United States Environmental Protection Agency

December 26, 2007

Superfund Frequent Questions – Aviall and Atlantic Research

1. What is "*Aviall*"? And where can I find the Supreme Court's decision?

Aviall Services, Inc. is a party in a case that reached the U.S. Supreme Court. The case concerned Aviall's ability to get a share of its costs - known as "contribution"- for hazardous site cleanup from another company.

The official name and citation of the case is Cooper Industries, Inc. v. Aviall Services, Inc., 125 S.Ct. 577 (2004); the case is often referred to as "*Aviall*." The U.S. Supreme Court issued its decision [http://a257.g.akamaitech.net/7/257/2422/13dec20041215/ www.supremecourtus.gov/opinions/04pdf/02-1192.pdf] on December 13, 2004.

2. What are the facts and procedural history of the case?

Cooper Industries, Inc. owned and operated four aircraft engine maintenance sites in Texas for a number of years before it sold the sites to Aviall. Aviall continued to operate at the sites and ultimately, discovered that both it and Cooper had contaminated the facilities. After undertaking a cleanup, Aviall sued Cooper for contribution toward the cleanup costs.

On summary judgment, the U.S. District Court for the Northern District of Texas held that Aviall could not obtain contribution from Cooper under section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) because Aviall had not been sued under CERCLA §§ 106 or 107. A divided panel of the Court of Appeals for the Fifth Circuit affirmed, but on rehearing en banc, the entire Fifth Circuit, by a divided vote, reversed the panel. The case then reached the U.S. Supreme Court.

3. What did the U.S. Supreme Court hold in *Aviall*?

The issue before the Supreme Court in *Aviall* was whether "a private party who has not been sued under section 106 or section 107 of CERCLA may nevertheless obtain contribution under section 113(f)(1) [of CERCLA] from other liable parties." CERCLA § 113(f)(1) provides, in part: "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."

The Supreme Court held that the plain language of CERCLA § 113(f)(1) allows a "potentially responsible party" (PRP) to seek contribution only "during or following" a "civil action" under CERCLA §§ 106 or 107(a). In other words, because Aviall had not

previously been sued for clean up of the site or for cost recovery under CERCLA, Aviall cannot sue for contribution under section 113(f)(1).

The Supreme Court declined to decide whether a PRP may recover costs under CERCLA § 107(a)(4)(B), which provides for recovery "of any other necessary costs of response incurred by any other person consistent with the national contingency plan." The Court remanded the case to the U.S. Court of Appeals for the Fifth Circuit.

On February 15, 2005, the Fifth Circuit remanded the case to the U.S. District Court for the Northern District of Texas with instructions to permit Aviall to amend its complaint to bring whatever statutory claims it believes necessary in light of the Supreme Court's decision. In a subsequent petition for a writ of mandamus from the Supreme Court, Cooper argued that the Fifth Circuit's remand instructions were inconsistent with the Supreme Court's decision.

4. Did the *Aviall* decision address contribution rights under section 113(f)(3)(B) of CERCLA?

No. While the Court noted that CERCLA § 113(f) provides another avenue for contribution under section 113(f)(3)(b), the Court did not address that subsection because it was not at issue in the case. That section provides that a potentially responsible party (PRP) "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 non-settling PRPs.

The United States acknowledged at oral argument before the Supreme Court that if a party enters into an administrative order on consent or a judicial settlement that resolves liability for response costs or response actions, that would entitle the party to seek contribution. Thus, for example, a remedial design/remedial action consent decree with the United States, or an administrative order on consent with EPA for remedial investigation/feasibility study, removal action, or reimbursement of response costs should give rise to a right of contribution pursuant to section 113(f)(3)(B). In order to clarify this issue, EPA and the U.S. Department of Justice signed “Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)” [http://www.epa.gov/compliance/resources/policies/cleanup/ superfund/interim-rev-aoc-mod-mem.pdf] on August 3, 2005.

5. Is EPA named as a party in the *Aviall* litigation?

No, EPA is not named as a party in the *Aviall* litigation. However, on February 23, 2004, the United States filed an amicus brief [http://www.usdoj.gov/osg/briefs/2003/3mer/ 1ami/2002-1192.mer.ami.pdf] on the merits of this case.

