



**CERCLA Cost Recovery & Contribution Post-
*Aviall***

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CERCLA Liability

- Strict Liability for hazardous substances at a “facility.”
- Liability is for actual cleanup and/or the costs of the cleanup.
- Joint and Several for all covered persons or Potentially Responsible Parties (PRPs)
 - owners (current or former)
 - operators (current or former)
 - generators or arrangers of waste at the site
 - transporters of waste to the site
- Few Defenses

CERCLA Cost Recovery & Contribution Before *Aviall*

- Potentially Responsible Parties (“PRPs”) could bring a “contribution action” under § 113
 - against other PRPs
 - to recover an equitable share of the response costs
 - liability under § 113 is several only
- Innocent parties and the government could bring an action for “cost recovery” under § 107(a) to recover ALL response costs
 - “covered persons” or PRPs
 - liability under § 107(a) is joint and several

Cooper Industries, Inc. v. Aviall Services, Inc.

FACTS

- Aviall Services bought four aircraft maintenance sites from Cooper Industries.
- Aviall later discovered that both it and Cooper had contaminated the sites and voluntarily cleaned up the contamination.
- Aviall then brought suit against Cooper under § 113(f)(1) of CERCLA to recover Cooper's fair share of the response costs.

Cooper Industries, Inc. v. Aviall Services, Inc.

HOLDING

- Section 113 provides for “contribution” from any PRP, but only:
 - during or following a civil action under § 106 (abatement) or § 107(a) (costs recovery), or
 - after an administrative or judicially approved settlement with the United States or a state.
- Because Aviall voluntarily cleaned up the properties, Aviall could not avail itself of contribution under § 113.

Cooper Industries, Inc. v. Aviall Services, Inc.

UNANSWERED QUESTION

- Can a PRP bring an action under § 107 for cost recovery or contribution?
 - Section 107(a)(4)(B) states that covered persons “shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan”
 - Statute does not differentiate between innocent parties and PRPs, although courts have.
 - Justice Ginsburg’s dissent cited the Supreme Court’s *Key Tronic* decision, in which the majority determined that § 107(a) implies a cause of action for PRPs to seek recovery of cleanup costs against other PRPs.

Alternative Strategies for Contribution

- Do Nothing
- Settlement with Government
 - Section 113(f)(3)(B) provides contribution for any PRP who has resolved all or part of its liability to the United States or a state in an administrative or judicially approved settlement.
 - Make sure agreement references settlement of CERCLA liability.
 - AOC or UAO may not work if not entered in Court.
 - Try to “amend” previous voluntary agreements or consent orders to include settlement of CERCLA liability.

Alternative Strategies for Contribution

- Claims for implied right of contribution under § 107.
 - Pre-SARA (1986), cases found an “implied right” to contribution for PRPs under § 107.
 - After § 113 was added, most circuits concluded that § 107 was not available to PRPs.
 - No circuit has addressed the issue post-*Aviall*.
 - District courts are divided.
- Federal Common Law
 - *Aviall* implies that it is not available, but the Supreme Court did not rule on the issue.

Alternative Strategies for Contribution

- Claims Under State Environmental Statutes
 - Aviall has no effect on claims brought pursuant to state environmental statutes.
 - Most states have CERCLA equivalent statutes, with rights of contribution.
 - Many state statutes provide greater recovery or are more flexible.
 - State statutes do not provide a claim against the United States, but provide a claim against the state.

Alternative Strategies for Contribution

- Other State Law Claims
 - Breach of Contract & Indemnity
 - Common Law Negligence, Trespass and Private Nuisance
 - Strict Liability for Intentional Discharges
 - Purpresture and Common Law Obstruction of Navigation
 - Public Nuisance: Imminent Danger to the Environment
 - Fraud and Negligent Misrepresentations

Alternative Strategies for Contribution

- Citizen Suits Under the RCRA
 - Injunction to compel third-party clean-up
 - Requires an imminent and substantial endangerment
 - Cannot be used to recover costs already incurred