
COOPER V. AVIALL -

WHAT DOES IT MEAN FOR VOLUNTARY CLEAN-UPS ?

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Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (Dec. 13, 2004).

Holding: A private party who has not been sued in a CERCLA administrative or cost recovery action under § 106 or § 107 may not obtain contribution for clean-up costs from other responsible parties under § 113(f)(1).

Background Facts:

Aviall purchased several aircraft engine maintenance sites in Texas from Cooper Industries. Aviall eventually discovered that it and Cooper had contaminated the facilities. After undertaking a cleanup, Aviall sued Cooper for contribution for cleanup costs.

District Court held that Aviall could not obtain contribution from Cooper under CERCLA § 113(f)(1) for the clean-up costs it had incurred because Aviall had not been sued under CERCLA § 106 or § 107. A divided panel of the 5th Circuit affirmed. On rehearing en banc, the 5th Circuit, reversed the panel, by divided vote.

Justice Thomas wrote the majority opinion for the Supreme Court, reversing and remanding. Justice Ginsberg filed a dissenting opinion in which Justice Stevens joined.

The Issue After Aviall:

Can a potentially responsible party (PRP) seek contribution for its response costs against other PRPs when there has not been a government action or claim under § 107 and no settlement under § 113(f)(3)(b)?

Related Issues:

1. Is there an express or implied right to contribution under § 107(a)(4)(B)? (i.e. whether potentially responsible parties (PRPs) may recover costs under § 107(a)(4)(B))
2. What impact does the decision have on contribution rights under § 113(f)(3)(b)?

Relevant CERCLA provisions:

§ 107(a)(4)(B) “[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person consistent with the national contingency plan.”

§ 113(f)(1) “Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)] of this title, during or following any civil action under section [§ 106] of this title or under section [§ 107(a)] of this title.”

§ 113(f)(3)(b) “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. . . .”

Possible post-Aviall options for pursuing a voluntary clean-up and seeking costs:

- State voluntary clean-up programs;
- Express right of action under § 107;
- Implied right of action under § 107;
- Settlement agreements under § 113(f)(3)(b);
- Citizen suit provisions of CERCLA and RCRA.

Contribution rights under § 107:

- Supreme Court declined to decide whether PRP may recover cleanup costs under § 107(a)(4)(B) and remanded to 5th Circuit on the issue.
- In response to *Aviall*, courts are divided on whether § 107 offers either an express or implied right of contribution. Some courts have found no right of contribution in § 107.
- *Blue Tee Corp. v. ASARCO, Inc.*, 2005 WL 1532955 (W.D. Mo. June 27, 2005)(finding plaintiff's claim for contribution under § 107 not viable; see *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530-531 (8th Cir. 2003)(claim under § 107 cannot be maintained by one PRP against another)).
- Express right:

Support for an express right: See *Key Tronic Corp. v. U.S.*, 511 U.S. 809 (1994)(Justice Scalia's dissent); see also *Aviall* dissent by Justice Ginsberg.

Found express right: *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2nd Cir. 2005); *Syms v. Olin Corp.*, 408 F.3d 95 (2nd Cir. 2005); *Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005); *Metropolitan Water Management Reclamation Dist. v. Lake River Corp.*, 365 F. Supp. 2d 93 (N.D. Ill. 2005); *Viacom v. U.S.*, 404 F. Supp. 2d 3 (D.D.C. 2005)

- Implied right:

Supreme Court in *Aviall*: "To the extent that *Aviall* chooses to frame its § 107 claim on remand as an implied right of contribution..., we note that this Court has visited the subject of implied rights of contribution before." *Aviall*, 125 S. Ct. at 586 (citing *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-47 (1981) (finding no implied or common-law right to contribution in the Sherman Act or Clayton Act); and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90-99 (1981)(finding no implied or common-law right to contribution in the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964)).

Finding implied right: *Kotrous v. Goss-Jewett Co. of No. Cal., Inc.*, 2005 WL 1417152 (E.D. Cal. 2005); *Cf City of Rialto v. U.S. Dep't of Defense*, No. EDCV 04-00079 (C.D.Cal. 2005)(finding no implied right.)

Contribution rights under § 113(f)(3)(b):

- Supreme Court noted that § 113(f) provides another avenue for contribution, but did not address those rights because it was not an issue in the case.
- If a party enters into an administrative order on consent or judicial settlement that resolves liability for response costs or actions, that party is entitled to seek contribution.
- EPA has amended its model orders and consent decrees to declare them “settlement agreements”. With DOJ, EPA recently signed “Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f).”

Citizen Suits:

- CERCLA § 310: any person may commence civil action for injunctive relief against any person “who is alleged to be in violation of any [CERCLA] standard, regulation, condition . . . [or] requirement . . .”
- RCRA § 7002: party may seek injunctive relief against any person who has contributed to “past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present imminent and substantial endangerment to health or the environment.”
- “injunctive relief” – may include requiring the responsible person to undertake clean-up.

Practical Tips:

- Enter into an administrative settlement with the state or EPA before engaging in cleanup.
- Consent or settlement order should “settle” liability and set obligations.
- If appropriate, amend existing pleadings or file new ones asserting claims under § 107, not § 113.
- Consider citizen suit availability before clean-up costs have been incurred.