6. What positions did the United States take in its amicus brief on *Aviall*?

Among other things, the United States took the position that, based on the plain language of CERCLA § 113(f)(1), a party that is itself liable or potentially liable may seek contribution under that section only during or following a civil action under section 106 or section 107, and conversely, that section 113(f)(1) does not authorize a contribution action in the absence of an ongoing or completed section 106 or section 107(a) civil action. The United States also stated that a liable party is limited to seeking contribution in the manner authorized by section 113(f), and that CERCLA § 107(a) does not provide an independent basis for a liable person to recover response costs from another liable person. The United States also stated that a "civil action" is "commonly understood to mean a judicial proceeding," and that "EPA's issuance of a section 106(a) administrative order does not generally entitle the recipient to seek contribution under section 113(f)(1)."

7. Did the *Aviall* decision address whether a party that voluntarily incurs cleanup costs may recover those costs under state law?

No. The opinion addressed recovery under federal law, specifically, CERCLA § 113(f)(1).

8. Did the *Aviall* decision address the right of non-liable parties to sue for costs?

No. The Supreme Court's opinion does not address the right of non-liable parties to sue for costs under section 107(a). Persons who clean up Brownfields sites may qualify as non-liable parties through the bona fide prospective purchaser exemption under CERCLA § 107(r).

9. Does EPA have a position on possible legislative changes in light of the *Aviall* decision?

EPA does not have a position on this issue.

10. Have there been any major court decisions regarding contribution and cost recovery rights since *Aviall*?

Yes. Since the Supreme Court's 2004 decision, there has been significant new case law regarding the scope of private parties' CERCLA contribution and cost recovery rights. EPA has compiled a list of some of the most significant cases. (Attachment) [**NOTE:** The list is not an exhaustive list of all cases that cite to *Aviall* and/or all cases that discuss the scope of cost recovery and contribution rights under CERCLA §§ 107(a) or 113.]

11. What was the Supreme Court's holding in *Atlantic Research Corp. v. United States*, 127 S. Ct. 2331 (2007) ("ARC")?

On June 11, 2007, the Supreme Court affirmed the Eighth Circuit's decision and held that under the plain terms of CERCLA § 107, a potentially responsible party (PRP) in Atlantic Research's situation can recover incurred cleanup costs from other PRPs where there is no corresponding legal action (suit or settlement) by EPA or a state under CERCLA §§ 106 or 107.

12. How can I find out more information about Atlantic Research decision?

For more information see the Supreme Court's decision, *Atlantic Research Corp. v. United States*, available on the Internet at http://www.supremecourtus.gov/opinions/06pdf/06-562.pdf, along with the following documents:

- Brief for the Petitioner United States [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-562_Petitioner.pdf]
- Brief for the Respondent [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-562_Respondent.pdf], and
- Reply Brief for the Petitioner United States [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-562_reply.pdf]

In several post-*Atlantic Research* cases, the United States filed briefs that discuss *Atlantic Research*-related issues. These statements represent the current views of the United States only and have not yet been accepted or rejected by the court.

- *Solutia, Inc. and Pharmacia v. McWane, Inc., et al*., United States Supplemental Amicus Curiae, July 27, 2007 [http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/aviall-docs/anniston-amicus-mem.pdf]. ("[A] person who has a contribution claim under Section 113 must use it, and cannot choose to use Section 107 instead.")
- *United States v. Industrial Excess Landfill*, United States' Response to Bridgestone/Firestone's Surreply in Opposition to the United States' Motion for Entry of *De Minimis* Partial Consent Decrees, September 28, 2007 [http://www.epa.gov/compliance/resources/faqs/cleanup/aviall-docs/iel-response-surreply.pdf]. ("Any interpretation that allowed *de minimis* settlors to be dragged into additional litigation would be contrary to Congressional intent as set forth in Section 122(g).")
- *City of Colton v. American Promotional Events*, Response Brief for Third-Party Defendant-Appellee the United States Department of Defense, November 14, 2007 [http://www.epa.gov/compliance/resources/faqs/cleanup/aviall-docs/colton-brief.pdf]. ("Since the decision in *Atlantic Research* . . . the United States has argued that parties who incur costs in carrying out obligations under a CERCLA

> consent decree have a claim under Section 113(f) for those costs, and cannot choose to sue under Section 107(a)(4)(B) instead.")

