance or Congressional action. Motion practice will likely explode in private cost recovery actions: defendants will be filing motions to dismiss and summary judgment motions in an effort to knock out contribution claims brought under the heretofore very popular CERCLA § 113(f)(1), whereas plaintiffs will be moving to amend their pleadings to assert alternative theories of recovery, including CERCLA §§ 107(a) and 113(f)(3), as well as claims under other state and federal statutes or common law. Parties who otherwise likely would engage in “voluntary” investigations or cleanups, including under certain state “brownfields” programs, now may refuse to go forward, absent a consent order or decree or an enforcements action (notwithstanding the prospect of joint and several liability, increased attorney fees and transactional costs, etc.), if they want to preserve their ability to sue other responsible parties under CERCLA. Accordingly, there undoubtedly will be delays and increased costs associated with cleanups of many contaminated sites. Interestingly, in *Aviall* the U.S. Department of Justice, as *amicus curiae*, argued on behalf of the defendant Cooper in favor of this narrowing of private contribution rights under CERCLA.

Parties who are involved in or are contemplating environmental cleanups or CERCLA litigation should re-evaluate their strategies and courses of action in light of this landmark Supreme Court decision. If you have any questions about the *Aviall* decision, or how best to proceed with respect to remediation, negotiations or litigation involving contaminated sites, please contact Kenneth K. Kilbert, Esquire at 412-394-5433 or email kkilbert@bccz.com or Lindsay P. Howard, Esquire at 412-394-5444 or email lhoward@bccz.com.