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In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the U.S. Supreme Court in December 2004 reversed the longstanding jurisprudence regarding Section 113(f)(1) contribution rights and in the process significantly circumscribed the ability of potentially responsible parties to pursue contribution under the Comprehensive Environmental Response, Compensation, and Liability Act. The authors of this article provide a federal circuit-by-circuit review of post-*Aviall* rulings through the end of 2006. That discussion is followed by an analysis of options available to parties seeking to maximize their cost recovery opportunities—or, conversely, to defend against such claims—in the wake of *Aviall* and its progeny.

Options for Potentially Responsible Parties in the Wake of the Aviall Decision

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Introduction

To promote expeditious private party cleanup of contaminated sites, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA'' or Superfund) in 1986 to provide potentially responsible parties (''PRPs'') who had ''resolved [their] liability to the United States or a State in an administrative or judicially approved settlement'' contribution protection from the claims of other PRPs for ''matters addressed'' in the settlement (''Section 113(f)(2) contribution protection''). In addition, Congress provided PRPs an express right of contribution against other PRPs to recover an equitable share of response costs incurred ''during or following any civil action'' under Sections 106 or 107(a) of CERCLA (''Section 113(f)(l) contribution rights''), or once the party seeking contribution ''has resolved its liability to the United States or a State in an administrative or judicially approved settlement'' (''Section 113(f)(3)(B) contribution rights''). In doing

 ISSN 0013-9211

so, Congress stated that nothing in that statutory language ''shall diminish the right of any person to bring an action for contribution in the absence of a civil action under'' Sections 106 or 107(a) of Superfund. CERCLA, § 113(f)(l).

Almost uniformly, the federal courts of appeal interpreted this statutory scheme as authorizing PRPs to bring a claim for contribution under Section 113(f) even in the absence of a Section 106 or 107(a) civil action or an administrative or judicially approved settlement resolving a party's liability to the United States or a state. Most courts also found, in light of that right to contribution and other relevant statutory language, that the statute did not authorize a party that is itself liable under CERCLA to bring a judicial action for recovery of its response costs under Section 107(a)(4)(B) of the statute (hereinafter ''Section 107(a)''), despite language in that provision authorizing ''any other person'' who has incurred ''necessary'' costs of response ''consistent with the National Contingency Plan'' to recover such costs.

However, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 59 ERC 1545 (2004) (''*Aviall*''), the U.S. Supreme Court reversed the longstanding jurisprudence regarding Section 113(f)(1) contribution rights and in the process significantly circumscribed the rights of PRPs to pursue contribution under CERCLA. The interpretation of that decision by the lower courts, and their determination as to whether and, if so, in what circumstances PRPs have other rights under CERCLA to recover a portion of their response costs from additional PRPs, has engendered significant uncertainty and, among other things, required parties to re-evaluate their ability to recover their response costs when those costs are incurred without the requisite Section 113(f) ''civil action'' or ''settlement'' resolving their liability. In particular, the *Aviall* decision has spawned considerable and conflicting case law as to whether PRPs may bring an action for ''cost recovery'' or ''contribution'' under Section 107(a) of CERCLA, and what it takes to ''resolve'' one's liability to the United States or a state for purposes of Section 113(f)(3)(B) contribution rights.

After a review of the *Aviall* decision, this article provides a federal circuit-by-circuit review of post-*Aviall* jurisprudence. That discussion is followed by an analysis of options available to parties who are seeking to maximize their cost recovery opportunities (or, conversely, defend against such claims) in the wake of *Aviall* and its progeny.[1]

Overview of the Aviall Decision

In *Aviall*, the U.S. Supreme Court held that a PRP who has not been sued under Section 106 or Section 107(a) of CERCLA may not obtain contribution under Section 113(f)(1) of the statute from other liable parties. Accordingly, any such PRP may seek contribution under Section 113(f) for response costs it has incurred only if it is or has been the subject of a ''civil action'' under either Section 106 or Section 107(a) of the statute, or has ''resolved its liability to the United States or a State'' for those response actions or costs in an ''administrative or judicially approved settlement'' within the meaning of Section 113(f)(3)(B).

The Supreme Court expressly left undecided the questions of whether a party that is itself liable under CERCLA has a cost recovery (or implied contribution) cause of action under Section 107(a)(4)(B) of CERCLA for less than joint and several liability, and whether an implied right of contribution exists under that same provision or elsewhere in CERCLA. Other questions left unresolved by the *Aviall* decision include, among others, the following:

1. Does a unilateral administrative order issued under Section 106(a) constitute a ''civil action'' under Section 106 for purposes of Section 113(f)(l) contribution rights?
2. Does an administrative consent order issued under Section 106 or Section 122 of CERCLA (or both) constitute an ''administrative or judicially approved settlement'' for purposes of Section 113(f)(3)(B) contribution rights? Similarly, under what circumstances does an administrative consent order under state law constitute an ''administrative settlement'' that has ''resolved liability'' for those purposes? In particular, must a state ''settlement'' be comparable to one that would be required of EPA under Section 122 of Superfund, which provides EPA authority to enter settlements with PRPs for response actions, subject to certain conditions?
3. Must a party seeking contribution have ''resolved its liability'' under CERCLA, or is ''resolution of liability'' to a state under a state ''Superfund-like'' statute sufficient? If the former is the case, since the only claims for which a PRP is liable to a state under CERCLA are for the *state's* own response costs, how can a PRP ''resolve its liability'' to a state for the PRP's *own* response costs so as to ''perfect'' a Section 113(f)(3)(B) contribution right?
4. What does it mean precisely to ''resolve'' one's liability to the United States or a state? In particular, if—as is typical—a ''settlement'' contains ''reopeners'' which authorize the United States (or a state) to ''reopen'' a party's liability, has that party ''resolved'' its liability? If so, at what point has the liability been ''resolved'', e.g., upon the effective date of the agreement, when all response action obligations under the agreement have been fulfilled (or, alternatively, merely implementation of the remedy without regard to ongoing operation and maintenance, or institutional control, requirements), or at some other point in time?
5. Is there a federal common law right of contribution for recovery of a PRP's response costs?

[1] The authors remind the reader that the post-*Aviall* landscape is rapidly changing and evolving with several new opinions issuing each month from the various federal district and circuit courts. The scope of this article's coverage and analysis of post-*Aviall* jurisprudence is current through Dec. 31, 2006. As such, the article does not address such developments as the Jan. 17, 2007, decision in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 2007 WL 102979, 63 ERC 1641 (7th Cir. 2007), in which the Seventh Circuit concurred with the holdings of the Second and Eighth Circuits that potentially responsible parties (''PRPs'') who ''voluntarily'' clean up a site have a cost recovery right under Section 107(a) of Superfund (38 ER 140, 1/19/07). Nor does this article address the Jan. 19, 2007, decision of the U.S. Supreme Court to grant the United States petition for a writ of certiorari (No. 06-562) in *Atlantic Research Corp. v. United States*, 459 F.3d 827, 62 ERC 1993 (8th Cir. 2006), to address the issue of whether and, if so, under what circumstances a PRP that does not satisfy the requirements for bringing a contribution action under Section 113(f) of Superfund may bring an action against another PRP under Section 107(a) of the statute (38 ER 185, 1/26/07).

  ER ISSN 0013-9211

6. What impact, if any, does *Aviall* have on contribution rights under state law?
7. What impact does *Aviall* have on the running of the applicable statutes of limitations for CERCLA contribution actions?

Post-Aviall Jurisprudence

The Aviall Case

On remand from the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit declined to rule on a principal question left unresolved by *Aviall*, i.e., whether a PRP itself has an express or implied right of action under Section 107(a) of the statute for less than joint and several liability. Instead, it remanded the case to the U.S. District Court for the Northern District of Texas with instructions that the court permit Aviall to amend its complaint to clearly state a Section 107(a) cause of action.

In response to that action, on March 4, 2005, Cooper Industries petitioned for a writ of mandamus from the Supreme Court to order the U.S. Court of Appeals for the Fifth Circuit to allow Cooper to litigate whether any Section 107(a) claims were waived by the manner in which Aviall had stated its claims in its complaint. Cooper argued that the Fifth Circuit's remand instructions had effectively decided the ''waiver'' issue without the opportunity for argument by Cooper on the issue, thereby denying it one of its defenses. While the Supreme Court considered Cooper's petition, the case was stayed in the U.S. District Court for the Northern District of Texas. The Supreme Court completed review of the petition and denied Cooper's request to litigate the issue of waiver. On June 2, 2005, the district court issued an order permitting Aviall to amend its complaint to assert, free of any challenge of waiver, any cognizable statutory claims arising from the Supreme Court's decision in *Aviall*. In its amended complaint, Aviall asserted claims for cost recovery and contribution under Section 107 of CERCLA and federal common law claims, along with state law claims. In response, Cooper filed a motion for partial summary judgment on the federal claims.

On Aug. 8, 2006, the district court granted Cooper's motion for partial summary judgment on the federal claims, 2006 U.S. Dist. LEXIS 55040 (No. 3:97-CV-1926) (N.D. Tex. Aug. 8, 2006). In so doing, the district court rejected Aviall's arguments under Section 107(a)(4)(B) that, because it was neither the federal government, a state, or an Indian Tribe, it fell under the class of ''any other person'' entitled to cost recovery under 107(a). The court held that Aviall's interpretation of ''any other person'' in Section 107(a)(4)(B), when viewed in the context of CERCLA as a whole, and Section 113 in particular, would ''at a minimum render key provisions of Section 113(f) superfluous, insignificant, or, in some instances, devoid of operative effect.'' Thus, the court concluded that Section 113(f) was the lone statutory mechanism available for a PRP to recover response costs. The court also rejected Aviall's argument that CERCLA implied a remedy under federal common law. Because Section 113(f) provided an express remedy, the court declined to find an implied one.

The First Circuit

■ **Bangor v. Citizens Communication Co.**, 437 F. Supp.2d 180, 63 ERC 1142 (D.Me. June 27, 2006) (''*Bangor*'').

In *Bangor*, the U.S. District Court for the District of Maine held that a PRP may bring a claim for contribution under Section 107(a) of CERCLA. The defendant argued that the city, as a PRP, had no implied right of action for contribution. However, the *Bangor* court declined to interpret *Aviall* as cutting off all contribution avenues to responsible parties who pursue remediation ''on a voluntary basis.'' The court suggested in its factual narrative that the city's voluntary remediation was relatively unique because the city pressured the Maine Department of Environmental Protection to allow for expedited investigation and cleanup in order to prepare the site for redevelopment of the city's waterfront area. However, in its legal analysis, the court did not evaluate the extent to which the city incurred costs ''voluntarily.'' Rather, the court simply noted that the costs were incurred voluntarily and explained that it would be nonsensical to allow PRPs to obtain contribution for costs incurred ''involuntarily'' under Section 113(f), while prohibiting PRPs from seeking contribution for costs incurred ''voluntarily.'' Thus, the court decided ''as a matter of law that the City may pursue an implied right of action under section 107.''

Examining precedent in the First Circuit, the court found that although the Circuit had not yet addressed ''*Aviall*'s impacts on implied rights of action under CERCLA, [it] did discuss this issue pre-*Aviall*.'' In *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 39 ERC 1097 (1995), ''the First Circuit previously acknowledged the possibility that 'a [responsible party] who spontaneously initiated a cleanup without governmental prodding might be able to pursue an implied right of action under § [107(a)]'.'' Thus, precedent did not preclude the district court from determining whether a Section 107 contribution claim was available to a PRP, and the court turned to the opinions of other federal courts to consider the issue. Based on this review, the court explained that ''most, if not all, of the decisions finding that Aviall has closed the Section 107 sluiceway for responsible parties found themselves bound by pre-Aviall case law in their circuit declaring that responsible parties could only pursue contribution via Section 113(f).'' Conversely, ''[c]ourts that were not limited by such precedent have generally found that responsible parties that do not meet the requirements for a claim under Section 113(f) may seek relief via Section 107.'' The district court in Maine ''fits within this latter camp and thus similarly finds that the city may pursue a claim under Section 107.''

In rendering its decision, the court ''also independently examined the language of section 107, which states in relevant part that a responsible party 'shall be liable for . . . any other necessary costs of response incurred by any other person.' '' The court stated that ''nothing in this text clearly forecloses a responsible party from being considered 'any other person' [and] allowing responsible parties to seek contribution from 'any other person' via section 107 appears to be in line with the explicit savings clause found in section 113(f)(1).'' Moreover, the court reasoned that ''CERCLA's purpose also supports the conclusion that responsible parties can pursue a section 107 claim [because i]f the section 107 sluiceway is closed, CERCLA would ensure contribution for responsible parties

who are forced to incur remediation costs beyond their pro rata share (via section 113(f))[, whereas] responsible parties who voluntarily incur remediation costs in excess of their pro rata share would have no CERCLA remedy.'' Such a result would generally discourage voluntary cleanups, which is not ''in line with CERCLA's purpose.''

The Second Circuit

■ **Syms v. Olin Corp.**, 408 F.3d 95, 60 ERC 1449 (2d Cir. May 18, 2005) (''*Syms*'').

In *Syms*, the U.S. Court of Appeals for the Second Circuit declined to decide if pre-*Aviall* precedent barring PRPs from recovering costs pursuant to Section 107(a) was still viable in light of *Aviall*. Because the parties had not fully briefed or argued *Aviall*'s impact on the case, the *Syms* court remanded the case for a decision on whether a Section 107(a) action was available to plaintiffs, who might be PRPs. In remanding, the *Syms* court acknowledged that the combination of *Aviall* and the pre-*Aviall* precedent ''would create a perverse incentive for PRPs to wait until they are sued before incurring response costs.''

■ **Consolidated Edison Co. of New York v. UGI Utilities**, 423 F.3d 90, 61 ERC 1321 (2d Cir. Sept. 9, 2005) (''*Con Ed*'').

In *Con Ed*, the Second Circuit found that it lacked subject matter jurisdiction over the plaintiff's contribution claim under Section 113(f)(3)(B) of CERCLA. The plaintiff claimed that the voluntary cleanup agreement it entered into with the state constituted an administrative settlement that resolved its CERCLA liability. However, the court disagreed because the only liability potentially resolved under the agreement was state law liability; the agreement left open the possibility of the plaintiff's liability under CERCLA. The *Con Ed* court explained: ''We read section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broad category of legal claims, is resolved. . . . Accordingly, we believe section 113(f)(3)(B) does not permit contribution actions based on the resolution of liability for state law – but not CERCLA – claims.''

The court also found that the existence of a ''reopener'' clause in the voluntary cleanup agreement precluded it from finding that the agreement constituted an administrative settlement that ''resolved'' Con Ed's CERCLA liability. According to the Court, the reopener, which ''reserves the [state's] right to take action under CERCLA 'deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement powers,' leaves open the possibility that the [state] might still seek to hold Con Ed liable under CERCLA.'' Moreover, the court noted that the agreement only offered Con Ed protection from liability during the time that the agreement was in effect (''i.e., while Con Ed is cleaning up the designated sites''). According to the Court, such language ''does not in any way suggest that Con Ed resolved its liability to the [state] under CERCLA.''

On the other hand, the *Con Ed* court determined that the plaintiff could pursue a Section 107(a) claim inasmuch as the plaintiff was a ''person'' under CERCLA and the plaintiff's ''costs to clean up the sites . . . are 'costs of response' within the meaning of that section.'' The Second Circuit explained that the *Aviall* opinion ''impels us to conclude that it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a).'' As a result, the court reasoned, ''[e]ach of those sections . . . embodies a mechanism for cost recovery available to persons in different procedural circumstances.'' Describing Section 107(a), the *Con Ed* court stated that parties are ''liable for the government's remedial and removal costs and for 'any other necessary costs of response incurred by any other person' consistent with the [NCP].'' Thus, the Second Circuit explained that ''[t]he only questions we must answer are whether [the plaintiff] is a 'person' and whether it has incurred 'costs of response.' ''

After finding that the plaintiff, as a ''firm'' or ''corporation,'' qualified as a ''person'' under CERCLA, the *Con Ed* court determined that the plaintiff was incurring costs of response tied to onsite removal and remedial action. The court did not distinguish between ''innocent'' parties and ''parties that, if sued, would be held liable under section 107(a)'' because that provision ''makes its cost recovery remedy available . . . to *any* person that has incurred necessary costs of response, and nowhere does [it] require that the party seeking necessary costs of response be innocent of wrongdoing.'' Thus, the *Con Ed* court held that ''section 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*.'' (emphasis supplied).

The *Con Ed* court concluded that this holding did not require it to revisit its pre-*Aviall* holding in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). The court distinguished its *Con Ed* opinion from *Bedford Affiliates*, which rejected certain Section 107 suits by PRPs, by explaining that it read the latter ''to hold that a party that has incurred or is incurring expenditures *under a consent order with a government agency* and has been found partially liable under section 113(f)(1) may not seek to recoup those expenditures under section 107(a).'' (emphasis supplied).

The Second Circuit did not explain why, if the text of Section 107(a) affords cost recovery rights to ''any person,'' only persons who had ''not been sued or made to participate in an administrative proceeding'' have a Section 107(a) right of action but other PRPs do not. Moreover, the *Con Ed* opinion leaves open the question of when a party is viewed as having been ''made to participate in an administrative proceeding'' or is ''incurring expenditures under a consent order with a governmental agency'' such that a Section 107(a) claim is not available to it. For example, the court held that the plaintiff could pursue a Section 107(a) claim even though it had entered a voluntary agreement with the state (arguably an ''administrative proceeding'' to which the plaintiff had to submit in order to secure the benefits afforded by its voluntary agreement with the state) and was presumably incurring costs under it. Perhaps the court did so because the plaintiff had initiated the agreement rather than accepted a ''consent order'' after the government indicated its intention to proceed against the plaintiff. In any event, in its zeal not to over-

  ER ISSN 0013-9211

turn *Bedford Affiliates*, the Second Circuit appears to have established a distinction between PRPs who may and may not invoke Section 107(a) that is both murky and without basis in the statutory text.

On April 14, 2006, defendant-appellee UGI filed a petition for writ of certiorari with the U.S. Supreme Court, asking the court to determine whether PRPs who have not been sued under CERCLA or ''resolved their liability'' to the government may recover costs from other PRPs under Section 107. UGI argued that the Second Circuit's opinion finding a contribution action under Section 107 conflicted with uniform holdings to the contrary. UGI also noted that the federal government had renounced decisions finding a Section 107 action for PRPs. Finally, UGI urged the court to hear this case to resolve nationwide uncertainty over the scope of Section 107 recovery actions. On June 14, the petition and attendant briefs were distributed for a Court Conference scheduled for Sept. 25, 2006.

On Oct. 2, 2006, the Supreme Court requested the U.S. Solicitor General to file a brief setting forth the federal government's position in this matter. In response to the court's invitation, the Solicitor's Office filed an *amicus* brief on behalf of the United States in late December 2006. In that brief, the government requested that the court deny the petition to review *Con Ed* and address the issue of a Section 107(a) right of action for PRPs by reviewing two other petitions pending before the court from the Third Circuit (*see DuPont, infra*) and the Eighth Circuit (*see Atlantic Research Corp., infra*). The government explained that it disagreed with the Second Circuit's ruling in *Con Ed*, but believed the other petitions would provide a more suitable vehicle for resolving the issue of whether PRPs can seek recovery of their response costs under Section 107(a) when a Section 113(f) contribution action is not available to them. According to the government, it is unclear ''whether the [Second Circuit] court of appeals correctly held that respondent was not entitled to bring suit against petitioner under Section 113''; as a result, should the Supreme Court feel compelled to address that issue first, it might never reach the Section 107(a) issue.

