Navigating the CERCLA Contribution Landscape in the Aftermath of Cooper Industries, Inc. v Aviall Services, Inc.

Summary

On December 13, 2004, the United States Supreme Court issued a highly anticipated ruling concerning the rights of parties to seek “contribution” for pollution cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). In Cooper Industries, Inc. v. Aviall Services, Inc., Case No. 02-1192, the Supreme Court held that § 113(f)(1) of CERCLA does not allow a potentially responsible party (“PRP”) to seek recovery of cleanup costs from another PRP unless it has first been subjected to a “civil action” brought under either § 106 or § 107 of CERCLA.

Aviall is notable not only because it is one of the very few decisions by the Supreme Court under CERCLA, but also because it represents a departure from what many environmental practitioners had assumed was settled law. Specifically, prior to Aviall most circuit courts allowed a contribution lawsuit to be filed on behalf of a party that had voluntarily undertaken a site cleanup against other PRPs, regardless of whether the plaintiff had first been sued. The Supreme Court decision in Aviall resoundingly holds to the contrary.

While foreclosing the availability of contribution lawsuits under § 113 absent a prior lawsuit or settlement, Aviall does not necessarily preclude all cost recovery for PRPs conducting voluntary cleanups. Indeed, the Court’s holding declined to resolve whether voluntary compliance with a pre-enforcement cleanup “order” would entitle a party to seek contribution under § 113. Additionally, while declining to consider whether the plaintiff in Aviall could recover cleanup costs under the alternate recovery provision of CERCLA, § 107 (widely held in the circuit courts to be unavailable to parties like Aviall who may have contributed to site contamination), the Court noted that § 107 is “clearly distinct” from § 113 but refused to decide whether current case law limiting § 107’s use should be reexamined.

In the weeks since Aviall was decided, it has already caused a dramatic shift in CERCLA practice for parties contemplating or engaged either in cost recovery litigation or in voluntary cleanup efforts. This Advisory will review the mechanics of site remediation and cost recovery by PRPs under CERCLA, discuss the potential impacts of Aviall on voluntary site cleanup efforts and claims for cost recovery, and identify strategic considerations for both prospective PRP plaintiffs and defendants in navigating CERCLA’s post-Aviall landscape.
Remediation and Cost Recovery Under CERCLA

Under CERCLA, both current owners and operators of a contaminated site and prior owners and operators at the time hazardous substance contamination occurred are among the parties that may be held liable to either the government or other private parties for site cleanup costs. While CERCLA allows the United States Environmental Protection Agency (“EPA”) to undertake response actions itself under § 104 and later recover its costs from one or more PRPs under § 107(a)(4)(A), EPA prefers for private parties to perform site cleanups and bear response costs in the first instance. Such responsibility and costs may be incurred either voluntarily – as is the case, for example, under brownfields redevelopment programs – or under government compulsion. CERCLA provides four vehicles by which a private party may be compelled to undertake remedial action: a settlement embodied in a judicial consent decree; a settlement embodied in an administrative consent order; a judicial order secured after litigation; or a unilateral administrative order issued by EPA.

District court litigation against PRPs to secure a declaratory judgment represents the most adversarial and ordinarily most costly EPA option. A judicial consent decree and administrative consent order are both bi-lateral agreements between the EPA and a PRP in which the performance and/or funding of remedial action on the part of the PRP is exchanged for a limited release from liability. They differ in that a judicially approved consent decree constitutes an order of the district court and must therefore be preceded by a civil complaint, even if it is only pro forma, whereas EPA and PRPs enter into administrative consent orders without judicial involvement. Both judicial consent decrees and administrative consent orders involve a significant expenditure of EPA resources including technical review of site conditions, negotiations with PRPs, and public notice and comment. A unilateral administrative order under § 106 typically involves technical site review by EPA staff, but leaves much of the burden on the PRP with respect to appropriate remedial design. The EPA may assess substantial sanctions for non-compliance with a unilateral § 106 order including penalties up to $32,500 per day.