For more information, you may also contact EPA's Office of Site Remediation Enforcement at (202) 564-4200.

13. What impact will *Aviall* and *Atlantic Research* have on EPA's enforcement and brownfields programs?

Currently, EPA is evaluating the potential impacts of these Supreme Court decisions on enforcement and brownfields programs and considering whether any actions are necessary. EPA also anticipates working in close coordination with state governments and organizations and the U.S. Department of Justice on issues related to these decisions.

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ATTACHMENT

CERCLA COST RECOVERY AND CONTRIBUTION RIGHTS: SIGNIFICANT CASE LAW DECISIONS POST-*AVIALL* (As of August 1, 2007)

NOTE: This list is not an exhaustive list of all cases that cite to *Aviall* and/or all cases that discuss the scope of cost recovery and contribution rights under CERCLA §§ 107(a) or 113.[1]

SUPREME COURT

***Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).** Private party who incurs response costs in cleaning up contaminated property, but has not been sued under sections 106 or 107, cannot bring a contribution action under section 113(f)(1) against other liable parties.

***Atlantic Research Corp. v. United States*, 172 S.Ct. 2331 (2007)**. CERCLA § 107(a) allows potentially responsible parties (PRPs) in Atlantic Research's position to recover cleanup costs from other PRPs where there is no corresponding legal action (suit or settlement) by EPA or a state under CERCLA §§ 106 or 107.

SECOND CIRCUIT:

***Consol. Edison Co. of NY. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005) ("Con Ed").** "[S]ection 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment."

***Seneca Meadows, Inc., v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279 (W.D.N.Y. 2006).** State consent orders qualify as contribution-conferring agreements for purposes of CERCLA § 113(f)(3)(B).)

THIRD CIRCUIT:

***E.I. DuPont de Nemours and Co. v. United States*, 460 F.3d 515 (3rd Cir. 2006)** PRPs cannot seek contribution under CERCLA § 107.)

FIFTH CIRCUIT:

***Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005).** PRP could bring CERCLA § 107 cost recovery claim for voluntary cleanup costs.)

[1] Cases that were effectively overturned by the Supreme Court's holding in Atlantic Research Corp. v. United States, 127 S.Ct. 2331 (2007) are not included within this list.

SIXTH CIRCUIT:
***Carrier Corp. v. Piper*, 460 F. Supp. 2d 827 (W.D. Tenn. 2006).** Unilateral administrative order (UAO) qualifies as a civil action for purposes of a PRP's contribution claim under CERCLA § 113(f)(1) and PRP can also seek cost recovery under section 107.

***ITT Indus., Inc. v. Borgwarner, Inc.*, 2006 U.S. Dist. LEXIS 59877 (W.D. Mich. Aug. 23, 2006).** Administrative order on consent (AOC) at issue was an "interim" agreement that did not resolve plaintiff's liability and did not fall within description of agreements in section 113(g)(3)(B) and thus did not confer contribution rights under section 113(f)(3)(B).

SEVENTH CIRCUIT:
***Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824 (7th Cir. 2007).** PRP has right of cost recovery under CERCLA § 107 for voluntary cleanup costs.

***Pharmacia Corp. v. Clayton Chem. Acquisition*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005).** AOC with EPA was an "order" not a settlement that would confer contribution rights under CERCLA § 113(f)(3)(B) and EPA-issued UAO was not a civil action that would confer contribution under section 113(f)(1).

NINTH CIRCUIT:
***ASARCO Inc. v. Union Pacific R.R. Co.*, 2006 U.S. Dist. LEXIS 2626 (D. Ariz. Jan. 24, 2006).** A memorandum of agreement between PRP and state did not give rise to a right of contribution under section 113(f)(3)(B).

***City of Rialto v. United States Dept. of Defense*, 2005 U.S. Dist. LEXIS 25179 (C.D. Cal. Sept. 23, 2005)** (Rialto II). Plaintiffs were eligible for entry of a separate judgment on their CERCLA § 107 contribution claim, which had been dismissed previously by the court.

D.C. CIRCUIT:
***Viacom, Inc. v. United States*, 404 F. Supp. 2d 3 (D.D.C. 2005)**. A PRP that cannot bring a contribution claim under section 113 may bring a claim to recover cleanup costs under section 107.