■ **Schaefer v. Town of Victor**, 457 F.3d 188, 63 ERC 1333 (2d Cir. July 13, 2006) (''*Schaefer*'').

The Second Circuit determined that a PRP who voluntarily cleans up a contaminated site before entering into a state consent order may maintain a claim under Section 107(a) to recover cleanup costs from other liable parties. The court stated that although the Supreme Court's *Aviall* opinion did not address whether a PRP may bring a Section 107 claim against other PRPs for joint and several liability, pursuant to *Con Ed,* Section 107 recovery is available to ''any PRP'' in the Second Circuit ''that has not been sued but that has voluntarily incurred cleanup costs.'' Like the *Con Ed* plaintiffs, Schaefer was a PRP who ''initiated cleanup and remedial action voluntarily (i.e., not pursuant to a court or administrative order or judgment).'' Thus, Schaefer was entitled to maintain a 107(a) claim.

The *Schaefer* court found that a Section 107(a) cost recovery action was proper here despite the fact that the site cleanup was taking place under two Consent Orders with the state. (The court noted that these orders likely would not have ''resolved'' the plaintiff's liability for purposes of Section 113(f)(3)(B) contribution rights because, per *Con Ed*, they only resolved state liability). According to the Court, the Consent Orders did not bar the claim because Schaefer began to incur cleanup costs voluntarily before entering into the Consent Orders. ''As a result, in contrast to *Bedford Affiliates* where 'Bedford agreed to begin cleanup procedures' pursuant to a consent order with the [New York State Department of Environmental Conservation], Schaefer's response costs were not incurred 'solely due to the imposition of liability through a final administrative order.' '' It is not clear whether the Second Circuit, in referring in *Schaefer* to only ''administrative orders'' was intending to read its ''made to participate in an administrative proceeding'' rubric in *Con Ed* as referring solely to situations involving such orders.

Schaefer also raised state law claims based on common law contribution, indemnification, and unjust enrichment. Because the Second Circuit dismissed the federal claims on statute of limitations grounds, it remanded the contribution and indemnification claims to the district court to determine whether to invoke supplemental jurisdiction and adjudicate these issues.

■ **AMW Materials Testing v. Town of Babylon**, 348 F. Supp.2d 4, 59 ERC 1677 (E.D.N.Y. Dec. 20, 2004) (''*AMW Materials*'').

Prior to the *Con Ed* decision, the district court barred a claim under Section 107(a) for indemnification because the plaintiffs were responsible parties and thus could not maintain such a claim under pre-*Aviall* Second Circuit precedent. The *AMW Materials* court did not address whether *Aviall* implicitly overruled this Second Circuit precedent. On appeal, the Second Circuit remanded the case to the district court to reconsider the Section 107 holding in light of *Con Ed.* 187 Fed. Appx. 24 (2d Cir. 2006). Specifically, the Second Circuit held that *Con Ed* made it relevant to determine ''whether and to what extent plaintiffs incurred response costs voluntarily.''

■ **Elementis Chemicals, Inc. v. TH Agriculture and Nutrition**, L.L.C., et al., 373 F. Supp.2d 257, 59 ERC 2071 (S.D.N.Y. Jan. 31, 2005) (''*Elementis*'').

In line with the pre-*Con Ed* holding in *AMW Materials*, the district court in *Elementis* held that a PRP that (i) owned a facility at the time it incurred response costs and (ii) does not have a Section 113(f) contribution claim in light of *Aviall* does not have a cause of action under Section 107(a) in the absence of an affirmative defense under CERCLA. In other words, a party may avail itself of a Section 107(a) cause of action only if it is a truly ''innocent'' party without any liability under CERCLA (in this case, presumably if it was an ''innocent landowner'' or ''bona fide prospective purchaser'' within the meaning of Sections 107(b), 101(35), (40) of CERCLA).

In so holding, the *Elementis* court determined that it should not ignore pre-*Aviall* Second Circuit precedent to the effect that a party that itself is a PRP has no cause of action under § 107(a)(4)(B) (*see Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998)) because the Supreme Court in *Aviall* had not expressly or impliedly overruled that precedent, but instead simply reserved judgment on the issues resolved by that precedent.

■ **W.R. Grace & Co. v. Zotos Int'l, Inc.**, 2005 WL 1076117 (No. 98-CV-838S(F)), 61 ERC 1474 (W.D.N.Y. May 3, 2005) (''*W.R. Grace*'').

In *W.R. Grace*, the district court held that a PRP could not maintain a Section 113(f)(3)(B) contribution claim because it had not resolved its CERCLA liability. The court found that two consent orders between the PRP and the New York State Department of Environmental Conservation (''NYSDEC'') only resolved the party's liability to the state under state law and did not resolve the party's CERCLA liability. Moreover, the court examined the CERCLA response action structure that provides for cooperative agreements between EPA and states for ''state-lead'' CERCLA sites. Even though Section 113(f) does not appear to require that any such agreement be in place for a party to have resolved its CERCLA liability to a state for purposes of Section 113(f)(3)(B) contribution rights, because neither of the consent orders at issue indicated that NYSDEC was operating pursuant to any agreement with EPA or even mentioned that NYSDEC was exercising any authority under CERCLA, the court determined the orders did not resolve the party's Superfund liability.

The *W.R. Grace* court also rejected the plaintiff's efforts to maintain a state law contribution action based on defendant's liability as an ''arranger'' under CERCLA. The plaintiff argued that, under *Aviall*, ''CERCLA no longer preempts state law contribution claims that are premised on a defendant's CERCLA liability.'' However, the district court found—and the plaintiff cited—no supporting language in *Aviall* for this argument. Noting that *Aviall* explained that the savings clause of Section 113(f)(1) did not establish a cause of action or authorize any additional causes of action outside of CERCLA, the court stated that at most Section 113(f)(1) provides that ''to the extent [a party] is found liable under some other federal law or a state law . . . CERCLA does not completely preempt the pursuit of non-CERCLA remedies.'' However, because the plaintiff had not demonstrated liability of the defendant under state law, the court held that it was not entitled to contribution under state statutory or common law.

The district court's holding was appealed and oral argument before the Second Circuit took place in January 2006. On appeal, W.R. Grace has relied on *Con Ed* to argue that it may recover some response costs under Section 107 if the court denies its claim for contribution under Section 113(f). As of the end of 2006, the Second Circuit had not yet rendered its decision.

■ **Benderson Dev. Co., Inc. v. Neumade Prods. Corp.**, 2005 WL 1397013 (No. 98-CV-0241SR) (W.D.N.Y. June 13, 2005) (''*Benderson*'').

In its pre-*Con Ed* opinion, the district court in *Benderson* held that pre-*Aviall* Second Circuit precedent, holding that PRPs can not maintain a cause of action under Section 107(a), still controls and that the PRP could not recover costs under Section 107(a). However, the *Benderson* court found that the PRP could seek contribution under Section 113(f)(3) because the Order on Consent issued by NYSDEC specifically provided that ''the provisions of 42 U.S.C. § 9613(f)(3) shall apply.'' Consequently, the *Benderson* court permitted the PRP to seek contribution under Section 113(f)(3)(B) to the extent that the claim for contribution related to the issues resolved in the Consent Order.

■ **Cadlerock Properties Joint Venture v. Schilberg**, 2005 WL 1683494 (No. 3:01CV896) (D. Conn. July 19, 2005) (''*Cadlerock*'').

In *Cadlerock*, the district court dismissed a PRP's Section 113(f) contribution suit because it had not been sued in a court action under either Section 106 or 107. The PRP had argued that a state pollution abatement administrative order issued by the Connecticut Department of Environmental Protection (''DEP'') was a ''civil order'' under Section 106 which qualified as a ''civil action'' under Section 107, thereby authorizing a contribution action under Section 113(f)(1). The *Cadlerock* court did not reach the issue of whether an administrative order issued under Section 106 qualifies as a civil action for the purposes of bringing a Section 113(f) contribution action. Instead, the court held that the DEP administrative order was not issued ''under Section 106'' because a Section 106 administrative order is ''something '[i]n addition to' and separate from any 'other action taken by a State or local government.' '' In so holding, the *Cadlerock* court noted that the DEP order did not mention CERCLA and was limited to state law. The district court also considered that EPA was not involved in the site and that DEP's activities were solely related to state pollution laws. In addition, there was no cooperative agreement between DEP and EPA, which would have suggested that DEP was acting under authority delegated by EPA.

The *Cadlerock* court also held that the PRP could not maintain a ''contribution action'' under Section 107(a), stating that *Aviall* neither explicitly nor implicitly overruled Second Circuit precedent holding that a PRP is limited to suing for contribution under Section 113. In its pre-*Con Ed* opinion, the court remarked that it was bound by this precedent until the Second Circuit or the Supreme Court directly overruled it.

■ **Kaladish v. Uniroyal Holding, Inc.**, 2005 WL 2001174 (No. 300CV854), 61 ERC 1347 (D. Conn. Aug. 9, 2005) (''*Kaladish*'').

After finding, pursuant to *Aviall*, that a current property owner is prohibited from bringing a Section 113(f)(1) contribution claim if the owner has not first been sued under Section 106 or Section 107 of CERCLA, the *Kaladish* court then rejected the property owner's cost recovery claim under Section 107 of CERCLA. The plaintiff claimed that he was an ''innocent landowner'' instead of a PRP and, as such, was entitled to recover ''necessary costs'' from the defendant. The *Kaladish* court found that the plaintiff was ''at least indirectly contractually related to the releases at issue,'' and therefore not eligible for the innocent landowner defense. After determining that the current property owner was a PRP, the *Kaladish* court held that ''one PRP may not pursue a [Section] 107 claim against another PRP.'' The court recognized the potential disincentive for PRPs to undertake voluntary remediation under this pre-*Con Ed* holding, but explained that it was bound by the pre-*Aviall* Second Circuit precedent in *Bedford Affiliates v. Sills*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998).

■ **City of New York v. New York Cross Harbor Railroad Terminal Corp.**, 2006 U.S. Dist. LEXIS 4238 (No. 98 CV 7227), 61 ERC 1995 (E.D.N.Y. Jan. 17, 2006) (''*NY Cross Harbor*'').

  ER ISSN 0013-9211

The parties in *NY Cross Harbor* had briefed the issue of whether a PRP who had not been sued or ''resolved'' its liability with the government for Section 113(f)(3)(B) purposes was entitled to cost recovery under Section 107. While they were briefing, the Second Circuit issued its *Con Ed* holding. In light of the *Con Ed* decision, the district court held that because the plaintiff City of New York would have been liable under Section 107(a) had it been sued, it could pursue a cost recovery action under Section 107 for costs it incurred ''voluntarily.'' The City apparently was not subject to any agreement or consent order with either the federal government or the state, as the district court did not consider those factors in its decision.

■ **Seneca Meadows, Inc. v. ECI Liquidating, Inc.**, 427 F. Supp.2d 279 (W.D.N.Y. April 20, 2006) (''*Seneca Meadows*'').

In *Seneca Meadows*, the district court held that the plaintiff Seneca Meadows, Inc (''SMI'') could bring a contribution action under Section 113(f)(3)(B) where it had entered into three consent orders ''resolving'' its liability with New York State (''state''). The court found SMI had resolved its liability to the state for Section 113(f)(3)(B) purposes because the consent orders indicated the state and SMI intended to do so. To support this finding, the court quoted the most recent consent order, which stated that ''to the extent authorized under [Section 113] . . . [SMI] shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by [Section 113] for 'matters addressed' pursuant to and in accordance with this Order . . . Furthermore, to the extent authorized by [Section 113], . . . [SMI] is entitled to seek contribution. . . .''

The court also noted that the latest consent order provided that when the state accepted a report indicating that no further action was required beyond monitoring, the acceptance would constitute a release of its claims and a covenant not to sue under New York law and all other provisions of statutory and common law. Although the defendant argued that the state had no authority to settle SMI's CERCLA liability, the court rejected this argument, noting that states need no authorization from the federal government to engage in response actions and recover costs from PRPs. As a result, the decision is at odds with another ruling (in the *W.R. Grace* case, *supra*) in the same federal district court on this issue.

The district court also found, alternatively, that SMI was entitled to contribution under Section 107(a). Even though *Bedford Affiliates* had held that a liable party could not seek cost recovery under Section 107(a) from another PRP and the *Con Ed* court had declined to overrule it, the district court stated that *Bedford Affiliates* was ''of questionable validity following [*Aviall*].'' The court noted that ''in light of CERCLA's purpose to encourage prompt cleanup of hazardous waste sites,'' it should not mechanically apply *Bedford Affiliates* by imputing that decision's bar on a PRP's cost recovery action under Section 107 to preclude SMI's claim for contribution under Section 107. In addition, relying on *Con Ed*, the *Seneca Meadows* district court distinguished between ''voluntary'' and ''involuntary'' cleanups and held that SMI's actions were not entirely ''involuntary.'' According to the court, the consent orders specifically noted that SMI admitted no liability or fault. Also, SMI's plans to develop the property provided the impetus for the consent orders, not an impending lawsuit. Thus the district court found that a contribution claim under Section 107(a) was appropriate. In doing so, the *Seneca Meadows* court interpreted the *Con Ed* decision liberally to provide a Section 107(a) cause of action not clearly available on the face of the *Con Ed* opinion.

■ **State of New York v. Solvent Chemical Co., et. al.**, 2006 U.S. Dist. LEXIS 36347 (No. 83-CV-1401C) (W.D.N.Y. June 5, 2006) (''*Solvent Chemical*'').

In *Solvent Chemical*, DuPont asked the district court to dismiss Solvent Chemical's contribution claim against it, in light of *Aviall*, *Zotos*, and *Con Ed*. DuPont argued that together these cases mean that a private party's right of contribution under CERCLA arises only when that party has been sued under CERCLA or otherwise resolved its CERCLA liability. DuPont contended that Solvent Chemical, which had entered into a Consent Decree with New York State (''state''), could not bring a claim for contribution under CERCLA because the costs for which it sought recovery were solely due to Solvent Chemical's resolution of state liability under state law. However, the district court found that because the state had originally sued Solvent Chemical under Section 107(a), Solvent Chemical could bring a claim for contribution against DuPont under Section 113(f)(1). Consequently, the court declined to determine whether the Consent Decree settled Solvent Chemical's liability under state law or CERCLA because *Aviall* did not require such a determination for Section 113(f)(1) claims. The court explained that such an inquiry would only be pertinent, if ever, when determining whether a party has resolved its liability to the federal or state government for the purposes of Section 113(f)(3)(B).

■ **Niagara Mohawk Power Corp. v. Consolidated Rail Corp.**, 436 F. Supp. 2d 398 (N.D.N.Y. June 28, 2006) (''*Niagara Mohawk*'').

Acting under the guidance provided by the Second Circuit in *Con Ed* and the Western District of New York in *W.R. Grace*, the *Niagara Mohawk* court dismissed a CERCLA plaintiff's contribution claim under Section 113(f)(3)(B) even though it had entered into a consent order with the New York State Department of Environmental Conservation. However, the court's principal basis for rejecting the 113(f)(3)(B) claim was that the consent order at issue was not part of the record and no motion to supplement the record had been made.

In what should only be considered *dicta*, the court also concluded that the plaintiff would not have a right to contribution under Section 113(f)(3)(B) in any event because DEC had not acted at the site pursuant to an express delegation of authority from EPA. The consent order provided that the plaintiff: ''[t]o the extent authorized under *42 U.S.C. Section 9613, . . .* should be deemed to have resolved its liability to the State for purposes of contribution protection provided by *CERCLA Section 113(f)(2)* for 'matters addressed' pursuant to and in accordance with this Order. . . . Furthermore, to the extent authorized under *42 U.S.C. Section 9613(f)(3)(B)*, by entering into this administrative settlement of liability, if any, for some or all of the response action and/or some or all of the costs of such action, [Niagara Mohawk] is entitled to seek contribution from any person except those entitled to contribution protec-

tion under *42 U.S.C. Section 9613(f)(2)*.'' Nonetheless, relying on *Con Ed*, the court explained that ''there is no evidence, argument, or even allegation that federal authorities vested CERCLA authority in the [state] with regard to the [order].'' Thus, the order could not have resolved plaintiff's CERCLA liability.

The district court further explained (again in dicta, but consistent with the *Con Ed* decision) that the consent order could not have ''resolved'' the plaintiff's CERCLA liability because the order's release and covenant not to sue contained a re-opener clause under which the state ''specifically reserved all of its rights to further investigate and require additional remediation related to hazardous waste.'' The opinion contains no analysis of the law relating to ''reopeners'' such as the one before the court, nor does it acknowledge that settlements with EPA under CERCLA Section 122 clearly resolve CERCLA liability but also contain statutorily-required reopeners.

The district court also concluded that an implied cause of action under Section 107(a) could not be maintained because *Con Ed* authorizes such contribution claims in only limited circumstances, such as when a plaintiff's liability has neither been adjudicated by a court nor resolved through a consent order. The plaintiff here did not fall within these limited circumstances because it incurred cleanup costs while acting pursuant to two state consent orders. The court added ''[a]lthough there has not been an apportionment of liability against Niagara Mohawk in a § 113(f) action, there never has been a question that Niagara Mohawk is liable for some of the response costs as it was the operator'' of the plant that generated and disposed of hazardous waste and ''it implicitly concedes its liability for some response costs by attempting to recover from the defendants in a contribution action.'' With this discussion, the district court appears to go further than *Con Ed* in setting up barriers to Section 107(a) actions.

■ **Major v. Astrazeneca**, 2006 U.S. Dist. LEXIS 65225 (No. 5:01-CV-618, 5:00-CV-1736) (N.D.N.Y. Sept. 13, 2006) (''*Major*'').

In *Major*, the district court granted the defendants' motion for summary judgment on the plaintiffs' claim for contribution under Section 113(f)(1) of CERCLA. The court explained that *Aviall* interpreted the ''natural meaning'' of Section 113(f) as limiting a party to seeking contribution under that provision only during or following a civil action brought pursuant to Sections 106 or 107(a). Because the court found nothing in the record indicating that a suit had been brought against the plaintiffs under either of those provisions, it held that they were foreclosed from seeking contribution under Section 113(f) and granted summary judgment on the issue in favor of the defendants.

* * *

As of the end of 2006, there existed more post-*Aviall* case law in the Second Circuit addressing the rights of PRPs under Section 113(f) and Section 107(a) than in any other federal circuit. Those decisions reflect well the uncertainty created by *Aviall*. Among other things, it is unclear in the Second Circuit (i) whether a consent order that does not pass Section 113(f)(3)(B) muster necessarily invalidates a Section 107(a) claim by a PRP; (ii) whether and, if so, in what circumstances a ''Voluntary Agreement'' with a state may be considered an ''administrative proceeding'' that can frustrate a Section 107(a) claim by a PRP; and (iii) whether, for Section 113(f)(3)(B) contribution right purposes, a state must have entered into a cooperative agreement with EPA under CERCLA for purposes of the site in question.

