

## Client Advisory

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# Supreme Court Decision to Affect Management of Corporate Environmental Liabilities

## ❑ *Ruling Casts Doubt on Value of “Brownfield” Cleanups*

A recent decision of the U.S. Supreme Court will have broad-ranging impacts on how parties assess and manage environmental liabilities. In *Aviall v. Cooper Industries*<sup>1</sup>, the Court has dramatically narrowed the ability of private parties to recover environmental costs through contribution lawsuits. Specifically, following *Aviall*, owners or operators of contaminated properties will not be able to sue other responsible parties under the major federal environmental statute (CERCLA) unless they are first sued by or settle with a government environmental agency.

The *Aviall* decision undercuts two decades of federal environmental caselaw that formerly granted private parties a blanket right to recover response costs from other responsible parties regardless of the government’s level of involvement. This decision has implications for management of environmental liabilities related to the ownership and operation of impacted properties, including purchase or financing of impacted property, performing environmental cleanups, and the sale of corporate assets. *Aviall* also casts doubt on the advisability of performing “brownfield” cleanups under State-run voluntary cleanup programs. Although brownfield programs can provide meaningful tax benefits and other incentives for developers of impacted properties, they lack the coercive element (government lawsuit or settlement) that is necessary to bring a contribution action against other responsible parties following *Aviall*. This restriction may seriously limit the value and increase the risk of brownfield investments.

## CERCLA Background

As originally passed in 1980, the federal Superfund law<sup>2</sup> contained a single provision for cost recovery claims (§107). Cases regarding §107 held that responsible parties (*i.e.*, owners and operators of contaminated properties) could use the provision to make contribution claims against other responsible parties. Under this scheme, parties were held jointly and severally liable, meaning in theory a responsible party could recover any or all of its costs from any other responsible party.

When CERCLA Amendments were enacted in 1986, a new section (§113(f)) was added to specifically provide for a right of contribution for responsible parties. Under this new provision, responsible parties could sue other parties, but only for their equitable share of costs (*i.e.*, contribution, unlike cost recovery under §107, did not include joint and several liability). Parties tried to make claims under both sections, which led to litigation regarding whether responsible parties could pursue remedies pursuant to §107 (cost

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<sup>1</sup> 125 S.Ct. 577 (December 13, 2004).

<sup>2</sup> Superfund is formally known as the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”).

recovery) and/or §113(f) (contribution). As a result of this litigation, a majority of federal courts held that: (1) §107 cost recovery suits were available only to the government and innocent parties (providing joint and several recovery and a six year statute of limitations), and (2) §113(f) provided two distinct causes of action for contribution available to responsible parties (providing proportionate recovery and a three year statute of limitations). This was the rule for almost 20 years prior to the *Aviall* decision, which severely restricts suits under §113(f).

## **Background of the *Aviall* Case**

Aviall bought several contaminated properties in Texas. The State of Texas alleged that Aviall had contributed to the contamination and informed Aviall that as the owner/operator of these properties it must remediate the properties or face an order or lawsuit from the State. Aviall performed the cleanup and filed §107 and §113(f) claims against Cooper, the prior owner/operator of the properties. The Texas District Court later combined these claims into a single contribution claim under §113(f).

In its defense, Cooper argued that because Aviall was never sued by the government under §106 or §107 of CERCLA and Aviall did not enter a settlement agreement with the government, Aviall's case did not fall within §113(f). Accordingly, Cooper argued that Aviall could not seek contribution. However, the District Court and the 5th Circuit Court of Appeals sitting *en banc* decided in Aviall's favor, holding that Aviall could pursue its claim (specifically under §113(f)(1)). Cooper appealed that decision to the U.S. Supreme Court.

## **The Supreme Court's Decision in *Aviall***

The Supreme Court majority agreed with Cooper that Aviall did not have a valid contribution claim. According to the Court, a §113(f)(1) claim, by the "plain language" of the Superfund statute, may only be sought "during or following" a civil action. Because no civil action had been brought (only threatened), the Court determined Aviall could not bring its claim. This decision is directly contrary to almost 20 years of federal caselaw indicating that a responsible party could bring a contribution suit under §113(f), regardless of whether it had been sued or settled its liability with the government. However, while shutting the door on the §113(f) cause of action, the Court also held that other contribution actions existing independent of CERCLA (such as State statutory or common law contribution claims) will not be barred, and also left open the possibility that a private party could bring a cost recovery action under §107.