Whether they act voluntarily, under the threat of sanctions, or in compliance with an administrative or court order, private parties are provided two mechanisms under CERCLA to recoup response costs from other PRPs who contributed to the contamination. Section 107 affords a cause of action to certain private parties where: (1) the defendant is within one of four categories of potentially responsible parties listed at § 107(a); (2) the site constitutes a “facility”; (3) a release or threatened release of a hazardous substance from the facility has occurred; (4) the release or threatened release has caused the plaintiff to incur response costs; and (5) the response costs are necessary and consistent with the National Contingency Plan.

The second avenue for private party response cost recovery that is available to PRPs was codified as an action for contribution under § 113 as part of the Superfund Amendments and Reauthorization Act of 1986 (“SARA”). Prior to its amendment, CERCLA did not contain an express contribution provision and facially left defendant PRPs without any recourse against other PRPs that may have contributed to the pollution. Circuit courts remedied this perceived inequity by reading an “implied” right of contribution under § 107. However, the circuits were split on the mechanics of such a remedy. Some
circuits adopted the Uniform Contribution Among Tortfeasors Act (“UCATA”), while others applied the Uniform Comparative Fault Act (“UCFA”), which resulted in differing approaches to cost allocation. The split among the circuits was not resolved by the Supreme Court before SARA codified contribution under § 113.

The UCATA and UCFA approaches differ primarily in their treatment of settlements with respect to the liability of non-settling parties. The UCATA approach establishes a pro tanto or “dollar for dollar” method of recovery – whereby each dollar recovered by a contribution plaintiff through settlements with other PRPs directly reduces the contribution plaintiff’s ability to recover against non-settling PRPs. The non-settling PRPs may be held liable for any remaining costs that have not been recovered through settlement – including “orphan” shares. By contrast, under the UCFA approach, each party remains liable for a percentage of harm based on the total costs regardless of whether a settlement has reduced the actual cost to the party seeking contribution.

While both § 107 and § 113 provide for cost recovery, the sections differ in several significant respects. Under § 107, which the courts have generally held is available for suits only by non-PRPs, liability is generally held to be joint and several (that is, with each defendant being liable for the entirety of costs) on the theory that numerous releases result in commingled contamination that is not readily divisible, and that the innocent plaintiff should not bear the burden of showing the allocation. It is the defendant’s burden to prove that the harm is divisible and thereby suited for an equitable allocation of liability instead. By contrast, non-innocent PRPs can sue under § 113 when authorized by CERCLA. Liability under § 113 generally has been held to be several only (meaning that any individual defendant can only be held liable for its own share). Therefore, cases under § 113 require an equitable allocation of response costs. In addition, the § 113 contribution plaintiff bears the burden of proving that it has carried more than its equitable share of response costs and of establishing the equitable share of the § 113 defendant’s liability.

Finally, § 107 and § 113 carry different statutes of limitations. The statute of limitations for § 107 cost recovery actions runs three years after the completion of a removal action or six years after the initiation of a remedial action. Under § 113 the statute of limitations for contribution runs three years after entry of either a judgment in a cost recovery action, a de minimis or cost recovery settlement under CERCLA, or a judicially approved settlement agreement.

The Aviall Decision

The underlying litigation in Aviall involved cleanup costs related to four aircraft engine facilities that defendant Cooper Industries, Inc. sold to plaintiff Aviall Services, Inc. in 1981 for continued operations. Subsequent to the sale, Aviall discovered that the property had been contaminated by petroleum and other hazardous substances that had leaked into the soil and groundwater from underground storage tanks and surface spills. Aviall notified Texas authorities of the contamination and in response was directed to clean up the site under the threat of enforcement action. However, neither the state nor federal government initiated an enforcement action against Aviall.
Aviall initiated site remediation activities under state supervision in 1984. In 1997, it filed suit against Cooper Industries in the U.S. District Court for the Northern District of Texas seeking to recover past and future cleanup costs estimated to exceed $5 million. Aviall’s complaint initially included contribution claims under both § 107(a) and § 113(f)(1), but the complaint was subsequently amended to consolidate its CERCLA claims under a single count grounded on § 113 alone. Thus, the proceedings focused primarily on the text and meaning of § 113(f)(1):

Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§ 106] or under [§ 107]. 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 [§ 106] or [§ 107].