The Third Circuit

■ **E.I. DuPont de Nemours and Co. v. United States**, 460 F.3d 515, 62 ERC 2025 (3d Cir. Aug. 29, 2006) (''*DuPont*'').

Creating a split with the Second and Eighth Circuits, the Third Circuit held that a PRP who engages in ''sua sponte voluntary cleanups'' of contaminated sites and is barred from bringing a contribution claim under Section 113 may not rely on Section 107 to seek contribution from other PRPs, including the United States government. DuPont's claim centered on the ''voluntary'' cleanup of 15 sites in several states, which the United States owned or operated during both World Wars and the Korean War, contributing to the onsite contamination at issue. DuPont argued that: (i) Section 107 expressly establishes a cause of action for PRPs to seek contribution from other PRPs irrespective of Section 113, and (ii) the federal common law supports an implied cause of action for contribution under Section 107. The Third Circuit disagreed, becoming the first post-*Aviall* federal appellate court to bar PRPs from using Section 107 to pursue contribution from other liable parties.

Although it recognized the contrary holdings of its sister circuits, the Third Circuit explained that it was bound by its own pre-*Aviall* precedent established in *New Castle County v. Halliburton*, 111 F.3d 1116, 44 ERC 1513 (3d Cir. 1997) (''[A] section 107 action brought for recovery of costs may be brought only by innocent parties that have undertaken clean-ups. An action brought by a [PRP] is by necessity a section 113 action for contribution.'') and in *Matter of Reading Co.*, 115 F.3d 1111, 44 ERC 1865 (3d Cir. 1997) (holding that a PRP may not invoke the implied cause of action for contribution found by courts under Section 107 prior to the enactment of Section 113 because ''Congress intended § 113 to be the sole means for seeking contribution''). The court explained that in light of this precedent it could not write its decision ''on a blank slate''; instead, ''*New Castle County* and *Reading* control the outcome of this case, and no intervening authority provides a basis sufficient to reconsider those precedents.''

The court refused to distinguish DuPont's case from its previous cases on the basis that DuPont voluntarily cleaned up the sites, whereas the plaintiffs in the court's prior cases had met the requirements to maintain a contribution claim under Section 113. The court explained, ''Our holdings in *New Castle County* and *Reading*—based on our interpretation of the statute—are broad, and nothing in those cases suggests that the results would have been different if the plaintiffs had undertaken voluntary cleanups.'' Therefore, based on its pre-*Aviall* precedent, the court denied DuPont's contribution claim under Section 107(a) because it found that Section 107 does not create an implied cause of action for PRPs.

  ER ISSN 0013-9211

DuPont also argued that an implied cause of action for contribution from other PRPs arises under federal common law. The Third Circuit disagreed, finding that its pre-*Aviall* precedent from *New Castle* County and *Reading* was unaltered by *Aviall* and, therefore, controlled the present case. The *Reading* court had held that ''when Congress expressly created a statutory right of contribution in CERCLA § 113(f) . . . it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes . . . [and] [p]ermitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress.'' Thus, the court declined to imply a cause of action under federal common law for PRPs engaged in sua sponte voluntary cleanups.

The dissenting opinion in *DuPont*, authored by Judge Sloviter, explained that the circuit's precedent established in *New Castle County* and *Reading* should have been reevaluated in light of the intervening authority of the Supreme Court's *Aviall* opinion. The dissent explained that *Aviall* ''weakened the conceptual underpinnings'' of those decisions. Moreover, the holdings in *New Castle County* and *Reading* ''cannot be reconciled with the policies Congress sought to encourage when it enacted CERCLA'' because ''[v]oluntary cleanups are vital to fulfilling CERCLA's purpose.'' According to Judge Sloviter, ''the effect of the majority's opinion will be that parties will be reluctant to engage in voluntary cleanups for fear that they may not be able to obtain contribution.''

In the wake of *DuPont*, parties in the Third Circuit may only seek contribution if they assert a Section 113(f) claim ''during or following'' a lawsuit or proceeding to settle their liability under Sections 106 or 107, or after ''resolving'' their CERCLA liability with EPA or an authorized state consistent with Section 113(f)(3)(B). Although parties who voluntarily clean up a site may still be able to pursue a claim under state law, any such claim against the federal government will be barred to the extent the government has not waived its sovereign immunity to suit under state law.

On Oct. 13, 2006, DuPont petitioned the Third Circuit for *en banc* review of this ruling, noting that not only does the decision create a split among the circuit courts concerning the ability of PRPs to assert Section 107 contribution claims against other PRPs, but it also represents a split decision of the Third Circuit's three-judge panel that rendered the decision, with one of those judges visiting from another circuit and sitting in by designation. However, on Oct. 30, 2006, the petition for *en banc* review was denied.

On Nov. 21, 2006, DuPont filed a petition for writ of certiorari with the U.S. Supreme Court, requesting that the court review the Third Circuit's ruling denying DuPont's claims of an express and implied right to recover its response costs from another PRP under Section 107(a). In the petition, DuPont argued that Supreme Court review is necessary to settle the ''square and explicit conflict among the circuits'' over the availability of Section 107(a) contribution claims to PRPs that voluntarily clean up a site. According to DuPont, absent the Court's intervention, the split among the circuits will persist and create further confusion in the regulated and environmental communities and produce unnecessary litigation in the courts. Therefore, DuPont argued, ''[i]f the consequence of [*Aviall*] is that there is no such right of action at all—not only under Section 113(f)(1) but under Section 107(a) and federal common law as well—it is this Court that should say so. And if that is to be the law going forward, it is critical that companies, the executive branch, and Congress know it as soon as possible.''

On Dec. 22, 2006, the United States filed its response brief to DuPont's petition. The government explained that while it believes the Third Circuit correctly ruled that Section 107(a) contributions claims are not available to PRPs that are prevented from recovering under Section 113(f), it also recognizes that the ruling conflicts with the decisions handed down by the Second (*Con Ed*) and Eighth (*Atlantic Research Corp.*) circuits. Thus, the government urged the court to grant DuPont's petition for *certiorari* and consolidate the case for review with *Atlantic Research Corp.*, for which a petition was also pending before the Court. However, because the petition for review of this case would likely be ripe before the *Atlantic Research* petition, the government encouraged the court to grant review of *DuPont* immediately to meet ''the need for expeditious resolution of the recurring questions presented by these cases concerning the remedies available under CERCLA.''

According to the government in its brief, Section 107 does not authorize a PRP to maintain a claim against another PRP because the ''most natural reading of the phrase 'any other person' [in that section] is that it excludes the persons who are the subject of the sentence: i.e., PRPs.'' Moreover, even if Section 107(a) could be viewed to provide an implied right to contribution, ''it would at most contain a right to 'contribution' in its traditional sense: that is, a right by one party to recover an amount from a jointly liable party after the first party has extinguished a disproportionate share of their common liability to a third party.'' Such a remedy would not be available to the petitioners, the government contends, because they ''have not extinguished their liability to any third party and are thus not seeking 'contribution' as that term is traditionally defined.'' The government also argued that even if Section 107 does authorize one PRP to sue another, the provision still must be balanced with Section 113(f)'s restriction of claims between PRPs to two specific circumstances – contribution ''during or following any civil action'' under Sections 106 or 107(a) and contribution after entering into an administrative or judicially approved settlement. Finally, the petition asserted that allowing PRPs to sue each other under Section 107(a) would undermine CERCLA's settlement scheme because ''a PRP that has not yet been sued under Section 106 or Section 107(a) might refuse to settle with the government in order to preserve its right to sue under Section 107(a) (and thereby take advantage of the substantially more generous provisions applicable to such an action).''

■ **Champion Laboratories, Inc. v. Metex Corp.**, 2005 WL 1606921 (No. 02-5284) (D.N.J. July 8, 2005) (''*Champion Laboratories*'').

In *Champion Laboratories*, the district court held that, under Third Circuit law, a PRP can not bring a cost recovery claim under Section 107(a). In so holding, the district court did not address *Aviall*'s potential impact on this precedent. The district court also dismissed a Section 113(f)(1) claim under *Aviall* because the party had not been subject to a civil action.

■ **Boarhead Farm Agreement Group v. Advanced Environmental Technology Corp.**, 381 F. Supp.2d 427, 61 ERC 1630 (E.D. Pa. July 20, 2005) (''*Boarhead*'').

Boarhead involves a group of PRPs that had undertaken responsibility for the preliminary stages of remediation and sought contribution from the remaining PRPs. After *Aviall*, the group moved, in part, to amend the complaint by changing the caption to name as plaintiffs individual group members who were previously parties to a Section 106 or 107 civil action and adding Sections 113(f)(3)(B) and 107(a) claims. Finding that the individual members were the real parties in interest, the *Boarhead* court granted the motion to amend the caption.

Regarding the proposed Section 113(f)(3)(B) claim, the court found that the claim did not ''alter the general fact situation or legal theory upon which [the group] sought to recover, and was not time-barred.'' In denying as futile the motion to add a Section 107(a) claim, the *Boarhead* court found that the PRPs could not maintain a contribution action under Section 107(a). The district court noted that although the Third Circuit was likely to reconsider this issue in litigation brought by DuPont [*DuPont, supra*], it was currently the law of the Third Circuit that Section 113 is the only avenue for contribution claims by PRPs.

Finally, because only some members of the group had been party to Section 106 and 107(a) suits brought by the government, the *Boarhead* court also considered whether CERCLA and *Aviall* required all of the parties to be subject to a civil action to maintain the group's original Section 113(f)(1) contribution action. Explaining that the *Aviall* opinion should be read narrowly, the court found that a plain-meaning reading of CERCLA ''suggests that one need not have been a party to the prior civil action to bring a contribution claim, only that a relevant prior civil action must exist.'' Inasmuch as the Section 113(f)(1) suit was brought by the PRPs that had been party to a suit, the *Boarhead* court did not deny the motion to amend the complaint as futile.

■ **Beazer East, Inc. v. Mead Corp.**, 2006 U.S. Dist. LEXIS 47628 (No. 91-408) (W.D. Pa. July 13, 2006) (''*Beazer East*'').

In the wake of *Aviall*, the defendant filed a motion to dismiss for lack of jurisdiction the plaintiff's contribution claim under Section 113(f)(1) because the plaintiff had voluntarily cleaned up the site. Denying the motion, the district court concluded that the U.S. Supreme Court did not identify a jurisdictional threshold in *Aviall* when it held that a private party who had not been sued under Sections 106 or 107 of CERCLA could not maintain a contribution action against another PRP under Section 113.

In so holding, the *Beazer East* court noted that the Supreme Court has previously explained that a statutory provision is not jurisdictional unless ''the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'' Because the district court found no such clear statement by Congress in the text of CERCLA's limitation on the availability of Section 113(f)(1) contribution claims (i.e., in the ''during or following a civil action'' language in that provision), it held that ''the condition recognized in *Aviall* . . . should be treated as an element of a § 113(f)(1) claim, not a jurisdictional prerequisite.''

In response to this ruling, defendant Mead asked the district court to certify for appeal its decision concerning whether *Aviall* established a jurisdictional threshold for PRPs to assert Section 113(f)(1) contribution claims against other PRPs. On Oct. 12, 2006, the district court certified its ruling for interlocutory appeal to the Third Circuit. Although the court stood by its earlier decision, it found that the defendant had cited recent case law from the First and Second Circuits implying that the conditional precedent of a Section 106 or 107(a) civil action to a Section 113(f) contribution claim may be jurisdictional, rather than elemental, in nature. Thus, the court concluded that ''[t]he fact that there are conflicting interpretations from numerous courts on the jurisdictional issue is sufficient for this court to conclude that there is a 'substantial ground for difference of opinion' on the jurisdictional implications of *Aviall*.'' The case was docketed in the Third Circuit on Dec. 6, 2006, and pretrial procedure is underway.

■ **Montville Township v. Woodmont Builders**, 2005 WL 2000204 (03-2680DRD) (D.N.J. Aug. 17, 2005) (''*Montville Township*'').

The *Montville Township* court determined that a PRP's memorandum of agreement with the state to remediate a contaminated site does not qualify as an ''administrative order'' under Section 106 of CERCLA. The court reasoned that the plaintiff voluntarily entered into the agreement in anticipation of an enforcement action by the state compelling cleanup of the site, despite the fact that the state had not threatened the plaintiff with an enforcement action or directed it to remediate the property. Because ''the Township's cleanup of the property was 'voluntary,' '' the agreement supporting the cleanup could not have been an administrative order under Section 106 of CERCLA, and *Aviall* ''dictates that the Township cannot recover pursuant to'' Section 113(f)(1).

The *Montville Township* court also dismissed the plaintiff's claim to recover costs from other PRPs under Section 107(a) of CERCLA. Noting that the *Aviall* decision failed to reach the issue of whether a PRP may bring a contribution claim against another PRP pursuant to that provision, the district court explained that ''[u]ntil the Supreme Court addresses the issue, courts in the Third Circuit are bound by *New Castle County*, which precludes a PRP from obtaining recovery of costs from another PRP under § 107(a).'' Because the Township owned the property, it was a PRP, and therefore could not maintain a Section 107(a) contribution claim against other PRPs.

■ **New Jersey Transit Corp. v. American Premier Underwriters, Inc.**, 2005 U.S. Dist. LEXIS 43212 (No. 04-6423) (D.N.J. Nov. 22, 2005) (''*New Jersey Transit*'').

In *New Jersey Transit*, the district court considered whether a plaintiff's claim for contribution founded on Section 107(a) could survive the defendant PRPs' motion to dismiss. The defendants argued that the claim must be dismissed because Section 113(f) provides the exclusive right to contribution in CERCLA and the Third Circuit does not recognize an implied contribution right under Section 107(a). The court agreed. Quoting pre-*Aviall* Third Circuit precedent from *New Castle County v. Halliburton*, 111 F.3d 1116 (3d Cir. 1997), the court explained ''[t]he history and language of section 113 lend support to our conclusion that it, and not sec-

  ER ISSN 0013-9211

tion 107, is the appropriate mechanism for obtaining a fair allocation of responsibility between two or more [PRPs].'' Because the Supreme Court in *Aviall* did not address the availability of an implied right to contribution under Section 107(a) and no subsequent decisions of the Supreme Court or Third Circuit [prior to the *DuPont* decision *supra*] have taken up the issue, the district court found that the circuit's pre-*Aviall* precedent remains binding. Consequently, the court held that the plaintiff could not maintain a Section 107(a) contribution claim and granted the defendants' motion.

The Fourth Circuit

■ **Mercury Mall Assocs. Inc. v. Nick's Market Inc.**, 368 F. Supp.2d 513, 60 ERC 1338 (E.D. Va. Feb. 28, 2005) (''*Mercury Mall*'').

In *Mercury Mall*, the district court dismissed a PRP's Section 113(f) contribution suit without prejudice because ''[a]t some point in the future, a separate cost recovery action might be asserted against [the party],'' which would entitle the plaintiff to bring a new Section 113(f) claim.

Addressing the PRP's Section 107(a) claim, the *Mercury* court acknowledged that ''the combined result of the Supreme Court's opinion in *Aviall* and the [previous] Fourth Circuit's holding [in *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776, 46 ERC 1481 (4th Cir. 1998)] barring an implied right of contribution under Section 107(a)] is quixotic'' but determined that it lacked the authority to find an implied right of action under Section 107(a) until the Fourth Circuit or the Supreme Court unequivocally holds one to exist.

Finally, the court refused to recognize the plaintiff's federal common law-based contribution claim, explaining that ''[t]hough some federal courts at one time recognized an implied right of action for contribution via § 9607 under the federal common law, the need for such an action was obviated by the addition of § 9613 to CERCLA in 1986.'' The court noted that ''[c]ontribution is a creature of statute, not common law''; therefore, ''[u]ntil Congress explicitly creates one, or until the . . . Fourth Circuit or the United States Supreme Court unequivocally holds that § 9607(a) implicitly provides for a contribution suit as a matter of federal common law, this Court will not unilaterally divine one.''

■ **R.E. Goodson Constr. Co. v. Int'l Paper Co.**, 2006 U.S. Dist. LEXIS 39850 (No. 4:02-4184) (D.S.C. June 14, 2006) (''*R.E. Goodson*'').

The U.S. District Court for the District of South Carolina denied the plaintiffs' request to revise its previous ruling dismissing their CERCLA claims. The plaintiffs argued that the district court's pre-*Aviall* ruling should be amended to address expressly the Supreme Court's *Aviall* decision, which, according to plaintiffs, should provide them with an alternative cause of action under Section 107(a)(4)(B) to recover cleanup costs voluntarily incurred should plaintiffs be found to be PRPs.

In rejecting plaintiffs' contentions, the court restated its position in the earlier ruling that ''the implied contribution theory by a PRP and the theory of cost recovery by a PRP under § 107(a) are not recognized in the Fourth Circuit'' or by the Supreme Court. As a result, the court held that the availability of a Section 107 claim for PRPs is a matter to be decided by the Fourth Circuit, which to date has held that only an innocent landowner may maintain a cost recovery action under Section 107.

On Dec. 15, 2006, the district court reconfirmed its earlier ruling and explained that while the difficulty *Aviall* creates for PRPs to recover response costs under Sections 107 and 113 ''may be at odds with the purpose of CERCLA to encourage voluntary clean-up, it is not this court's function to anticipate what action the Fourth Circuit may take. 2006 U.S. Dist. LEXIS 91342, *4 n.2 (D.S.C. Dec. 15, 2006). The court also addressed the defendants' cross-claims against the United States seeking cost recovery under Section 107(a) and contribution under Section 113(f)(1) for any liability they may have for cleanup costs and remediation. The court first determined that, as a PRP, defendant International Paper Co. was limited to bringing a contribution claim under Section 113(f). However, because it had not already been subject to a civil action under Section 106 or to any ''legally supportable Section 107(a) claims,'' *Aviall* precluded International Paper's contribution claim against the federal government. The district court then found that defendant International Paper Realty Corp. (''IPR'') was an innocent purchaser and could assert a Section 107(a) cost recovery claim against the United States. However, because IPR had not been subject to a civil action under Section 106 or to a legally supportable Section 107(a) claim, the court dismissed its Section 113(f) contribution claim against the federal government.

The Fifth Circuit

■ **Vine Street LLC v. Keeling**, 362 F. Supp.2d 754, 60 ERC 1850 (E.D. Tex., March 24, 2005) (''*Vine Street*'').

The district court in *Vine Street* held that PRPs that do not have a right of contribution under Section 113(f) in the wake of *Aviall* may nonetheless pursue cost recovery under Section 107(a). Noting that the ''Fifth Circuit has not directly addressed [presumably subsequent to the Supreme Court *Aviall* decision] the issue of precisely who may bring a claim under Section 107(a),'' and citing First Circuit law that it concluded supported its position, the *Vine Street* court found that where a PRP ''cannot meet the specific requirements to state a claim for contribution under Section 113(f)(l) . . . [that PRP] can bring a claim under Section 107(a)(4)(B). Quite simply, a [PRP] that voluntarily works with the government to remedy environmentally contaminated property should not have to wait to be sued to recover cleanup costs since Section 113(f)(l) is not meant to be the only way to recover cleanup costs.'' Instrumental to the court's decision was the fact that those pre-*Aviall* courts that had held that PRPs can not invoke Section 107(a)(4)(B) had done so in the belief that those parties had recourse to Section 113(f) contribution claims in the absence of the now requisite ''civil action'' or government ''settlements.'' On Nov. 6, 2006, the district court confirmed this ruling by again finding that PRPs may pursue recovery under Section 107(a) subsequent to a voluntary cleanup, 2006 U.S. Dist. LEXIS (E.D. Tex. Nov. 6, 2006).