## **Issues Left Open by the *Aviall* Decision**

The Supreme Court explicitly chose not to address several issues, leaving those issues to the lower courts. Regarding a potential §107 cost recovery claim by Aviall (as an alternative to the §113 claim the Supreme Court would not allow), the Court indicated the lower courts would have to consider the issue further. The Court noted several Circuit Court cases holding (as discussed above) that a responsible party may not pursue §107 claims (*i.e.*, that only the government or an innocent party can recover costs under §107). This issue was remanded to the 5th Circuit Court of Appeals, which subsequently held that Aviall *could* pursue a §107 claim. However, as discussed above, the majority of federal courts have held that §107 claims are only available to the government and innocent owners, not responsible parties. Accordingly, the 5th Circuit Court's decision is an anomaly and responsible parties should not expect to be able to bring claims under §107 to avoid the restrictions of *Aviall*.

Additionally, the Supreme Court did not address whether a unilateral governmental order to perform cleanup (a "§106 claim") would qualify as a "civil action" to form the legal basis for a §113(f) contribution claim by the responsible party. If the lower federal courts hold that a §106 claim will satisfy the requirement of a "civil action," then parties that have been ordered to perform cleanup would be able to recover under §113(f). If however the courts hold a §106 claim does not constitute a "civil action," a government order to perform cleanup will not be enough to support a contribution suit. In this situation, a party may be placed in the unusual position of asking the government to file a lawsuit, so the responsible party can settle that liability with the government and in turn file claims for contribution against other responsible parties.

## Legal and Practical Implications of the *Aviall* Decision

As discussed above, the *Aviall* decision represents a significant change in the law that will have broad-ranging impacts on how companies manage their environmental liabilities. The decision will impact the way parties perform environmental due diligence, how they remediate properties and how they go about seeking cost recovery or contribution from other parties. Although the fallout of the *Aviall* decision is uncertain (especially considering the various issues the Supreme Court left for the lower federal courts to decide), we believe the decision will have significant legal and practical impacts in each of the following areas:

**Environmental Due Diligence.** In any transaction involving an environmentally sensitive company or property, up-front due diligence regarding environmental conditions and the current and past operations of the company will be of primary importance. Following *Aviall*, parties can no longer afford to perform limited environmental due diligence on the assumption that they can later recover their costs from prior owners and operators. Obtaining due diligence is especially important for purchasers of companies that may have environmental liabilities associated with properties that they divested long ago.

**Sale of Assets with Environmental Impairments.** In addition to the enhanced need for environmental due diligence from the buyer's perspective, selling assets or companies with environmental issues may become more difficult following *Aviall*. Because buyers may have little or no recourse against past owners and operators, sellers may find themselves required to provide more and stronger environmental indemnity protections to their buyers, even for conditions the seller did not cause. The use of environmental insurance may provide some relief; however, the issue of "who pays" with regard to environmental conditions has become an even more significant issue.

**Performing Cleanups and Seeking Contribution.** To assure CERCLA recovery, parties should consider seeking administrative settlements with government agencies. The settlements should be negotiated to contain specific provisions to preserve the party's CERCLA claims against other responsible parties. If drafted properly, the settlement will also provide a defense against CERCLA claims by other responsible parties.

**Pursuing Cleanup Costs Outside of CERCLA.** We recommend preserving CERCLA claims if possible, as CERCLA provides for strict liability and retroactivity. However, in many cases we have been able to help clients identify alternative means for recovery of cleanup costs, such as other federal statutes, State statutes and common law claims such as nuisance. Following *Aviall*, these potential sources of non-CERCLA cost recovery may be increasingly valuable.

**Brownfield Redevelopment.** *Aviall* has seriously impacted the advisability of relying on voluntary brownfield cleanup programs for the redevelopment of impacted properties. These brownfield programs, which offer reduced cleanup standards and other incentives to developers of brownfield properties, have resulted in a relaxed attitude regarding due diligence. This relaxed attitude, which was at least partly premised on the assumption that the developer could recover costs from other responsible parties, is no longer correct following *Aviall*. In light of the decision in *Aviall*, entering these brownfield programs is equivalent to electing *not* to recover costs from other parties. This is because brownfield programs are *voluntary* — *i.e.*, they lack the necessary coercive element required to obtain contribution from other parties (government lawsuit or settlement) following *Aviall*. Further, while brownfield programs offer the promise of reduced cleanup costs, if those costs rise unexpectedly, the brownfield owner/developer will be left "holding the bag," unable to obtain contribution from other liable parties. As a result, the relaxed due diligence standard that has been encouraged by the brownfield programs is potentially risky and inappropriate following *Aviall*. Any investor or developer considering brownfield properties must be advised to perform thorough due diligence, on the assumption they cannot recover their costs from other parties.

## We Can Help

Katten Muchin Zavis Rosenman can assist you in evaluating the impact of the *Aviall* ruling on your company's assessment and management of environmental liabilities. For more information, contact Adam M. Meek at 312.902.5391 or [adam.meek@kmzr.com](mailto:adam.meek@kmzr.com).

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