On cross-motions for summary judgment, the District Court found that Aviall had abandoned its § 107 claim and held that relief under § 113(f)(1) was not available to Aviall because it had not been sued by the state or federal government under CERCLA § 106 or 107. On appeal, a panel of the Fifth Circuit affirmed the decision, relying on the language of § 113(f)(1) affording contribution “during or following” an enforcement or cost recovery civil action brought by the government. However, upon an en banc rehearing, the Fifth Circuit reversed the prior panel’s decision and reasoning. The full court reasoned, in part, that in providing that a cost recovery action “may” be brought during or after the commencement of § 106 or § 107 actions, § 113(f)(1) did not limit the availability of contribution “only” to those circumstances.

On appeal, the Supreme Court reversed the Fifth Circuit and reaffirmed the more literal interpretation of § 113(f)(1) that was originally embraced by the District Court and the circuit panel. Writing for the majority, Justice Thomas wrote, “[t]he natural meaning of [the first sentence of § 113(f)(1)] is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action” or after a judicially or administratively approved settlement agreement. In rejecting Aviall’s argument that § 113(f)(1) should be understood to mean that “during or following” a § 106 or § 107 civil action “is one, but not the exclusive, instance in which a person may seek contribution,” the Court held that the “natural meaning of ‘may’ in the context of the enabling clause is that it authorizes certain contribution actions – ones that satisfy the condition – and no others.” An alternative interpretation, the Court reasoned, would render the phrase “during or following” superfluous.

The Court was similarly unmoved by Aviall’s invocation of the last sentence of § 113(f)(1) (which states that “[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]”) as an independent basis for contribution in the absence of a § 106 enforcement action or § 107 cost recovery action. That savings clause, the Court held, serves only to clarify that § 113(f)(1) “does nothing to ‘diminish’ any cause(s) of action for contribution that may exist independently of § 113(f)(1)” but “does not itself establish a
cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought ‘during or following’ a § 106 or § 107(a) civil action, nor does it specify what cause of action, for contribution, if any, exists outside of § 113(f)(1).”

The Court supported its reading of § 113(f)(1) based on the “whole of § 113” which, it noted, begins the statute of limitations upon the “date of judgment” with respect to civil actions under § 106 and § 107 and the “date of settlement” with respect to judicially or administratively approved settlement orders. “Notably absent,” the Court observed, “is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup.” The absence of such a provision, the Court held, “supports the conclusion that to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).”

**Shifts and Unknowns in the CERCLA Landscape**

The most immediate result of the Court’s holding in *Aviall* is the express limit on the availability of contribution claims under § 113(f)(1) only to plaintiffs who have first met one of the following criteria: (1) been subject to a § 106 judicial enforcement action by the EPA; (2) been sued in a § 107 cost recovery civil action; or (3) entered into a judicially or administratively approved settlement with the EPA or a State. This holding most directly impacts PRPs that, like Aviall, have incurred response costs without first having been sued, ordered or obligated under a settlement agreement initiated or duly authorized by the EPA or a state. Such PRPs may, in some cases, include current site owners participating in state “brownfields” programs and would appear to include PRPs who perform or fund site remediation in response to EPA and state agency notifications or orders that fall short of involving a “civil action.” The decision also gives rise to several unresolved questions that the Court raised either directly or by implication.

One question that the Court, in a footnote, specifically declined to decide is whether a party who has received a unilateral administrative order by EPA under § 106, unaccompanied by an enforcement lawsuit under § 106, would be eligible to pursue contribution under § 113(f)(1). Because § 106 does not authorize state agency orders, the notice served on Aviall by the then Texas Natural Resources Conservation Commission did not constitute an order under § 106, and the issue was therefore not presented in the *Aviall* case. However, EPA may issue § 106 orders without commencing any civil litigation in district court. A court could find that such orders do not equate to “civil actions” under a strict reading of § 113(f)(1). PRPs served with a § 106 order would then face the choice of either complying to avoid potential penalties – thereby putting at risk any rights of contribution under § 113(f)(1) – or compelling the government to initiate an enforcement action under § 106 to secure the right of contribution – and expose themselves to penalties of up to $32,500 per day and liability for additional government expenses.

The decision also revived the question of whether a PRP might seek contribution under § 107 – a proposition that could provide “voluntary” PRPs with an alternative to the § 113(f)(1) avenue that *Aviall* otherwise foreclosed. There is a clear consensus among the circuit courts that joint and several liability recovery under § 107 is not available to
plaintiffs who themselves were PRPs with respect to the contamination at issue. However, *Aviall* refused to address the validity of this consensus.