■ **Aviall Services Inc. v. Cooper Indus. LLC**, 2006 U.S. Dist. LEXIS 55040 (No. 3:97-CV-1926) (N.D. Tex. Aug. 8, 2006). *See supra.*

The Sixth Circuit

■ *Petition for Writ of Certiorari*, **Gencorp Inc. v. Olin Corp.** (U.S., No. 05-11, June 27, 2005).

Petitioner Gencorp filed a petition for writ of certiorari with the Supreme Court seeking review of the judgment of the U.S. Court of Appeals for the Sixth Circuit, 390 F.3d 433, 59 ERC 1609 (6th Cir. 2004). Petitioner urged the court to consider whether a unilateral administrative order is a ''civil action'' under Section 113(f)(1)—a question the Supreme Court specifically reserved in *Aviall*. The court denied the petition. 126 S.Ct. 420, 63 ERC 1480 (Oct. 11, 2005).

■ **ITT Indus., Inc. v. BorgWarner, Inc.**, 2006 U.S. Dist. LEXIS 59877 (No. 1:05-674) (W.D. Mich. Aug. 23, 2006) (''*ITT*'').

Relying on pre-*Aviall* precedent from the Sixth Circuit, the district court in *ITT* held that a PRP that incurs cleanup costs pursuant to an administrative consent order may not seek reimbursement from other PRPs under Section 107(a). The court explained that the Sixth Circuit's 1998 opinion in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 47 ERC 1285 (6th Cir. 1998), which ''squarely held that a PRP is not entitled to bring a cost recovery action under § 107(a) . . . [because] all contribution actions are controlled by CERCLA § 113,'' remained the controlling law of the circuit. According to the court, *Aviall* ''does not overrule *Centerior* in any way.'' In fact, the Supreme Court in *Aviall* ''specifically declined to address whether PRPs have a cause of action under § 107 and it strongly suggested that no implied right of contribution exists under § 107.'' Consequently, ''no direct conflict exists'' and ''[t]his Court remains bound by the Sixth Circuit's controlling decision in *Centerior*.'' In reaching this conclusion, the court recognized that *Aviall* and *Centerior*, ''when read together, may prevent certain PRPs from recovering under either § 107 or § 113.'' Nevertheless, the court concluded that ''the unavailability of a federal cause of action is not itself a reason for a court to engage in expansive statutory interpretation.''

Based on the controlling precedent of *Centerior*, the district court dismissed with prejudice the plaintiff's claim for cost recovery under Section 107(a). In doing so, it rejected ITT's argument that the present case was distinguishable from *Centerior* because, unlike that case where the plaintiff incurred response costs pursuant to a § 106 unilateral administrative order from EPA, ''ITT incurred costs pursuant to an administrative order by consent, in which ITT specifically declined to admit liability.'' However, the court declined to distinguish the cases, reasoning that ITT's order by consent did not mean that it voluntarily undertook cleanup. Rather, ''[a]lthough ITT was not unilaterally ordered to conduct the [response], the administrative order by consent, by its terms, was undertaken only at the prodding of the EPA after Plaintiff was identified as a PRP.'' As a result, the court concluded, the allegations of ITT's complaint failed to state a Section 107 claim for cost recovery.

The court also dismissed with prejudice ITT's claim for contribution under Section 113(f)(3)(B). The court explained that the administrative order by consent between ITT and EPA did not constitute an administrative settlement within the meaning of Section 113(f)(3)(B) because it ''does not purport to resolve any party's liability—not ITT's, not the United States' and not that of any State.'' The consent order did not release any potential claims that EPA may have against ITT or any other entity. As the court noted, ''[r]ather than a final settlement, the administrative order by consent is an interim agreement between ITT and the United States that resolves no liability and is not described by 42 U.S.C. § 9613(f).'' Therefore, ''[u]nder the plain language of § 113(f)(3)(B), the administrative order by consent is not a 'settlement' subject to contribution.'' The court further concluded, based on *Aviall*, that ''§ 113(f)'s reference to administrative settlements must be construed as referring only to those settlements identified in § 113(g)(3)(B): that is settlements made pursuant to §§ 122(g) and (h).'' Because ITT's consent order did not qualify as a Section 122(g) ''de minimis'' settlement nor a Section 122(h) cost recovery settlement, the court found that ITT had failed ''to allege the existence of an administrative settlement entitling it to seek contribution under § 113(f).''

■ **Ford Motor Co. v. United States** (No. 04-72018) (E.D. Mich., May 22, 2006) (''*Ford*'').

On May 22, 2006, the federal government filed a motion to dismiss Section 107(a) and 113(f)(3)(B) claims brought against the government by Ford. The government argued that under Sixth Circuit precedent, Ford, a PRP, was not entitled to maintain a 107(a) claim. Next, the government asserted that Ford could not bring a Section 113(f)(3)(B) claim because it had not resolved common liability shared with the federal government to the State of Michigan. Because the United States had not waived its sovereign immunity to liability under the state hazardous waste laws pursuant to which Ford had incurred its response costs, the government asserted that an administrative order and state corrective actions under state hazardous waste law could not have resolved any common liability. In addition, the government argued, Ford had not resolved its liability to the state because the administrative orders had expressly reserved Ford's liability. A motion hearing on the government's motion to dismiss took place on Sept. 27, 2006, and on Sept. 29, the court dismissed Ford's Section 107(a) claim (apparently without a written decision explaining its rationale).

■ **Carrier Corp. v. Piper**, 2006 U.S. Dist. LEXIS 80098 (No. 05-2307) (W.D. Tenn. Sept. 30, 2006) (''*Carrier*'').

In *Carrier*, the district court considered, in the context of a 12(b)(6) motion to dismiss, whether a PRP that is subject to an EPA-issued Unilateral Administrative Order for Remedial Design and Remedial Action (''UAO'') may maintain claims against another PRP for cost recovery under Section 107(a) or for contribution under Sections 113(f)(1) or 107(a). The court first determined that, although the issue is not expressly addressed in the statute, the Sixth Circuit in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 47 ERC 1285 (6th Cir. 1998), ''has determined that a PRP, itself, cannot bring an action under § 107(a), but rather must resort to suing for contribution under

  ER ISSN 0013-9211

§ 113(f).'' Accordingly, because *Centerior* is binding precedent for courts in the Sixth Circuit, the court ruled that if it eventually determines after full evaluation of the record that the plaintiff is a PRP, the plaintiff will be precluded from asserting a cost recovery claim against the defendant PRP under Section 107(a).

The *Carrier* court then addressed the plaintiff's contribution claim founded on Section 113(f)(1). After noting that *Aviall* did not decide whether an administrative order, such as the UAO at issue here, qualifies as a civil action for purposes of Section 106 or 107(a) and distinguishing *Aviall* because EPA had not taken ''judicial or administrative measures to compel cleanup,'' the district court determined (contrary to other courts) that the UAO that EPA issued to the plaintiff under Section 106 qualifies as a ''civil action'' in Section 113(f)(1). The court reasoned that the Sixth Circuit's *Centerior* decision suggests that ''the issuance of an administrative order under § 106 satisfies the requirement in § 113(f)(1)'' and the decision found that the savings clause in Section 113(f)(1) codified the common law of contribution, ''which required only 'that plaintiff act under some compulsion or legal obligation to an injured party.' '' According to the *Carrier* court, the UAO satisfied this requirement because it is ''similar to a judgment issued pursuant to a court proceeding'' in terms of the burden it imposes on the party to which it is served and that party ''has little choice but to comply.'' (The court explained that the UAO carries a noncompliance penalty of up to $25,000 per day and noncompliance can also bring about the imposition of punitive damages under Section 107(c)(3).) Thus, the court found that the plaintiff had been subject to a civil action under Section 106 of CERCLA and, therefore, its Section 113(f)(1) contribution claim could proceed.

Finally, the court evaluated whether the plaintiff also could rely on Section 107(a) for an implied right to contribution. Because the court held that the plaintiff had stated a contribution claim under Section 113(f)(1), it believed that the plaintiff did not need to seek contribution outside of the 113(f) framework. Nevertheless, the court continued, ''no implied right to contribution exists under the law of this Circuit and, thus, Carrier's claim must proceed pursuant to § 113(f).'' To support this conclusion, the *Carrier* court explained that although the Sixth Circuit's *Centerior* decision did not directly address the issue of an implied right to contribution, it ''appears to have limited a PRP's cause of action against another PRP to § 113(f),'' noting that '' 'claims by PRPs . . . seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by mechanisms set forth in § 113(f).' '' The district court therefore concluded that, as contemplated by *Centerior*, the Sixth Circuit requires all actions for contribution to be brought under Section 113(f). Moreover, the court reasoned that because the Supreme Court in *Aviall* did not evaluate whether an implied right to contribution exists under Section 107 and hinted in dicta that, if faced with the issue, it may reject such an implied right, the Sixth Circuit's *Centerior* decision on this point has not been modified and remains the binding law of the circuit. Consequently, ''Carrier's sole method for pursuing an action for contribution lies in § 113(f).''

The Seventh Circuit

■ **Pharmacia Corporation and Solutia, Inc. v. Clayton Chemical Acquisition LLC**, et al., 382 F. Supp.2d , 60 ERC 2141 (S.D. Ill. March 8, 2005) (''*Pharmacia*'').

The *Pharmacia* court held first that an administrative order on consent (''AOC'') entered into with the Environmental Protection Agency was not an ''administrative settlement'' for purposes of Section 113(f)(3)(B) contribution rights because it was not an ''administrative settlement'' pursuant to Section 122(d)(3) of CERCLA (which authorizes EPA to enter agreements with PRPs to effectuate response actions) but rather simply an ''administrative order'' under Section 106 of the statute. In so ruling, the district court relied on the following:

- The order stated in its caption that it was issued pursuant to Section 106, which provision does not reference administrative settlements;
- The document was entitled an ''Administrative Order by Consent'', rather than an ''Administrative Settlement'';
- Even though the AOC stated in its body that it was issued in part pursuant to Section 122, that provision merely ''give[s] rise to [EPA's] authority to undertake various actions that make up the AOC, but . . . . the AOC *itself* is issued pursuant to Section 106(a)'' (emphasis in original);
- The AOC refers to civil penalties for violation of the order as provided for in Section 106(b)(l) (rather than the civil penalties provided for in Section 122(l)), and to judicial enforcement of the order under Section 106; and
- The document nowhere refers to itself as a ''settlement'' but rather as an ''order.''

Unlike the *Carrier* court, *supra*, the *Pharmacia* court further held that neither the AOC nor a unilateral administrative order (''UAO'') issued by EPA in connection with the site involved constituted a ''civil action'' under Section 106 for purposes of Section 113(f)(l) contribution rights. In so doing, the court reviewed the legislative language and structure of CERCLA (including the structure of both Section 106 itself and relevant statute of limitations provisions in Section 113) and concluded that those indicia of congressional intent, coupled with the ''natural meaning'' of the term ''civil action,'' warranted a conclusion that the term ''clearly'' referred in CERCLA to ''a non-criminal judicial proceeding'' only, and not an administrative order.

Pharmacia Corp. filed a motion for reconsideration of the district court's decision finding that the AOC was not the type of ''settlement'' contemplated in Section 113(f)(3)(B). However, the parties settled the matter, and the case was dismissed before the court had an opportunity to reconsider the issue.

■ **City of Waukesha v. Viacom Int'l Inc.**, et al., 362 F. Supp.2d 1025, 60 ERC 2021 (E.D. Wisc. March 23, 2005) (''*Waukesha*'').

The district court denied as futile a PRP's motion to add CERCLA claims under Sections 113(f)(3)(B) and 107(a). In its denial, the *Waukesha* court held that a cost share pilot program contract between the party and the State Department of Natural Resources (''WDNR'') was not an ''administrative or a judicially approved settlement'' resolving CERCLA liability for two main reasons. First, the contract was under a state law provision that provided such contracts would not

affect liability under any other statutes. Second, WDNR had declined to sign a separate administrative settlement agreement explicitly resolving CERCLA liability. As a result, adding a Section 113(f)(3)(B) claim was futile. In addition, the *Waukesha* court held that since *Aviall* did not vacate Seventh Circuit precedent limiting PRPs to contribution claims under Section 113(f), that precedent was controlling and no Section 107(a) claim could be pursued by the plaintiff.

Subsequently, the district court also denied as futile the city PRP's motion to add a contribution claim under Section 113(f)(3)(B) based on a signed environmental settlement agreement between the city and WDNR. Citing the Second Circuit's *Con Ed* opinion, the court explained that ''section 113(f)(3)(B) creates a CERCLA contribution right only where a party resolves some or all of its liability for a 'response action,' '' and ''resolving liability with respect to non-CERCLA claims, such as claims arising under state environmental statutes, does not create a CERCLA contribution right under section 113(f)(3)(B).'' Because the settlement agreement did not resolve the city's CERCLA liability, adding the requested contribution claim was futile. *City of Waukesha v. Viacom Int'l Inc.*, 404 F. Supp.2d 1112 (E.D. Wisc. Oct. 31, 2005).

■ **Metropolitan Water Reclamation Distr. of Greater Chicago v. Lake River Corp.**, et al., 365 F. Supp.2d 913, 60 ERC 1508 (N.D. Ill. April 12, 2005) (''*Metropolitan Water*'').

In *Metropolitan Water*, the district court held that a PRP who voluntarily undertook cleanup efforts could seek contribution under Section 107(a). The *Metropolitan Water* court reasoned that Section 107(a) contains an implied right for PRPs to recover costs because such a right existed before Congress added Section 113(f)(1) to CERCLA and Congress preserved the right with the savings clause in Section 113(f)(1). The district court stated that ''any other outcome would seem to lie contrary to the general purposes of CERCLA to promote prompt and proper cleanup of contaminated properties.''

Agreeing with the dissent in *Aviall*, ''insofar as they express a prediction of the result [allowing PRPs to recover costs under Section 107(a)] that would occur when the Court had to decide the question,'' the *Metropolitan Water* court, unlike the *Waukesha* court, apparently determined that *Aviall* implicitly overruled pre-*Aviall* Seventh Circuit precedent finding no Section 107(a) claim for PRPs.

An interlocutory appeal to the Seventh Circuit was sought by defendant and granted. On May 2, 2006, the United States filed an amicus brief in that appeal arguing that a private PRP may not pursue cost recovery under section 107(a)(4)(B). The government cited pre-*Aviall* Seventh Circuit precedent to support its argument. The federal government explained that it interpreted Section 107 as providing for the liability of PRPs, but not as providing private PRPs a remedy. The government noted that before Congress added Section 113 to CERCLA, it was not clear whether Section 107 provided a remedy for PRPs. Thus, Section 113 was enacted to provide that remedy, which is exclusive for private PRPs. Accordingly, the government argued, the court should refrain from finding an implied remedy in Section 107. The government asserted that, in Section 113, Congress placed specific limitations on a PRP's ability to pursue contribution and courts should not allow PRPs to circumvent those limitations by allowing implied claims under Section 107. Finally, the government also argued that the term ''any other person,'' to whom a PRP can be liable under Section 107, was not intended to include PRPs.[2]

■ **Glidden Co. v. FV Steel and Wire Co.**, 2006 U.S. Dist. LEXIS 70242 (No. 05C1356) (E.D. Wis. Sept. 21, 2006) (''*Glidden*'').

In *Glidden*, the U.S. District Court for the Eastern District of Wisconsin reversed a bankruptcy court's rulings that, *inter alia*, *Aviall* precluded plaintiff PRPs from maintaining future claims for contribution under CERCLA against a bankrupt defendant PRP and, thus, those PRPs did not have contingent claims under the Bankruptcy Code to recover future cleanup costs. The parties had all been named co-PRPs by EPA, entered into a voluntary PRP agreement to manage the cleanup pursuant to EPA's remedial plan, and subsequently agreed to an EPA-issued Administrative Order on Consent (''AOC'') to govern the remediation. However, after several years of cleanup activity, the defendant PRP filed for bankruptcy, and plaintiff PRPs filed claims against the bankruptcy estate to secure costs to be incurred from completing the remaining cleanup work on the contaminated site. On appeal to the district court, plaintiff PRPs argued that, contrary to the bankruptcy court's ruling, they had contingent claims against the bankrupt defendant PRP for future cleanup costs under Sections 113(f)(3)(B), 113(f)(1), and 107(a) of CERCLA.

The district court first determined that Section 113(f)(3)(B) did not provide plaintiffs with a contingent claim for future contribution against the bankrupt defendant. The court explained that Section 113(f)(3)(B) authorizes a party that settles with the government to seek contribution from a party that ''is not a party'' to that settlement. Because plaintiffs and the defendant were all parties to the AOC, the court found that Section 113(f)(3)(B) could not provide plaintiffs with a contribution claim against the defendant.

The court then found that plaintiff PRPs did have a contingent claim for contribution against the defendant PRP under Section 113(f)(1). After explaining that the Bankruptcy Code authorizes parties to bring claims for ''all legal obligations of the debtor, no matter how remote or contingent, so that such obligations will be able to be dealt with in the bankruptcy case,'' the court stated that ''although possibly unlikely, the EPA could bring a civil suit in the future against claimants relating to cleanup outside the scope of the [AOC].'' Consequently, because the Bankruptcy Code requires courts to value any contingent claim, the bankruptcy court ''should have assigned a value to claimants' contingent § 113(f)(1) claim, taking into account the likelihood that EPA will bring a civil action against claimants in the future.''

Lastly, the district court held that plaintiff PRPs also had a contingent claim for contribution against the defendant PRP under Section 107(a) of CERCLA. Agreeing with the Second and Eighth Circuits (the *Con Ed* and *Atlantic Research* decisions), the *Glidden* court

[2] This article does not address the Jan. 17, 2007, decision of the Seventh Circuit in this case, in which that court held that PRPs who ''voluntarily'' clean up a site have a cost recovery right under Section 107(a) (38 ER 140, 1/19/07).

  ER ISSN 0013-9211

concluded that ''under *Aviall*, when PRPs may not bring contribution actions under § 113(f)(1), they may do so under § 107(a).'' To support this holding, the court explained that, as noted in *Aviall*, by providing a savings clause in Section 113(f)(1), Congress could only have intended ''to preserve pre-§ 113 case law authorizing PRPs to seek contribution under § 107(a).'' In addition, the court believed that allowing PRPs that are precluded from seeking contribution under Section 113 to do so under Section 107(a) comports with the plain language of that provision and with the overall purpose of CERCLA ''to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'' Moreover, according to the court, allowing PRPs to maintain Section 107(a) contribution claims ''is not contrary to *Akzo Coatings*, a pre-*Aviall* case in which the Seventh Circuit limited a PRP's ability to invoke § 107(a) where that PRP had access to § 113(f)(1).'' Thus, the district court reversed the bankruptcy court's ruling and remanded the case for reconsideration.

The Eighth Circuit

■ **Atlantic Research Corp. v. United States**, 459 F.3d 827, 62 ERC 1993 (8th Cir. Aug. 11, 2006) (''*Atlantic Research*'').

Joining the Second Circuit (in its *Con Ed* decision), the Eighth Circuit became the second federal appellate court to hold that a party who voluntarily incurs cleanup costs at a contaminated site may maintain a cost recovery action against other PRPs under Section 107(a). Citing *Con Ed*, the Eighth Circuit explained that in the wake of *Aviall*, ''it no longer makes sense to view § 113 as a liable party's exclusive remedy.'' In doing so, the court was clearly troubled by the fact that even though Atlantic Research ''voluntarily investigated and cleaned up the contamination, incurring costs in the process,'' it was barred from bringing a Section 113 claim because it ''commenced suit before, rather than 'during or following,' a CERCLA enforcement action.''

The *Atlantic Research* court was confronted with virtually identical relevant facts as those addressed by the Second Circuit in *Con Ed*. Atlantic Research was a PRP that undertook voluntary site remediation without being compelled to remediate by judicial or administrative order. The only apparent meaningful factual difference between the cases is that Atlantic Research engaged in ''*sua sponte*'' remediation, while *Con Ed* remediated under a ''Voluntary Cleanup Agreement'' with the New York State Department of Environmental Conservation.

In reaching its decision, the court explained that Section 107 and Section 113 are ''distinct'' provisions. ''Accordingly, it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism . . . as the government requests.'' Rather, like the Second Circuit in *Con Ed*, the *Atlantic Research* court found that liable parties have the right to bring a cost recovery action under Section 107 if the parties ''have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107.'' However, although it recognized that Section 107 ''allows 100% recovery,'' the court noted that in the Eighth Circuit, ''a liable party may not use § 107 to recover its full response costs.''

Notably, the Eighth Circuit observed that, in enacting Section 113, Congress did not intend ''to eliminate the preexisting right to contribution it had allowed for court development under § 107.'' As the court explained, ''[t]he plain text of § 113 reflects no intent to eliminate other rights to contribution; rather, § 113's saving clause provides 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.' '' Therefore, the court concluded that ''the broad language of § 107 supports not only a right of cost recovery but also an implied right to contribution.'' By finding that Section 107(a) supports an implied right of action for contribution, the Eighth Circuit took a broader interpretation of the provision than the Second Circuit did in *Con Ed* and *Schaefer*, *supra*, where that Circuit apparently only found a right to maintain a cost recovery action under Section 107.

From a policy perspective, the Eighth Circuit reasoned that ''[a] contrary ruling, barring Atlantic from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome.'' In this case, ''the United States is a liable party [and], simultaneously, CERCLA's primary enforcer.'' Therefore, if the court adopted the Government's position—that allowing a Section 107 claim to proceed renders Section 113 meaningless—''the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle.'' Such a ''bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially liable for a site's contamination.'' Thus, the court concluded, Congress ''did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power.''

In addition to its statutory claims for direct recovery and contribution, Atlantic Research claimed a similar right to recovery of its costs under federal common law. However, given its ruling on the statutory claims, the court decided to ''leave that question for another day.''

On Oct. 24, 2006, the United States filed a petition for writ of certiorari with the U.S. Supreme Court, requesting review of the Eighth Circuit's decision finding that Atlantic Research, a PRP that voluntarily cleaned up a contaminated site, has an implied right to contribution under Section 107(a) of CERCLA, No. 06-562 (U.S. Oct. 24, 2006). In its petition, the government argued that Supreme Court attention is necessary to resolve the split over this issue that has emerged between the Second and Eighth Circuits in *Atlantic Research* and *Con Ed* and the Third Circuit in *DuPont* (*see supra*). According to the government, the position of the Second and Eighth Circuits is misguided because Section 107 does not authorize a private PRP to maintain a claim against another PRP, and it is ''debatable'' whether the provision contains an implied right to contribution at all. Even if Section 107 does authorize one PRP to sue another for cost recovery, the government argues that the provision still must be balanced with Section 113(f)'s restriction of claims between PRPs to two specific circumstances—contribution ''during or following any civil action under Section 106 or 107(a)'' and contribution after entering into an administrative or judicially

approved settlement. Moreover, the petition asserts, allowing PRPs to sue each other under Section 107(a) would undermine CERCLA's settlement scheme because ''a PRP that has not yet been sued under Section 106 or Section 107(a) might be well advised to *refuse* to settle with the government, in order to preserve its right to sue other PRPs under Section 107(a) and thereby take advantage of the substantially more generous provisions applicable to such an action.'' (emphasis in original).

On Jan. 3, 2007, Atlantic Research filed a brief in support of the government's petition for Supreme Court review.[3] In the brief, Atlantic Research voiced its continued support for the Eighth Circuit's decision in its favor, but explained that it believes the government's petition mischaracterizes the issue that the Supreme Court should address if it grants *certiorari*. According to Atlantic Research, the court would not need to reach the issue left unresolved by *Aviall*—whether 107(a) confers upon a PRP a right to maintain a cost recovery claim against another PRP—because, despite the court's holding in *Aviall*, Atlantic Research still has a viable contribution claim under Section 113(f). Atlantic Research reasoned as follows:

> Although the court seemingly held that the PRP seeking contribution under § 113(f) must first have been sued in a § 106 or § 107(a) action, nothing in CERCLA supports that holding. Section 113(f) unequivocally provides that ''*any* person may seek contribution from *any* other person who is liable or potentially liable under § 9607(a) . . . during or following *any* civil action under . . . § 9607(a).'' [emphasis added in brief] This provision raises the question whether absent being sued under § 107(a), a person may nevertheless bring an action for declaratory relief seeking an adjudication of another's joint liability or potential joint liability under § 107(a) and, if so, is such an action a civil action under § 107(a)? If a viable declaratory judgment action is a ''civil action under § 107(a),'' and if the declaratory judgment action establishes the liability or potential liability of another PRP, then, by definition, the prevailing PRP may seek contribution under § 113(f). That is, if ARC [Atlantic Research] has stated a viable claim for declaratory relief, and if its claim constitutes a § 107(a) civil action, then ARC's action was ''pending'' when ARC also sought contribution (partial cost recovery) from the government. Because ARC has stated a viable claim for declaratory relief, and because such a claim is a § 107(a) civil action, ARC is entitled to seek contribution from the government under § 113(f)(1).

■ **Blue Tee Corp. v. Asarco, Inc.**, 2005 WL 1532955 (No. 03-5011) (W.D. Mo. June 27, 2005) (''*Blue Tee*'').

In *Blue Tee*, the district court dismissed a claim under Section 113(f)(1) where the party sought contribution for costs incurred while responding to a UAO issued by EPA. In line with the *Pharmacia* but not the *Carrier* court, the district court held that, under *Aviall* contribution under Section 113(f)(1) is only available to a PRP after being sued in a Section 106 or 107 civil action. The district court rejected the PRP's policy arguments to the contrary, noting they were foreclosed by *Aviall*. The district court also rejected the PRP's constitutional arguments because the Supreme Court in *Aviall* ''did not feel compelled for constitutional reasons to read § 113(f)(1) of CERCLA to enable contribution claims by parties who voluntarily elected to clean up property at the direction of government authorities.''

In addition, the *Blue Tee* court denied as futile the plaintiff's motion to file an amended complaint with Sections 107(a) and 113(f)(3)(B) claims. In opposing the motion, defendants had argued that CERCLA requires administrative settlements with cleanup requirements to be approved by the attorney general and entered in the appropriate court as a consent decree after public notice. Agreeing with defendants, the court held that Eighth Circuit and Supreme Court law did not support finding that compliance with a UAO was equivalent to an administrative settlement for the purposes of Section 113(f)(3)(B). The *Blue Tee* court next addressed the Section 107(a) claim and stated that *Aviall* expressly declined to overrule the line of cases, including Eighth Circuit cases, limiting recovery for PRPs to claims under Section 113. Therefore, because neither claim would survive a motion to dismiss, the court denied the motion to file an amended complaint.

Finally, the plaintiff argued that a right to contribution also existed under federal and Missouri common law. The court disagreed, noting that the U.S. Supreme Court has not previously found an implied right of contribution under the federal common law with other statutes and that a claim for contribution under Missouri common law would be preempted by the express language of Section 113 of CERCLA. Although the district court did not expressly discuss the Supreme Court's rule of law for evaluating the availability of federal common law claims, it cited *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90-99 (1981), in which the court explained that ''once Congress addresses a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law.'' The Supreme Court further clarified that ''[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.'' Apparently applying this rule of law, the *Blue Tee* court declared that the plaintiff's common law claims would be futile.

The Ninth Circuit

■ **Adobe Lumber, Inc. v. Taecker**, 2005 WL 1367065 (No. CV S02-186) (E.D. Cal. May 24, 2005) (''*Adobe Lumber*'').

The district court held that, under pre-*Aviall* Ninth Circuit precedent, Section 107(a) provides an ''implicit right of contribution'' for PRPs, precedent that remains valid because *Aviall* did not rule on the issue. The *Adobe Lumber* court stated that ''in the wake of *Aviall*, [the party's] Section 107 claim is construed as it was before the congressional enactment of Section 113.''

The court denied without prejudice the defendants' motion to dismiss the PRP's contribution claim because the Ninth Circuit is currently considering the issue of whether an implicit right of contribution may be found

[3] This article does not address the Jan. 19, 2007, decision of the U.S. Supreme Court to grant certiorari (38 ER 185, 1/26/07).

  ER ISSN 0013-9211

in Section 107(a) in the wake of the *Aviall* decision. *See infra*. Thus, the court stayed discovery pending resolution of the issue by the Ninth Circuit. *Adobe Lumber, Inc. v. Hellman*, 2006 U.S. Dist. LEXIS 136, 62 ERC 1107 (No. CV S05-1510) (E.D. Cal. Jan. 4. 2006).

■ **Kotrous v. Goss-Jewett Co. of Northern California, Inc.**, 2005 WL 1417152 (No. CV S02-1520) (E.D. Cal. June 16, 2005) (''*Kotrous*'').

As in *Adobe Lumber*, the district court in *Kotrous* held that Ninth Circuit precedent allows a PRP to maintain a contribution action under Section 107(a). The *Kotrous* court noted that *Aviall* did not expressly rule on this issue and, thus, did not overrule the Ninth Circuit on the issue. The court held that, to the extent that defendants argued that the Ninth Circuit had barred a PRP from any recovery under Section 107(a), they were mistaken in their interpretation of Ninth Circuit precedent. The district court stated that although a PRP in the Ninth Circuit cannot maintain an action under Section 107(a) for *joint and several liability*, Section 107(a) still contained an ''implied right of contribution'' for PRPs.

Noting substantial grounds for a difference of opinion with its holding, including the ambiguity of the *Aviall* opinion and conflicting precedent of other district courts within the Ninth Circuit, the court granted defendants an interlocutory appeal to the Ninth Circuit of the contribution claim. *Kotrous v. Goss-Jewett Co. of Northern California, Inc., et al.*, 2005 WL 245606 (No. CV S02-1520) (E.D. Cal. Oct. 4, 2005).

■ **Ferguson v. Arcata Redwood Co.**, 2005 WL 1869445 (No. 03-5632) (N.D. Cal. Aug. 4, 2005) (''*Ferguson*'').

The district court in *Ferguson* found that a PRP who voluntarily remediates her property may bring a contribution claim against other PRPs under Section 107 of CERCLA. The *Ferguson* court rejected the plaintiff's contribution claim under Section 113(f)(3)(B) against various PRPs for past and future voluntary response costs. The plaintiff claimed that she was entitled to contribution because letters she exchanged with state and federal agencies constituted ''an administrative or judicially approved settlement'' for purposes of CERCLA. Reasoning that none of the letters contained the word ''settlement'' or ''CERCLA,'' so as to indicate that EPA was exercising authority under CERCLA, or demonstrated any tacit intent to create a settlement agreement, the *Ferguson* court found that the letters could not qualify as a settlement capable of conferring a right to contribution under Section 113 of CERCLA.

Nonetheless, the district court allowed the plaintiff's Section 107 contribution claim to proceed. Although acknowledging that the Ninth Circuit holds that ''a PRP cannot bring a claim for joint and several liability under Section 107,'' the *Ferguson* court explained that ''the Ninth Circuit also recognize[s] a PRP's right to bring a contribution claim under Section 107.'' Because the Supreme Court in *Aviall* declined to address the availability of Section 107 contribution claims, the *Ferguson* court abided by Ninth Circuit precedent and allowed the plaintiff to bring a Section 107 contribution claim against other PRPs.

■ **City of Rialto v. United States Dep't of Defense**, 2005 U.S. Dist. LEXIS 26941 (No. 04-00079) (C.D. Cal. Aug. 16, 2005) (''*City of Rialto*'').

Disagreeing with the *Kotrous* and *Adobe Lumber* courts, the district court in *City of Rialto* held that to maintain a contribution claim under Section 107(a), PRPs must allege facts sufficient to satisfy the prerequisites of a contribution action under Section 113(f). The court interpreted the Ninth Circuit's pre-*Aviall* precedent as recognizing an implicit right to contribution in Section 107(a), but as also recognizing that Section 113(f) ''governs, regulates, and qualifies that right.'' Because *Aviall* did not address the question of an implied right of contribution in Section 107(a), the court reasoned that this Ninth Circuit precedent remains intact. As such, PRPs seeking contribution under Section 107(a) must ''plead facts which indicate they could satisfy § 113(f).'' Because plaintiffs' allegations did not satisfy Section 113(f) as interpreted by *Aviall*, the court dismissed the contribution claim.

Notably, the district court explained that it disagreed with the *Kotrous* court's reliance on the Section 113(f)(1) savings clause because that provision ''is not a signal that independent contribution claims are in fact available to PRPs outside of § 113(f).'' Further, the court argued that the reading of Ninth Circuit pre-*Aviall* precedent in *Kotrous* ''does not take into account the . . . very clear language on the relationship between §§ 107(a) and 113(f), the basis for [the Ninth Circuit's] holding.'' Likewise, the court disagreed with *Adobe Lumber* because it ''neglects'' the Ninth Circuit's ''instruction that § 113(f) 'governs,' 'regulates,' and 'qualifies' a § 107(a) contribution claim and that a claim asserted by a PRP under § 107 requires the application of § 113.''

Recognizing that its holding conflicted with other district courts within the Ninth Circuit, the *City of Rialto* court certified the issue for permissive appeal to the Ninth Circuit. *City of Rialto v. United States Dep't of Defense*, 2005 U.S. Dist. LEXIS 25179 (C.D. Cal. Sept. 23, 2005). As a result, the Ninth Circuit will now have an opportunity to revisit its pre-*Aviall* holding in light of *Aviall* and its progeny.

In its brief before the Ninth Circuit, the Department of Defense (''DOD'') argued that *Aviall* did not provide any reason to revisit the Circuit's pre-*Aviall* precedent. DOD noted that courts have always recognized that the limitations in Sections 113(f)(2) and 113(g)(3) occasionally preclude a PRP from obtaining contribution. DOD also argued that contribution actions and cost recovery actions represent distinct remedies, and, because a PRP would necessarily make a claim for contribution, Section 113(f) provides the appropriate remedy for a liable party. In addition, DOD contended that PRPs have no implied right of contribution under Section 107. Instead, DOD asserted that Section 107 merely defines the liability of PRPs to others. Even if Section 107(a) did contain an implied right of contribution, the government argued, it ought to be restricted by the limitations imposed by Section 113. Otherwise, the Section 107 remedy would render Section 113 superfluous. The matter is currently in litigation in the Ninth Circuit.

■ **Aggio v. Estate of Aggio**, 2005 U.S. Dist. LEXIS 37428 (No. 04-4357) (N.D. Cal. Sept. 19, 2005).

The district court found that, in the wake of *Aviall*, it retained subject matter jurisdiction over a PRP's Section 107(a) claim for response costs incurred in cleaning up releases of hazardous substances. Like the courts in *Adobe Lumber*, *Kotrous*, and *Ferguson*, the

district court explained that ''Ninth Circuit authority recognizes that a PRP has an implied right to seek contribution under § 107(a)'' and that ''the Supreme Court specifically declined to consider that very question in *Aviall*.'' The court concluded that ''[u]ntil the Supreme Court or the Ninth Circuit rules otherwise, this court is bound by the Ninth Circuit's pre-*Aviall* decisions.''

As did the *Rialto* court, the district court certified for appeal its order denying defendant's motion to dismiss for failure to state a claim under CERCLA. 2006 U.S. Dist. LEXIS 3183 (N.D. Cal. Feb. 14, 2006). The claims have been in mediation.

■ **ASARCO, Inc. v. Union Pacific R.R. Co.**, 2006 U.S. Dist. LEXIS 2626, 62 ERC 1092(No. 04-2144) (D. Ariz. Jan. 24, 2006) (''*Asarco*'').

In assessing the right to contribution under Section 113(f)(3)(b) in the context of a settlement agreement between a PRP and a state, the court determined that to maintain a contribution claim under that provision the PRP must resolve its CERCLA liability in its settlement with the state. As such, resolution of the PRP's liability under state law is insufficient to maintain a claim for contribution. Similar to the *W.R. Grace* decision in the Western District of New York, the court explained that EPA may delegate to states the authority to enter into a settlement with a PRP that resolves that PRP's CERCLA liability. However, to create a valid CERCLA settlement for contribution purposes, a ''duly-authorized state must follow the same procedures and meet the same requirements when entering into CERCLA settlements as when the EPA itself is entering into such settlements, as the state is simply the agent of the EPA.'' Consequently, while states and PRPs may enter into environmental cleanup settlements absent EPA ''authorization,'' a settlement lacking such authorization cannot serve as a basis for a CERCLA contribution claim under Section 113(f)(3)(B).

Based on this conclusion, the district court found that a Memorandum of Agreement (''MOA'') between the PRP and the state and a No Further Action (''NFA'') letter issued by the state were insufficient to support the PRP's CERCLA contribution claim under Section 113(f)(3)(B). Because the state had not obtained the requisite authorization from EPA to enter into CERCLA settlement agreements, the MOA could not resolve the PRP's CERCLA liability. Moreover, the NFA letter had not even mentioned CERCLA, federal law, or the EPA. Therefore, the PRP was not entitled to maintain an action for contribution under Section 113(f)(3)(B).

■ **McDonald v. Sun Oil Co.**, 423 F. Supp.2d 1114, 62 ERC 1613 (D. Or. March 14, 2006) (''*McDonald*'').

Following several other federal district courts in the Ninth Circuit, the District Court of Oregon in *McDonald* held that a party who voluntarily cleans up its contaminated site may maintain an action against other PRPs to recover costs under Section 107(a). The court allowed the contribution claim to proceed because it deemed the claim consistent with pre-*Aviall* Ninth Circuit precedent, which supports an implied right of contribution under Section 107. Quoting that precedent, the district court explained that ''the enactment of § 113 in 1986 did not replace the implicit right to contribution many courts have recognized in § 107(a); rather, § 113 determines the contours of § 107, so that a claim for contribution requires the 'joint operation' of both sections.''

The district court also highlighted the Supreme Court's recognition in *Aviall* that Section 113 provides a savings clause, which ''rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP.'' The district court reasoned that because *Aviall* did not determine whether Section 107 provides an implied right of action for contribution, the Supreme Court left this decision to the lower courts. Thus, after finding that the plaintiff PRP ''is assisting voluntarily in the assessment and cleanup of the . . . property,'' the court held that in the absence of a civil action authorizing a Section 113(f)(1) claim, ''there still remains a private right of action for contribution under § 107 . . . . When a plaintiff falls outside the technical requirements of § 113, the contribution claim is allowed under § 107, and the mechanics of the apportionment are governed by the factors established in § 113.'' Therefore, the court denied the summary judgment motion to dismiss the plaintiff's Section 107 contribution claim.