While acknowledging the extensive circuit court caselaw, and despite dicta in another Supreme Court case suggesting that § 107 does create a contribution right, *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the *Aviall* Court expressly refused to hold that § 107 creates any right to contribution. The Court stated, “[t]o hold that Aviall may pursue a § 107 action, we would have to consider whether these decisions are correct, an issue that Aviall has flagged but not briefed. And we might have to consider other issues, also not briefed, such as whether Aviall . . . may pursue a § 107 cost recovery action for some form of liability other than joint and several.” Where a full legal and factual record has been established, several district courts, under the circumstances presented, have allowed a PRP like Aviall to proceed under § 107. See, e.g., *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1241 (M.D. Pa. 1996); *Town of Wallkill v. Tesa Tape, Inc.*, 891 F. Supp. 955 (S.D.N.Y. 1995); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575 (D. Conn. 1994).

It is also unclear what standards and mechanics for cost allocation would apply if the Court were to allow PRPs to seek contribution under § 107, as the pre-SARA split among the circuits between use of the UCATA and the UCFA for implied contribution under § 107 was never resolved. Conceivably, the *Aviall* case could return to the Supreme Court following its treatment by the Fifth Circuit on remand and thereafter present these or other issues for decision and further alteration to the CERCLA litigation landscape. In the meantime, practitioners and PRPs should reevaluate all pending contribution actions and consider the implications for their dealings with the EPA and state agencies.

**Implications and Practical Considerations**

*Aviall* makes clear that PRPs that “voluntarily” incur response costs cannot pursue contribution under § 113(f)(1). If “voluntary” PRPs are also foreclosed from seeking contribution under § 107, PRPs that have incurred millions of dollars of cleanup costs in response to § 106 unilateral administrative orders may be left without recourse. Concern has been expressed that such a result could also have a chilling effect on new voluntary cleanups – including under brownfield redevelopment programs.

Entities seeking to use brownfields programs may also need to consider a possible disconnect between the holding in *Aviall* and typical program provisions. Many state programs, like New York’s Brownfields Cleanup Program (“BCP”), contain both an eligibility requirement which precludes participation by parties against which a civil enforcement action is pending or to which an administrative order has issued, and liability protection which prevents the state from issuing a civil complaint or administrative order against a participating party. *See ECL § 27-1405, et seq.* If *Aviall* is understood to require either a bi-lateral administrative consent decree or civil settlement, or the pendency of a civil action under § 106 or § 107, as a predicate for contribution, then participation in a state brownfields program and the ability to seek contribution under § 113 could be mutually exclusive. The “civil action” or administrative order needed for contribution would preclude program eligibility, and program participation...
would prevent the predicate civil action or order from being filed. However, certain parties wishing to take advantage of the brownfields programs may be “innocent purchasers” under CERCLA and therefore able to file suit under § 107.

Aviall’s requirement of a predicate “civil action” for § 113 contribution invariably will incline many PRPs toward the formality of an administratively, if not judicially, approved consent order. The EPA, however, may prove hesitant to expend the additional resources that are required for consent – as opposed to unilateral – orders. The EPA may also feel additional inter-governmental pressure to issue § 106 orders with respect to sites at which other governmental entities are PRPs. At such sites, the decision to initiate an enforcement action or enter into a consent decree could expose governmental PRPs to lawsuits for contribution, where, by contrast, the governmental PRPs might try to escape contribution liability if EPA issues a unilateral enforcement order to non-governmental PRPs.

Conclusion

The federal district and circuit courts will unquestionably be engaged in mapping the contours of the post-Aviall contribution landscape during the coming months and years. During that time, the Supreme Court may more clearly define the course for PRPs to travel or cause further uncertainty instead. At this time, the most appropriate road sign would read “Caution.” PRPs should carefully weigh the perceived benefits of perfecting a § 113 contribution claim against the public comment and potentially greater performance standards that should be expected in connection with any consent decree or “friendly litigation.” Brownfields program participants should consider the potential limits on their ability to seek contribution, and parties to existing contribution actions should evaluate both the continued viability of their claims as pled and the availability of other potential avenues for contribution or equivalent recovery.

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