■ **Sunnyside Develop. Co. v. Opsys U.S. Corp.**, 2006 U.S. Dist. LEXIS 26655 (No. C 05-01447 SI) (N.D. Cal. April 27, 2006) (''*Sunnyside*'').

In *Sunnyside*, the plaintiff sought recovery of its full response costs incurred while addressing hazardous substance releases that occurred during the defendant Opsys' lease of the property. Defendant Lite Array (which removed equipment from the property and caused hazardous substances releases) moved to dismiss the case on the grounds that the plaintiff Sunnyside, as a PRP, was precluded from seeking joint and several liability under Section 107. Sunnyside argued that it was not a PRP, and even if it were, it would be entitled to seek contribution under Section 107. The district court explained that, under the Ninth Circuit's decision in *Pinal Creek Grp. v. Newmont Mining Corp.* (118 F.3d 1298, 45 ERC 1588 (9th Cir. 1997)), a PRP cannot maintain a claim for joint and several liability under Section 107. Because the plaintiff, as a landowner, appeared to be a PRP, did not claim to be an ''innocent landowner,'' and did not expressly seek equitable contribution under Section 107(a), the court granted Sunnyside leave to amend its complaint to clarify whether it is a PRP and whether it seeks contribution, rather than cost recovery, under Section 107(a). In its amended complaint, the plaintiff alleged that it is an innocent landowner and that it is in fact seeking contribution. The case remains in litigation.

■ **AMCAL Multi-Housing, Inc. v. Pacific Clay Products**, 457 F. Supp.2d 1016 (C.D. Cal. Oct. 6, 2006) (''*AMCAL*'').

In *AMCAL*, plaintiffs purchased property from Pacific Clay Products and then discovered extensive onsite contamination. They notified local authorities and the fire department of the presence of the contamination and were required by the local authorities to remediate the site. After completing the cleanup, plaintiffs filed a Section 107(a) claim against Pacific Clay in the U.S. District Court for the Central District of California, and the defendant moved to dismiss on the grounds that AMCAL was a PRP. Broadening the split among California's federal district courts, the *AMCAL* court granted the motion to dismiss the plaintiffs' Section 107(a) claims for cost recovery. Tacitly agreeing with

  ER ISSN 0013-9211

the *City of Rialto* court, the *AMCAL* court determined that the Ninth Circuit's pre-*Aviall* precedent from *Pinal Creek* precluded plaintiffs from maintaining a cost recovery action against another PRP under Section 107(a) of CERCLA.

The court also found that because plaintiffs voluntarily remediated the onsite contamination, they also were precluded from bringing a contribution claim against the defendant under Section 113(f). The court explained that ''[u]ntil and unless the Ninth Circuit cuts loose the implied right to contribution under Section 107(a) from the moorings of Section 113(f)(1), a PRP who voluntarily incurs cleanup costs will have no right to recover any of those costs from other PRPs.'' The court added that ''[t]he only way out is for the PRP to demonstrate its entitlement to one of the many defenses to PRP status found in the statute.'' The court therefore dismissed plaintiffs' action, but granted them 30 days to file an amended complaint alleging a defense to PRP status.

The Tenth Circuit

■ **Raytheon Aircraft Co. v. United States**, 435 F. Supp. 2d 1136, 62 ERC 1746 (D. Kan. May 26, 2006) (''*Raytheon*'') (*see infra* at ''*Wartime Claims Litigation*'').

The Eleventh Circuit

■ **Atlanta Gas Light Co. v. UGI Utilities**, 463 F.3d 1201, 63 ERC 1000 (11th Cir. Sept. 6, 2006) (''*Atlanta Gas Light*'').

In *Atlanta Gas Light*, before reaching the merits of a veil-piercing claim under CERCLA, the Eleventh Circuit first determined that it had jurisdiction under Section 113(f)(3)(B) to adjudicate a claim brought by a PRP after incurring cleanup costs while acting pursuant to an EPA order. Notably, the plaintiff's complaint failed to specify the particular subsection of Section 113 under which its claims were brought. The defendant utility company argued that the court lacked jurisdiction due to the *Aviall* holding that parties may not maintain contribution claims under Section 113(f)(1) ''unless they had been sued under § 107 or § 106 themselves.'' Rejecting this argument, the court stated that ''as the Second Circuit in [*Con Ed*] noted, it [is] possible for a party that settled to bring an action under § 113(f)(3)(B) if the settlement cover[s] CERCLA claims.'' According to the court, this option was available to the plaintiff here because, after being identified as a PRP by EPA, Atlanta Gas Light ''negotiated with EPA and entered into orders to investigate and then to clean up the site.'' In the court's view, this meant that the plaintiff had ''settled and the settlement covered CERCLA claims.'' Therefore, the court ''readily'' concluded, without any additional analysis of whether other prerequisites exist for a party to be able to ''resolve'' its liability for Section 113(f)(3)(B) purposes, that ''we have jurisdiction under § 113(f)(3)(B).''

The D.C. Circuit

■ **Viacom, Inc. v. United States**, 404 F. Supp.2d 3, 62 ERC 1219 (D.D.C. July 19, 2005) (''*Viacom*'') (*see infra* at ''*Wartime Claims Litigation*'').

'Wartime Claims' Litigation

In a number of cases, private party PRPs have sought contribution from U.S. government agencies for response costs those PRPs have incurred in cleaning up facilities that contributed to wartime production of the United States (based on the ownership or ''operation'' of those facilities, in whole or in part, by the U.S. government during the time hazardous substances were released there). Because these so-called ''wartime claims'' cases typically do not arise in the context of a Section 106 or 107(a) civil action, or after an ''administrative or judicially approved settlement'' within the meaning of Section 113(f)(3)(B), the viability of these private PRP claims may be jeopardized by the *Aviall* decision and have already been the subject of motions to dismiss by the United States in the wake of *Aviall*.

■ **General Motors Corp. v. United States**, 2005 WL 548266 (D.N.J. March 2, 2005) (''*General Motors*'').

In *General Motors*, the district court held that (i) *Aviall* required a determination that the plaintiff's complaint for contribution failed to state a claim under Section 113(f)(l) because it did not allege any previous civil action taken under Sections 106 or 107(a), but that (ii) a motion for leave to amend the complaint to assert a right to cost recovery under Section 107(a) and, alternatively, an implied right of contribution under that provision would be granted in light of the opportunity of the Third Circuit to reexamine CERCLA 107(a) in the then pending *DuPont* appeal in light of *Aviall*.

On June 16, 2005, the district court stayed *General Motors Corp. v. United States* until the Court of Appeals for the Third Circuit issued its decision in *Dupont*. Order, *General Motors Corp. v. United States* (No. 01-CV-02201) (June 16, 2005). The Third Circuit issued its decision in *DuPont* on Aug. 29, 2006. However, the district court's stay on litigation in *General Motors* has yet to be lifted.

■ **E.I. DuPont de Nemours and Co. v. United States**, 460 F.3d 515, 62 ERC 2025 (3d Cir. Aug. 29, 2006) (''*DuPont*'').

''Wartime claim'' cases have provided a perspective on the view of the United States regarding the impact of the *Aviall* decision and causes of action now available to PRPs under CERCLA. For example, in *DuPont, supra*, a ''wartime claims'' case brought by DuPont and other parties before the U.S. Court of Appeals for the Third Circuit, DuPont filed a brief requesting the court to rule on the questions of whether a PRP who is liable under CERCLA has a cause of action under either Section 107(a)(4)(B) of the statute or federal common law to recover an equitable share of its response costs from another PRP, even in the absence of a prior or pending Section 106 or 107(a) action or Section 113(f)(3)(B) settlement.

The federal government filed its reply brief on April 22, 2005, arguing that ''CERCLA is properly interpreted to limit a PRP to seeking contribution in the manner authorized by Section 113(f)'' because, even if the language of Section 107(a) suggests an implied right of action, looking at CERCLA as a whole suggests otherwise. Specifically, the government contended that the pre-

conditions for a contribution action contained in Section 113(f) provide evidence that Section 107(a) does not provide a remedy not subject to these preconditions. Thus, even if Section 107(a) previously contained an implied right of action, it did not survive the enactment of Section 113(f). In addition, according to the government, finding an implied right of action in Section 107(a) would render Section 113(f) superfluous. Finally, the government asserted that the savings language in Section 113(f)(1) only referred to independent contribution actions that exist outside of CERCLA, such as under state law. In addition to the above arguments, the government maintained that the absence of an implied right of action in Section 107(a) is supported by the legislative history of the 1986 Superfund Amendments and Reauthorization Act, traditional understanding of contribution actions, and other provisions in CERCLA.

As explained in greater detail above (*see DuPont, supra*), on Aug. 29, 2006, the Third Circuit concurred with the federal government and held that a PRP who voluntarily cleans up a site and who is barred from bringing a contribution claim under Section 113 may not rely on Section 107 to seek contribution from other PRPs, including the United States government.

■ **Raytheon Aircraft Co. v. United States**, 435 F. Supp. 2d 1136, 62 ERC 1746 (D. Kan. May 26, 2006) (''*Raytheon*'').

In a complaint filed on July 28, 2005, defense contractor Raytheon Aircraft Company sought from the federal government contribution for cleanup costs incurred at a former military facility in Kansas pursuant to both a UAO issued by EPA and an AOC entered into with EPA. On Nov. 17, 2005, the United States filed a motion to dismiss the claim, arguing that *Aviall* prevents PRPs like Raytheon from seeking contribution for costs incurred as a result of the orders issued to Raytheon. In response, Raytheon alleged that the U.S. government is using *Aviall* to sidestep its own CERCLA liability. According to Raytheon, the United States is issuing UAOs and certain AOCs to private parties at sites where the United States is a PRP, which may preclude private PRPs from maintaining contribution claims following the *Aviall* decision.

On Feb. 24, 2006, the U.S. Chamber of Commerce filed an *amicus* brief, joining Raytheon in urging the district court to reject the government's motion to dismiss. In its brief, the Chamber argued that ''[b]y deciding whether to issue UAOs or employ one of the other enforcement options, the United States controls whether it can be sued for contribution as a PRP under section 113(f).''

On May 26, 2006, the district court issued its opinion, holding that Raytheon could not assert a claim under Section 113(f)(1) for contribution for costs incurred pursuant to the UAOs because a Section 106 administrative order does not qualify as a ''civil action.'' The district court also rejected Raytheon's argument that it could recover costs associated with responding to the UAO under Section 113(f)(3)(B). The government had conceded, however, that Raytheon could state a claim for recovery under Section 113(f)(3)(B) of certain costs incurred responding to the AOCs.

The district court also held that, because Raytheon failed to allege that it was not a PRP, it could not state a claim for cost recovery under Section 107(a). Having rejected Raytheon's claims for cost recovery, the court ultimately held that Raytheon could nonetheless state a claim for contribution under Section 107(a). Specifically, the district court held that a PRP who ''is barred from seeking recovery under Section 113(f) maintains an implied right to contribution under Section 107(a).'' The district court reasoned that this implied right had existed prior to the enactment of Section 113(f), which was not intended to diminish any rights. Therefore, if it was not encompassed by Section 113(f), as held in *Aviall*, the implied right of contribution remained in Section 107.

■ **Viacom, Inc. v. United States**, 404 F. Supp.2d 3, 62 ERC 1219 (D.D.C. July 19, 2005) (''*Viacom*'').

The *Viacom* court considered whether a PRP that had not been sued under CERCLA may pursue a contribution claim against the United States for the remediation of a New Jersey site where uranium for atomic bombs was processed. The district court held that a PRP that can not seek contribution pursuant to Section 113(f) has a right to seek recovery of its costs under Section 107(a).

The *Viacom* court explained that, unlike the district courts holding otherwise, it was not constrained by pre-*Aviall* D.C. Circuit decisions limiting PRPs to contribution actions under Section 113(f). Remarking that *Aviall* expressly held that Section 113(f) did not serve to preclude other types of recovery actions, the *Viacom* court rejected arguments to the contrary. The court cited in particular *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) (''*Key Tronic*''), as support for its holding that Section 107 and ''the implied cause of action thereunder . . ., compel the result that [a PRP] may seek to recover Superfund costs under that section.'' The *Viacom* court also noted that barring cost recovery for PRPs that have voluntarily remediated sites would provide an incentive for PRPs to wait to be sued before undertaking cleanup, which contradicts the main purposes of CERCLA—''prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible part[ies].'' Finally, the *Viacom* court referred to the legislative history of CERCLA to support its holding, observing that ''Congress [in enacting Section 113(f)] intended to 'clarify' and 'confirm,' rather than curtail, the right of contribution'' that courts had previously found implied in the statute.

See also supra the discussion of decisions in *Atlantic Research*, *Ford*, and *City of Rialto* involving other ''wartime claims'' cases.

Recovery of Response Costs for a Federal PRP

In some situations, the United States brings suit (or otherwise seeks) to recover response costs incurred by a federal department or agency PRP. Recognizing that its post-*Aviall* position that PRPs have no right under Section 107(a) to recover response costs could redound to the government's detriment where it is a PRP itself, the United States has now taken the position in several briefs that, as the ''sovereign,'' it ''always'' has a Section 107(a) action, even where a private PRP in the same circumstances would not. *See*, *e.g.*, *United States v. Atlantic Research Corporation*, No. 06-562, United States Petition for a Writ of Certiorari, October 2006 (''*Atlantic Research Corp.* Cert. Petition''), at 20-21 & n.9; *City of Rialto v. U.S. Department of Defense*, No. 05-56749 (9th Cir.), Brief of the U.S. Respondents, April 2006, at 25;

  ER ISSN 0013-9211

Metropolitan Water Reclamation District of Greater Chicago v. Northern American Galvanizing and Coatings, Inc., No. 05-3299 (7th Cir.), United States Amicus Brief, May 2006, at 13-14.

The predicate for this position is largely pre-*Aviall* case law and certain Section 113(f) legislative history. Although beyond the scope of this article, a number of robust arguments to the contrary exist, especially where the federal agency involved is acting merely as any other PRP rather than as an ''enforcer'' of CERCLA, e.g., when the agency is not acting pursuant to CERCLA authorities delegated by the President. *See*, *e.g.*, *DuPont*, 460 F.3d at 521 n.5 (''Of course, § 107 also renders PRPs liable to federal and state governments and Indian tribes, and thus those parties (*acting in their enforcement capacity and not as PRPs*) may bring § 107 cost recovery actions as well''), 528-29 (''the express cause of action under § 107 (cost recovery) is limited to governments and Indian tribes (*acting in their enforcement capacity*) and innocent landowners''). *See also Atlantic Research Corp.* Cert Petition, at 21 n.9 (''courts have recognized that, notwithstanding Section 113(f), the United States retains the right *to enforce* CERCLA through either Section 106 or Section 107(a), even when it also happens to be a PRP. . . .'') (emphasis supplied throughout). No post-*Aviall* court has yet ruled on this issue.

Implications of Post-Aviall Judicial Decisions

There are a number of reasons why one would have thought that, in the wake of *Aviall*, federal courts might be favorably inclined to assist PRPs in the search for sources of contribution rights within the scope of Section 113(f), Section 107(a), or elsewhere in CERCLA. These include (i) the clear congressional purpose, identified by numerous federal courts, to promote timely cleanup of contaminated sites by providing PRPs the incentives of contribution protection and contribution rights; (ii) the havoc that *Aviall* has created in overturning what appeared to be well-settled and essentially uniform jurisprudence in the lower courts that a CERCLA right of contribution exists even in the absence of a Section 106 or 107(a) civil action or Section 113(f)(3)(B) settlement; and (iii) the at least implicit invitation of the U.S. Supreme Court in *Aviall* for courts to re-examine whether PRPs have either an express or implied right of action under Section 107(a) of the statute (as well as the indication in the dissenting opinion in *Aviall*—and in *dicta* and the dissenting opinions in the Supreme Court decision in *Key Tronic*—that at least four justices on the Supreme Court appear inclined to rule that PRPs can recover a proportionate share of their response costs under Section 107(a)(4)(B)).

Although some post-Aviall decisions demonstrate a judicial willingness to interpret contribution rights under CERCLA ''broadly'' in the wake of *Aviall*, many district court decisions to date are not encouraging to those pursuing such rights. In some cases, district courts have simply felt compelled to adhere to pre-*Aviall* circuit precedent holding that PRPs have no claim under Section 107(a). In others involving Section 113(f)(3)(B) actions (to which PRPs have increasingly turned in light of *Aviall* and limitations on the use of Section 107(a)), courts have chosen to impose conditions on qualifying state ''administrative settlements'' not seemingly called for by the statute. These decisions, taken as a whole, indicate that the circumstances in which a PRP will be able to pursue cost recovery/contribution rights will vary for some time, not only among federal circuits but within federal circuits, and that considerable appellate litigation will be necessary (in the absence of congressional amendment of Superfund to clarify the scope of PRP causes of action) before the range of such rights is settled.

Even should the U.S. Supreme Court, as expected, bring at least some measure of clarity to the rights of PRPs under Section 107, there are likely to remain important interpretative questions and considerable uncertainty regarding the ability of PRPs to recover their response costs. For example, should the court decide that PRPs have a Section 107(a) action, it is not clear whether the court would (i) view that right as one for cost recovery under a joint and several liability theory (subject to a Section 113(f)(1) contribution counterclaim) or for contribution only (consistent with Ninth Circuit decisions), and (ii) conclude that the right is ''absolute'' or rather is conditioned (as the Second Circuit held in *Con Ed*) on the plaintiff not having been ''made to participate in an administrative proceeding'' (and, if so conditioned, what constitutes an ''administrative proceeding''). If a Section 107(a) right is so conditioned, parties not under government compulsion to conduct cleanups will be faced with a decision of whether to seek to conduct cleanups under administrative settlements in order to obtain liability releases and contribution protection (with the hope and expectation that such settlements will either qualify as Section 113(f)(3)(B) settlements or not invalidate a Section 107(a) action), or conduct *sua sponte* ''at risk'' cleanups.

Moreover, should the court hold that PRPs have a Section 107(a) action, it presumably will do so with the limitation that that action exists only when a PRP has no Section 113(f) contribution action. Otherwise, plaintiffs could pick and choose between the two sections and might be inclined to avoid the more ''generous'' provisions of Section 107(a). *See, e.g., Atlantic Research Corp.* Cert. Petition, at 21-22. (Of course, the curious fact that parties who do not settle with the government would thereby be in a more advantageous position than those who do has not been lost on some observers). In that event, we may find contribution defendants in the ironic position of arguing that Section 113(f)(3)(B) rights *are* available to the plaintiff(s) in their case, such that what may be a more favorable Section 107(a) right of action is not.

In the event that the Supreme Court holds that private PRPs are without a Section 107(a) action even if they also lack Section 113(f)(1) contribution rights, the question of what it takes to ''resolve one's CERCLA liability'' for Section 113(f)(3)(B) purposes would take on heightened importance. Supreme Court review of the issue of whether PRPs have Section 107(a) rights will not likely entail meaningful, if any, analysis of the predicates for a Section 113(f)(3)(B) action (especially if certiorari is granted only in the *Atlantic Research* and/or *DuPont* cases, as the U.S. has argued, but not *Con Ed*). Moreover, there currently is a relative dearth of informative circuit court discussion of the prerequisites to a Section 113(f)(3)(B) action. As such, the deeply divided district court decisions on what types of settlements qualify for Section 113(f)(3)(B) contribution purposes are likely to plague putative contribution

plaintiffs and spawn yet further litigation. Particularly troubling for plaintiffs are those decisions on state agreements that (i) require states to enter into cooperative agreements with EPA and/or ''follow'' CERCLA Section 122 settlement procedures in order to ''resolve CERCLA liability,'' and/or (ii) point to ''reopener-like'' provisions in state agreements as a basis for concluding that liability has not been ''resolved,'' despite the fact that Section 122(f)(6) of CERCLA *mandates* remedy reopeners in most federal settlements.

The stakes in, and impact of, such litigation are also likely to be high for a reason wholly independent of contribution rights. Given the virtually identical operative language in Section 113(f)(3)(B) and 113(f)(2), if a party does not have a Section 113(f)(3)(B) contribution right it likely does not have Section 113(f)(2) contribution *protection* either.

The above discussion merely scratches the surface of issues that have come to the fore in light of *Aviall*. As just one other example, the United States has argued, and found some judicial support for the notion, that despite Section 113(f)(1)'s requirement that contribution claims ''be governed by Federal law,'' contribution claims (even if cognizable under Section 107(a)) should be governed by traditional common law principles of contribution. *See, e.g., Atlantic Research Corp.* Cert. Petition, at 17. To the extent that be the case, contribution plaintiffs may find themselves facing more obstacles than seemingly has typically been the case in the past. *See, e.g., DuPont v. United States*, 297 F. Supp 2d 740, 58 ERC 1532 (D.N.J. 2003), *aff'd on other grounds*, 460 F.3d 515, 62 ERC 2025 (3d Cir. 2006), *petition for cert. filed*, No. 06-726 (contribution plaintiffs must demonstrate that (i) plaintiff and defendant are jointly liable to a third party, (ii) plaintiff has *discharged, under compulsion, the entire claim* of that party; and (iii) plaintiff has paid more than its fair share of that common liability).

For instance, if a plaintiff must have ''discharged'' the ''entire'' claim of a third party to pursue contribution against another party also liable for that claim, does that mean that plaintiff can not proceed with its claim until a cleanup is complete? If so, what constitutes ''complete''? Moreover, how would such a plaintiff, in many a remedial action case, be able to bring such a claim within the applicable statute of limitations under CERCLA, e.g., within six years of ''*initiation* of physical onsite construction of the remedial action'' under Section 113(g)(2)(B) of CERCLA? Finally, to the extent a party ''volunteers'' to conduct a cleanup, e.g., under a state brownfield or other ''voluntary cleanup'' program, has it done so ''under compulsion'' so as to trigger a contribution claim?

In the absence of legislative clarification, resolution of these fundamental issues is likely to require years of additional litigation. The above discussion suggests that if amendment of CERCLA is ultimately the path chosen, the task may not be as straightforward as some proposals to date have appeared to assume.

DOJ/EPA Aviall Guidance

In response to uncertainty in the federal courts stemming from the Supreme Court's decision in *Aviall*, EPA and the U.S. Department of Justice (''DOJ'') have issued interim revised model settlement language for administrative orders on consent (''AOCs''). *See* EPA and DOJ, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contributions Rights and Protection Under Section 113(f) (Aug. 3, 2005) (''DOJ/EPA *Aviall* Guidance''). The new interim language makes explicit that AOCs constitute ''administrative settlement agreements and orders on consent'' under Section 113(f)(3)(B) of CERCLA, thereby authorizing contribution suits with respect to matters covered in AOCs. The revised language in the AOCs now provides: ''The parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA . . . pursuant to which Respondents have . . . resolved their liability to the United States'' for past and future response actions and costs addressed by the AOC. The interim language revises AOCs for removal actions, remedial investigations/feasibility studies, and remedial designs.

Although it remains to be seen whether courts will concur with DOJ/EPA's interpretation of the statute, EPA and DOJ intend this new language to perfect and protect the rights of parties to a CERCLA AOC with EPA to file contribution claims against other PRPs at a contaminated site.

Options After Aviall Decision and Its Progeny

The *Aviall* decision and the case law that has developed in its wake present a number of challenges for parties seeking to recover under CERCLA costs incurred in cleaning up contaminated sites. The discussion that follows summarizes certain options that parties may wish to consider, depending upon the circumstances and jurisdiction in which they find themselves, to seek to maximize their chances for response cost recovery (or, as a defendant, attempt to forestall such recovery).

■ Pursue Section 107(a) Claim in Favorable Jurisdictions

Prior to *Aviall*, the Seventh and Ninth Circuits appeared to be the only circuits that allowed PRPs in some circumstances to recover their response costs under Section 107(a). *See, e.g., Nutri Sweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 784 (7th Cir. 2002) (allowing a PRP to bring a Section 107 action if, among other things, the PRP did not itself ''pollute'' the site in any way); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 45 ERC 1588 (9th Cir. 1997); *Western Properties Service Corp. v. Shell Oil Company*, 358 F.3d 678, 58 ERC 1022 (9th Cir. 2004) (although a PRP can not bring a claim for joint and several liability under Section 107, Section 107(a) confers an implied right of contribution for PRPs). As such, in the Ninth Circuit, PRPs generally may bring Section 107(a) claims for contribution, but cannot bring Section 107 claims for joint and several liability. In the Seventh Circuit, on the other hand, a party may wish to demonstrate that it did not ''pollute'' the site itself (even if it is liable, for example, as a current owner of the site) and pursue a Section 107(a) cost recovery claim.

Virtually all the other circuits ruling on the issue pre-*Aviall* appeared to require a plaintiff to demonstrate that it is not a liable party itself under CERCLA in order to pursue a Section 107(a) cause of action. However, post-*Aviall*, both the Second and Eight Circuits have recognized limited Section 107(a) claims by PRPs in certain circumstances. *See supra Con Ed* (PRP voluntarily remediating a site and ''not made to participate in

  ER ISSN 0013-9211

an administrative proceeding'' entitled to bring Section 107(a) cost recovery claim); *Atlantic Research Corp.* (finding that ''the broad language of § 107 supports not only a right of cost recovery but also an implied right of contribution'' for PRPs who voluntarily incur cleanup costs). In light of the *Con Ed* and *Atlantic Research Corp.* decisions, a PRP in the Second or Eighth Circuit may seek to demonstrate that it has a Section 107(a) cost recovery claim because it is voluntarily cleaning up a site without the compunction of an administrative order. An issue that may arise in such cases is whether ''administrative proceedings'' other than formal administrative orders (e.g., so-called ''voluntary agreements'' with states that parties must enter into to secure certain liability releases and other benefits) may jeopardize Section 107(a) claims.

In federal circuit courts arguably without controlling case law to the contrary, a PRP may wish to argue that in the wake of *Aviall*, courts should find that PRPs have cost recovery rights under Section 107(a). *See, e.g., Viacom, supra*. In any circuit, a party may also seek to invoke Section 107(a) for cost recovery by demonstrating that it has a valid Section 107(b) defense to CERCLA liability (i.e., that it is not a PRP due to an act of God, act of war, or the ''third party,'' ''innocent landowner,'' or ''bona fide prospective purchaser'' defenses found in CERCLA, § 107(b), 101(35),(40)).

■ Demonstrate That A Section 113(f)(1) Contribution Claim is Being Brought During or Following a Civil Action Under Sections 106 or 107(a) of CERCLA

This path forward is easy if EPA has filed a Section 106 civil action in federal court (an event which virtually never occurs) or, more likely, EPA or a state has filed a cost recovery action in federal court pursuant to Section 107(a) with respect to the response costs for which contribution is sought. In the absence of these judicial filings, a PRP is left to argue that any UAO (or AOC) that may have been issued pursuant to Section 106 should be considered a ''civil action'' under Section 106. In crafting arguments to that effect, PRPs should be mindful of the rationale of the *Pharmacia*, *Raytheon*, and *Blue Tee* courts in their opinions holding that an administrative order is not a ''civil action'' for purposes of Section 113(f)(1). *But see Carrier, supra*. PRPs may also want to evaluate the benefits of seeking an AOC (rather than accepting a UAO) that could be crafted in a way that it likely passes Section 113(f)(3)(B) muster.

■ Demonstrate That a Section 113(f)(3)(B) Contribution Claim is Being Brought by a Party That Has Already Resolved Its Liability to the United States or a State in an ''Administrative or Judicially Approved Settlement''

In making this demonstration, a PRP should be prepared to address the following arguments, among others, that may be raised in opposition to such a claim based on an existing ''settlement agreement'' (similarly, a PRP opposing such a claim should evaluate making these arguments):

- For the reasons most fully stated by the *Pharmacia* court, an administrative consent order ''issued'' under Section 106 should not be construed to be an ''administrative settlement'' within the meaning of Section 113(f)(3)(B). (Note that parties may seek to rely on similar arguments to advance a position that an AOC under state law is not an ''administrative settlement'' for purposes of Section 113(f)(3)(B). The ultimate strength of such arguments will rest not only on the merits of the *Pharmacia* court's rationale, but also on the language of the order itself and the structure of the state law under which the order is issued.). Of course, to the extent federal consent orders for removal actions, RI/FSs, or remedial designs are involved, the DOJ/EPA *Aviall* Guidance provides guideposts for assessing their adequacy for Section 113(f)(3)(B) contribution right purposes. Plaintiffs may face arguments, nonetheless, that that guidance, interpreting as it does legal rights and obligations under CERCLA, is not entitled to deference by courts.

- A settlement with a state is not an ''administrative settlement'' for purposes of Section 113(f)(3)(B) unless it resolves a PRP's CERCLA liability, rather than merely a PRP's liability under state law. *See, e.g., Con Ed, supra*; *Waukesha, supra*; *Elementis, supra* (''Thus, § 113(f)(3)(B) says in essence that any person who has settled with the United States or a state regarding its *CERCLA* liability may seek contribution from any other person who has not so settled.''); *E.I. DuPont de Nemours & Co. v. United States,* 297 F. Supp.2d 740, 747 (D.N.J. 2004) (''a CERCLA contribution action can only be brought in three circumstances. . . . (ii) a contribution action may be brought following a judicially or administratively approved settlement of *CERCLA* liability pursuant to Section 113(f)(3). . . .''); *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys.,* 255 F.Supp.2d 134, 152 (W.D.N.Y. 2002) (''*Pfohl Brothers*'') (''CERCLA § 113(f)(3)(B) authorizes a PRP who has administratively *settled its liability under CERCLA § 106 or § 107(a)* to the federal or a state government regarding its response and remediation costs to seek contribution . . . .'') (emphasis supplied throughout).

- A party has not ''resolved its liability'' unless it has received in an administrative settlement a covenant not to sue and release from further liability from the federal or state government for the response actions and costs for which it seeks contribution. *See, e.g., ITT, supra*. Even if a party has received a covenant not to sue and release from liability, a party has not ''resolved its liability,'' and therefore can not bring a Section 113(f)(3)(B) contribution claim, until the conditions upon which that covenant and release are predicated (e.g., implementation of a remedy) have been met.

  In this regard, it should be noted that cases addressing when contribution protection under Section 113(f)(2) becomes effective under a settlement agreement support an argument that a party has ''resolved its liability'' upon entering the agreement. *See, e.g., Dravo Corp. v. Zuber,* 13 F.3d 1222, 1226, 37 ERC 2073 (8th Cir. 1994) (''*Dravo*'') (rejecting argument that contribution protection did not begin until after settling parties had completed the actions required of them under the agreement, and holding instead that that protection was conferred ''at the time the settling parties entered into the agreement'' (based upon, among other things, the language of the agreement), and remained in effect as long as the settling PRPs remained in compliance with the agreement); *U.S. v. Colorado & Eastern R. Col.,* 50 F.3d 1530, 1538, 40 ERC 2109 (10th Cir. 1995) (going even further than *Dravo* and holding that failure of settling parties to pay monies owed under a consent decree did not constitute a default that terminated contribution protection).

- The existence of ''reopeners'' in a settlement agreement demonstrates that a party remains liable for additional response actions and costs of the type covered by the agreement, and has not ''resolved its liability'' for Section 113(f)(3)(B) purposes with

respect to those actions and costs. *See, e.g.*, *Con Ed, supra*, and *Niagara Mohawk, supra*. It should be noted that this position would appear to argue too much. Congress required that covenants not to sue for future liability in settlement agreements under Section 122 of CERCLA contain ''reopeners'' for ''unknown conditions'' (such agreements typically contain ''reopeners'' for ''new information'' as well). At the same time, Congress clearly intended that Section 113(f)(3)(B) contribution rights be accorded to parties who have ''resolved their liability'' in a Section 122 agreement. Courts can properly give effect to both statutory provisions, as they must, only if Section 113(f)(3)(B) contribution is available despite the presence of a Section 122 reopener. The same results should pertain for any other ''reopener'' under a federal or state agreement (at least unless and until the reopener is triggered). Otherwise, a Section 113(f)(3)(B) contribution right would never materialize due to the ongoing nature of the reopener condition(s).

- A party has not resolved its liability to a state for purposes of Section 113(f)(3)(B) unless the state was acting pursuant to authority delegated by agreement with EPA pursuant to CERCLA and/or the consent agreement was otherwise consistent with the requirements for settlements in Section 122 of CERCLA. *See, e.g.,W.R. Grace*, *supra*; *ASARCO*, *supra*; *ITT*, *supra*. *But see, e.g.*, *Seneca Meadows, supra.*

- Even if a state administrative settlement declares that it is a Section 113(f)(3)(B) settlement, that declaration does not in and of itself render it such. Instead, a Section 113(f)(3)(B) contribution claim does not arise in the absence of a settlement that would trigger the statute of limitations under Section 113(g)(3), which the Supreme Court in *Aviall* arguably turned to in order to define the contribution rights established in Section 113(f). *See, e.g.*, Defendants' Memorandum of Law in Support of Motion to Dismiss Complaint, *Pfohl Brothers*, *supra*, July 20, 2005. *But see Pfohl Brothers*, 255 F.Supp. 2d at 154-155 (in finding in favor of plaintiff's right to pursue a Section 113(f)(3)(B) claim, invoking the stated intention of the parties that their resolution of state response cost claims under Section 107(a) of CERCLA qualified as a state ''administrative settlement'' within the meaning of Section 113(f)(3)(B)).

To the extent the case at hand involves a state administrative settlement, the discussion above assumes that a party seeking to invoke Section 113(f)(3)(B) contribution rights must demonstrate that it has ''resolved its liability'' to the state for the response actions that that party itself has taken. However, to the extent a party must resolve only its *CERCLA* liability to a state for purposes of Section 113(f)(3)(B) (*see supra*), it is worth noting that the only liability a PRP has to a state under CERCLA is under Section 107(a) for that *state's own* response costs, and not for any response actions that need to be taken—and were taken—by the PRP at a site. (States have no enforcement authority under Superfund to require PRPs to undertake response actions). This circumstance raises the interesting question of whether a PRP: (i) only needs to resolve *state* response cost claims in order to perfect a Section 113(f)(3)(B) contribution right to recover a portion of the *PRP's* response costs (a seemingly unlikely result); (ii) needs to resolve its liability to the state under *state* law for response actions required at the site (which would seem to fly in the face of the case law cited above that it is *CERCLA* liability that needs to be resolved); and/or (iii) cannot bring a Section 113(f)(3)(B) contribution action via a state administrative settlement unless it has also resolved its liability to the United States for the response actions that are the source of the contribution claim at issue (a result at odds with the language of Section 113(f)(3)(B) allowing for settlement with the United States *or* a state).

Given the discordance among judicial decisions interpreting Section 113(f)(3)(B) in the wake of *Aviall*, creative defendants are likely to raise obstacles in addition to those set forth above in opposition to Section 113(f)(3)(B) contribution claims. The nature and force of these arguments will be dictated by, among other things, whether the ''settlement agreement'' at issue was issued under federal or state law and the language of the agreement itself.

■ Seek and Obtain Modifications to Existing Settlement Agreement So That It Qualifies as Section 113(f)(3)(B) ''Settlement''

If a PRP is concerned that an existing settlement agreement with EPA or a state may not qualify as a Section 113(f)(3)(B) ''settlement'' (e.g., because the state agreement does not resolve liability under CERCLA or contain a sufficiently effective covenant not to sue or release from liability), it could seek to have EPA or the state modify that agreement so that it comports with what a court would likely expect for purposes of Section 113(f)(3)(B). In doing so with EPA, a PRP should be mindful of the DOJ/EPA *Aviall* Guidance and that EPA (and states) are unlikely to want to modify an existing agreement absent a compelling reason to do so. Even if this approach might not ''perfect'' Section 113(f)(3)(B) claims for prior response costs incurred during any time the original ''settlement'' was determined to be ''infirm'' under Section 113(f)(3)(B), it could salvage claims for future response actions and costs, which would be particularly useful if few response actions had yet been taken under the agreement.

■ Enter Into New ''Administrative or Judicially Approved Settlement'' That Qualifies as Section 113(f)(3)(B) Settlement

PRPs who are contemplating cleaning up contaminated property voluntarily and out from under the auspices of the federal or state government, or who are facing a federal or state UAO seeking to compel such cleanup, may now have additional incentives to enter into an ''administrative settlement'' with EPA or the relevant state to ''resolve'' their liability for response actions and costs at issue. *But see*, *supra*, *Con Ed* and *Atlantic Research Corp.* (which indicate that this may not be the case if a PRP is cleaning up a site on a wholly voluntary basis and wishes to preserve a Section 107(a) claim). To the extent pursuit of an acceptable administrative settlement is viewed as an attractive option, the discussion above reveals that any such settlement agreement will need to be very carefully drafted to ensure, as best as possible, that the agreement passes muster as a Section 113(f)(3)(B) ''settlement.''

For purposes of a settlement with EPA, an AOC with the model AOC ''settlement'' language from the DOJ/EPA *Aviall* Guidance should be employed (or should at least be used as a starting point). For purposes of a settlement with a state agency, the prerequisites to a Section 113(f)(3)(B) settlement are less clear. Some courts, like the *W.R. Grace*, *Asarco*, and *Niagara Mo-*

  ER ISSN 0013-9211

hawk courts, have essentially required settlements that are on all fours with the settlement authorities and procedures set forth in CERCLA for EPA. Most other district courts to date, such as *Seneca Meadows*, have required much less. While the necessary prerequisites are thus likely to vary depending upon the district court in which one finds oneself, the following factors should be considered, at a minimum:

- While a simple ''No Further Action'' letter may perhaps be generally satisfactory for financing purposes and for a determination on the part of a prospective purchaser that the risk associated with a transaction and/or clean-up is acceptable, that mechanism may well not suffice if a current owner or prospective purchaser is contemplating pursuit of other PRPs for a portion of response costs incurred (e.g., because it contains no release from CERCLA liability or covenant not to sue sufficient to pass Section 113(f)(3)(B) muster).

- In addition to the items referenced above that should be addressed in any such settlement agreement, it would appear prudent to include in any such agreement, among other things, language to the following effect evidencing the intention of the parties:

  For purposes of 42 U.S.C. § 9613(f)(2), (3)(B), this agreement is intended by the parties to constitute, and shall be construed as, an ''administrative settlement'' that has resolved the liability of [name of PRP(s)], if any, under federal and state law, including all statutory and common law, for the response actions and costs addressed in this settlement agreement. Notwithstanding any other provision of this agreement, the contribution protection afforded by 42 U.S.C. § 9613(f)(2), and the contribution rights provided by 42 U.S.C. § 9613(f)(3)(B), shall be effective upon the effective date of this agreement [as that date is defined in the agreement].

  See, *e.g.*, *Pfohl Bros.*, 255 F.Supp 2d at 154-155 (finding that state ''Orders on Consent'' that: (i) were issued under state statutory remedial and order authority, (ii) declared the parties' intention that they ''qualify as State administrative settlements within the meaning of [Section 113(f)(3)(B)],'' and (iii) resolved the liability of the settling parties for state response costs at the site under Section 107(a) and required the settlors to reimburse state costs and remediate the site, were ''administrative settlements by which the [settlors] have settled their liability to [the state] in connection with the cleanup and remediation of the [site], in accordance with [Section 113(f)(3)(B)]'').

- Put another way, any settlement with a state should, at a minimum, (i) resolve a PRP's CERCLA liability (ii) through some form of release or covenant not to sue (iii) that takes effect upon the effective date of the settlement agreement. In addition, parties entering such settlements would do well to ensure that other ''standard'' provisions in state settlements, e.g., in state ''voluntary cleanup program'' agreements, do not undercut the showing that must be made that *CERCLA* liability has been *resolved*.

It should be noted that Section 113(f)(3)(B) does not appear on its face to limit federal ''settlements'' to agreements reached pursuant to CERCLA authorities. Accordingly, although assuredly an open question, a ''settlement agreement'' reached largely under other federal statutes (e.g., an AOC under the corrective action provisions of Section 3008(h) of RCRA for investigative activities or interim measures) *might* qualify as a Section 113(f)(3)(B) ''settlement'' in some courts as long as it ''resolved'' a PRP's liability under CERCLA as well.

■ In Circuits With Controlling Case Law to the Contrary, Bring Section 107(a) Action Nonetheless on the Theory That Section 107(a) Creates Express Right to Cost Recovery

As noted above, PRPs in most federal circuits remain without a right of action under Section 107(a). However, the *Aviall* decision left open the question of whether a PRP has an express right of action under Section 107(a) of CERCLA to recover less than all of its response costs. As also noted above, an analysis of the dissenting opinions in the *Aviall* and *Key Tronic* opinions indicates that at least four of the Justices on the Supreme Court believe that PRPs can recover an equitable share of their response costs under Section 107(a)(4)(B). Taken together with the unanimous dicta in *Key Tronic* that Section 107 ''unquestionably provides a cause of action for private parties to seek recovery of cleanup costs,'' *Key Tronic*, 511 U.S. at 818, these opinions suggest that there is a reasonable chance that the Supreme Court, squarely faced with the issue, would hold that PRPs have a right to cost recovery of at least a portion of their response costs in the absence of an available Section 113(f) contribution claim.

Accordingly, despite circuit court case law to the contrary, PRPs could file claims under Section 107(a) in those circuits and seek to recover their response costs from other PRPs on the theory that Section 107(a) provides an express right of action for such costs, whether that right is styled as a right of cost recovery or contribution. The principal and most fundamental basis for arguing for such a cause of action is the language of Section 107(a)(4)(B), which states that any person liable under Section 107 for response costs is liable for ''*any* other necessary costs of response incurred by *any other person* consistent with the national contingency plan'' (emphasis supplied). While the analysis gets rather complex quickly after that general proposition, arguments in favor of a Section 107(a) action for PRPs have ultimately prevailed, at least in the context of ''voluntary'' cleanups, in the Second and Eighth Circuits, despite pre-*Aviall* case law there seemingly to the contrary.

That said, such arguments are likely to be met by resistance from federal district courts, who may well be unwilling to depart from established circuit precedent against such a right in light of the failure of the *Aviall* decision to call that precedent into question. *See ITT* and *R.E. Goodson, supra*. Moreover, U.S. Supreme Court review of this question it left unanswered in *Aviall* would obviate the need to ''swim upstream'' against adverse circuit precedent.

■ Bring Action for Response Costs on the Theory That There Is Implied Right of Contribution Under Section 107(a) of CERCLA

In *Aviall*, the Supreme Court also expressly declined to decide whether PRPs have an implied right of contribution under Section 107(a) of the statute in the absence of an express right. In so doing, the court noted that it had visited the subject of implied rights of contribution in *Texas Industries v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638-47 (1981) (''*Texas Industries*''), and *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 90-99 (1981) (''*Northwest Airlines*''). In both of

those cases, the Supreme Court refused to recognize either implied contribution rights in the federal statutes involved or federal common law contribution rights. Some commentators have suggested that the Supreme Court's invocation of these two decisions suggests that the court is dubious as to whether an implied right of contribution exists under Section 107(a) of CERCLA.

However, since the Supreme Court issued its *Aviall* opinion, various district courts in the Ninth Circuit have indicated that *Aviall* left intact preexisting precedent in the Ninth Circuit indicating that PRPs have an ''implied'' or ''implicit'' right of contribution (i.e., for less than joint and several liability) under Section 107(a). *See* ''*The Ninth Circuit*'' discussion, *supra*. As discussed *supra*, the Eighth Circuit in *Atlantic Research Corp.* also found that PRPs have an implied right to contribution under Section 107(a).

On the other hand, the Third Circuit in *DuPont* and district courts in the Fourth and Sixth Circuits have found that *Aviall* left intact preexisting precedent in their respective circuits indicating that Section 107(a) does not support an implied right of contribution for PRPs. *See supra*. The United States also advocated this position in an *amicus* brief filed with the Seventh Circuit on May 1, 2006, for the interlocutory appeal of *Metropolitan Water Reclamation Dist. of Greater Chicago v. N. American Galvanizing & Coatings, Inc.*, (No. 05-3299) (7th Cir.). In its brief, the United States argued that Section 107 provides a right of cost recovery to only the United States, states, Indian tribes, and nonliable private parties; it does not provide an implied right to contribution because that ''would potentially allow a PRP to circumvent the substantive requirements of sections 113(f)(1) and (f)(3)(B).'' Complicating the matter, federal district courts within each of the Fifth and Seventh Circuits have come to conflicting decisions over whether PRPs have an implied right to contribution under Section 107(a).

Although the Supreme Court as a general matter has increasingly looked with disfavor upon finding ''implied'' causes of action in federal statutes, substantial arguments can certainly be advanced, based on that Court's precedent and the language of—and congressional intent behind—CERCLA, that an implied right of contribution should be found in Section 107(a). As evident by post-*Aviall* jurisprudence to date, however, the receptivity of courts to this claim remains uncertain at best.

■ Pursue a Common Law Right of Contribution

A PRP also might argue that a right of contribution exists as a matter of federal common law. Once again, *Texas Industries* and *Northwest Airlines* provide the framework for analysis. Arguments in favor of finding a federal common law right of contribution would include the following:

- A federal rule of decision is necessary to protect several uniquely federal interests in CERCLA, including the waiver of sovereign immunity therein; and
- Congress has vested exclusive jurisdiction in the federal courts for CERCLA claims and empowered them to create governing rules of law for CERCLA (e.g., Congress intended to create a federal common law right of contribution for claims for recovery of an equitable share of response costs, as is evident from the legislative history not only of CERCLA as originally enacted in 1980, but also when the statute was amended in 1986 to add an express right of contribution in Section 113 of the statute).

However, post-*Aviall* courts ruling on the issue to date have not been receptive to claims for contribution based on federal common law. Although various judicial decisions had found such a common law-based cause of action for contribution prior to the enactment of Section 113 in 1986, post-*Aviall* case law generally holds that the enactment of Section 113 obviated the need (and left courts without authority) to continue recognizing and permitting such claims. *See, e.g.*, *DuPont* (3d. Cir.), *supra*; *Aviall* (N.D. Texas), *supra*; *Mercury Mall Associates, supra*; and *Blue Tee, supra*. DuPont's aforementioned petition to the U.S. Supreme Court for a writ of certiorari asked for review of the Third Circuit's holding that no such federal common law claim exists.

■ Pursue Available Rights of Contribution Under State Law

Contribution rights may be available to PRPs under state statutory or common law. This option will necessitate a close, case-by-case examination of relevant state statutory and case law decisions. Arguments that may be advanced against such claims include, but certainly are not limited to, the following:

- State law contribution actions are preempted because they conflict with the CERCLA contribution scheme. *See*, *e.g.*, *Bedford Affiliates*, *supra*, 156 F.3d at 425-26 (2nd Cir. 1998); *In re Reading*, 115 F. 3d 1111, 1117 (3d Cir. 1990).
- In the case of contribution claims against federal PRPs, such claims are barred because, unlike with respect to liability under CERCLA, the United States has not waived sovereign immunity with respect to such state law claims. *But see* 42 U.S.C. § 9620(a)(4) (Section 120(a)(4) of CERCLA) (''State laws concerning removal and remedial actions, *including State laws regarding enforcement,* shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States. . .'') (emphasis supplied).

At least two post-*Aviall* district courts to date have prohibited plaintiffs from pursuing state common law and statutory causes of action for contribution. In *Blue Tee*, *supra*, the Western District of Missouri denied the plaintiff's state common law claim for contribution on the ground that Section 113(f)(1) requires application of federal law to contribution claims by PRPs under CERCLA. The court explained that ''any common-law claim for contribution in Missouri would be preempted by the express language of CERCLA § 113, which provides that contribution claims against parties who are liable or potentially liable under § 107(a) 'shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.' '' Because the plaintiff was a PRP, it ''must look to § 113(f), and not state law, for any right to contribution.'' In *W.R. Grace*, *supra*, the Western District of New York found that CERCLA does not completely preempt the pursuit of state remedies, but that the plaintiff had failed to demonstrate arranger liability of the defendant under the state law at issue, thus precluding a state law-based cause of action.

As a separate matter, it is worth nothing that one state court recently relied on the Supreme Court's rationale in *Aviall* as guidance for evaluating claims under the state superfund statute where that statute was ''suf-

  ER ISSN 0013-9211

ficiently similar'' to CERCLA to allow for reasonable comparison. *See, e.g.*, *Hicks Family Ltd. P'ship v. 1st Nat'l Bank of Howell*, 2006 Mich. App. LEXIS 2933 (No. 268400) (Mich. Ct. App. Oct. 3, 2006) (relying on *Aviall* to hold that a party that incurs costs remediating a contaminated site in Michigan has a right of action for contribution under Michigan's superfund law, the Natural Resources and Environmental Protection Act, if the party has itself been sued under the law).

■ Conduct a ''Voluntary'' Cleanup Under a State ''Brownfields Program'' and Rely on the ''Enforcement Bar'' Under Section 128(b) of CERCLA

Under Section 128(b) of CERCLA, the United States may not use its authority to take administrative or judicial enforcement action under Section 106(a), and may not recover its response costs pursuant to Section 107(a), against a party at an ''eligible response site'' (as that term is defined in Section 101(41) of CERCLA) that ''is conducting or has completed a response action'' that is ''in compliance with the State program that specifically governs response actions for the protection of public health and the environment.''

Although certain sites are not eligible for this CERCLA ''enforcement bar,'' and although the bar is subject to certain other exceptions and conditions (including an ''imminent and substantial endangerment'' reopener), this prohibition on federal action under Sections 106(a) or 107(a) is otherwise applicable to response actions under state ''voluntary cleanup,'' or ''brownfields,'' programs without regard to whether those programs have been independently determined by EPA to be ''sufficiently robust.'' Moreover, the prohibition is applicable regardless of the nature of any ''agreement'' the party conducting the response action has reached with the state, as long as the cleanup is being conducted in compliance with state program requirements.

It could be argued that a party conducting a cleanup that qualifies for the Section 128(b) enforcement bar has either (i) ''resolved its liability'' to the United States by doing so (albeit not in a ''settlement agreement'' with the United States, unless a party were able to secure a written ''agreement'' from the United States to that effect), (ii) independently resolved its liability to the state to the extent it has reached a requisite Section 113(f)(3)(B) ''settlement agreement'' with the state under that program (*see supra*), or (iii) perhaps most simply, has a defense to liability under Section 107(a) of CERCLA (at least insofar as the United States is concerned) and therefore is entitled to bring an action for recovery of its costs under Section 107(a) against other PRPs as a ''non-liable'' party (provided that it is conducting its response activities in accordance with the state program).

The above argument may hold the most promise at ''eligible response sites,'' especially inasmuch as it would appear to require no more than compliance with the terms of a state voluntary cleanup program. That said, the argument (apparently untested in court) is likely to be vigorously contested. For example, one response to it is that while Section 128(b) provides a defense to liability to the United States, it does not provide a defense to liability under CERCLA to the state, thereby potentially making it harder for a party to argue that it has a complete defense to CERCLA liability to the state and is a non-liable party entitled to bring a cost recovery action under Section 107(a). That said, as noted above, the only claim that a state has under CERCLA is for recovery of its own response costs. If the Section 107(a) claims a party were to bring on the basis of the Section 128(b) bar did not involve a claim for recovery of a portion of state response costs paid by that party, the potential existence of such a state claim under CERCLA should be of little moment. Moreover, to the extent that party has resolved its liability under CERCLA for state response costs for which that party now seeks cost recovery/contribution under Section 107 in concert with recovery of its own response costs, that party should be able to argue that it has a complete defense to *any* CERCLA liability for the response actions and costs for which it seeks cost recovery.

■ Seek to Address Liability for Response Costs Through Contractual and Insurance Rights

To the extent that recovery of response costs by a seller or a buyer of assets in a commercial transaction is of both sufficient moment and uncertainty (in the wake of *Aviall*), a party to a transaction may simply want and need to address rights to recovery of such costs as best it can through contractual rights and obligations established in transaction documents. To the extent that approach is less than satisfactory (or even if it is satisfactory), the availability (and potential assignment) of insurance rights emanating from historical Comprehensive General Liability policies or new environmental insurance policies covering certain response costs may warrant consideration.

Prospects for Congressional Relief

For at least three reasons, Congress has not moved swiftly (despite certain limited initiatives to date) to enact amendments to Superfund that overturn the *Aviall* decision or reduce the uncertainty created by it:

- Congress has waited first to see whether the courts will craft acceptable ''remedies'' to fill the gaps in contribution rights created by *Aviall* (Supreme Court review of PRP rights under Section 107(a) will likely foster this ''wait and see'' attitude);
- Federal agencies and departments such as the Departments of Defense and Energy, who have clearly benefited from *Aviall*'s limitation on contribution rights, would vigorously oppose such congressional action and make it very difficult for the Bush Administration to support it; and
- Many other parties oppose reopening CERCLA to address *Aviall*, fearful that other significant issues posed by the statute will come to the fore that they would rather not see face legislative change (e.g., Superfund taxes and natural resource damage claims).

Notwithstanding those forces, the U.S. Department of Justice (''DOJ'') formed a workgroup in the aftermath of *Aviall* that has examined both legislative changes to CERCLA and increased enforcement funding to address concerns that the *Aviall* decision may unduly hinder the pace of ''voluntary'' cleanups. Moreover, efforts were undertaken in the Senate Environment and Public Works Committee to examine the appropriateness and viability of legislative amendments to address the untoward impacts of *Aviall*. Likewise, on Oct. 23, 2006, Rep. John Dingell (D-MI), then ranking minority member of the House Energy and Commerce Committee, sent a letter to EPA requesting the Agency's input on a prospective legislative fix to limit or reverse

Aviall's implications by amending Section 113 of CERCLA to eliminate the language that the Supreme Court interpreted as precluding a PRP from seeking contribution unless it has first been subject to a Section 106 or 107(a) civil action. These efforts may intensify in both Houses of Congress with the Democratic Party's return to control of the House and Senate, especially if party leaders see fit to ''re-open'' Superfund for other reasons.

Given (i) that it will likely take some time (and significant appellate litigation) before the courts sort through the scope of available contribution rights in the wake of *Aviall*, (ii) the increasing recognition that courts have failed to fashion a ''common'' response to the *Aviall* decision, such that contribution rights vary considerably from jurisdiction to jurisdiction, (iii) the strong federal policy and need (given limited available federal funding) to encourage private party cleanups, and (iv) the parallel interest of state and municipal governments in promoting ''voluntary cleanups'' (especially where significant economic benefits will thereby accrue from resulting site redevelopment), there is likely to be considerable ongoing pressure on Congress to take steps to clarify and expand the availability of contribution rights in the wake of *Aviall*. Although Supreme Court review of whether PRPs have an action under Section 107(a) to recover response costs may well alleviate such pressure in the short term, it remains unclear, for the reasons set forth above, whether any such review will adequately address the havoc occasioned by post-*Aviall* litigation.

Conclusion

The Supreme Court granted review of the *Aviall* decision of the Fifth Circuit to resolve whether a PRP that has not been sued under Sections 106 or 107(a) of CERCLA may nonetheless assert a claim for contribution under Section 113(f)(1) of the statute. In overturning years of what appeared to be well-settled jurisprudence that such a claim does exist, the court's decision unleashed a torrent of litigation that has done little, at bottom, to settle the expectations of PRPs as to their rights to recover cleanup costs. Now, more than two years after the court's decision, the scope of those rights is not only highly uncertain as a general matter but also subject to the fortuitous circumstance of which federal judicial circuit or district a PRP happens to find itself.

While Supreme Court review and resolution of the question of whether PRPs have an action under Section 107(a) should add a measure of clarity to what is now a cloudy picture, that resolution—no matter its nature—is not likely to put to rest various uncertainties which beset those seeking to recover response costs. Not the least of these are posed by the highly inconsistent post-*Aviall* decisions as to what it takes to ''resolve liability'' for purposes of Section 113(f)(3)(B) contribution rights. Those decisions are not likely to be the subject of near term Supreme Court review, and they portend a new wave of litigation almost irrespective of what the Supreme Court may do with the issue of a PRP's Section 107(a) rights. Moreover, given the virtually identical relevant language in Sections 113(f)(3)(B) and 113(f)(2) of CERCLA, those decisions have far-reaching consequences for contribution protection as well, for if a party has not ''resolved its liability'' for Section 113(f)(3)(B) contribution right purposes it is difficult to imagine how it has ''resolved its liability'' for purposes of Section 113(f)(2) contribution protection. Parties sleeping soundly tonight, confident in their contribution protection, may wake up tomorrow to find that they have been sleeping without the protective cover they thought guarded them so well.

The underlying purposes served by CERCLA and wise stewardship of public and private resources are not well served by the present state of post-*Aviall* affairs. Though certain quarters would no doubt beg to differ, a well-reasoned case can be made that legislative relief and ''clarity'' are appropriate and necessary, despite the apparent difficulty (and accompanying risks) of seeking to secure those ends. While it is probable that the prospect of a near-term ''definitive'' Supreme Court ruling on Section 107(a) rights of PRPs will delay any meaningful push for legislative action, in the eyes of some, Congress can not ride to the rescue soon enough. After all, as the Third Circuit aptly noted in *DuPont*, *supra*, the debate over the circumstances in which PRPs should be entitled to pursue recovery of their response costs under CERCLA is a matter for Congress and ultimately warrants a policy decision by it, and not by our courts.

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