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Options For Potentially Responsible Parties to Pursue Recovery Of Response Costs In the Wake Of The *Aviall* Decision

Karl S. Bourdeau
Beveridge & Diamond, P.C.
Washington, DC
kbourdeau@bdlaw.com

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Beveridge & Diamond, P.C.
Washington, DC
kbourdeau@bdlaw.com

I. INTRODUCTION

A. To promote and maximize expeditious private party cleanup of contaminated sites, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act "(CERCLA", or Superfund) in 1984 to:

1. 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"), and

2. provide PRPs a 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 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).

B. Almost uniformly, the federal Circuit Courts of Appeal interpreted this statutory scheme as:

1. 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, and

2. in light of that right and other relevant language, not authorizing a party that is itself liable under CERCLA to bring a judicial action for "cost recovery" of its response costs under Section 107(a) of the statute, despite language in that provision authorizing "any person" who has incurred "necessary" costs of response "consistent with the National Contingency Plan" to recover such costs.

C. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, ____ *U.S.* ____, *125 S. Ct. 577 (2004) ("Aviall")*, the U.S. Supreme Court reversed this longstanding jurisprudence and significantly circumscribed the rights of PRPs to pursue contribution under Section 113(f) of CERCLA. Depending upon how the lower courts interpret that decision, and determine whether PRPs have other rights under CERCLA to recover a portion of their response costs from additional PRPs, *Aviall* may hinder the cost recovery ability of parties who "voluntarily" clean up sites without the requisite Section 113(f) "civil action" or "settlement" resolving their liability.

II. OVERVIEW OF THE *AVIALL* DECISION

A. In *Aviall*, the U.S. Supreme Court held that a party may seek contribution under Section 113(f) of CERCLA for response costs it has incurred only if:

1. it is or has been the subject of a "civil action" under either Section 106 or Section 107 of the statute, or

2. it 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).

B. The Supreme Court expressly left undecided the questions of:

1. whether a party that is itself liable under CERCLA has a cost recovery cause of action under Section 107(a)(4)(B) of CERCLA for less than joint and several liability, and

2. whether an implied right of contribution exists under that same provision or elsewhere in CERCLA.

C. Other questions left unresolved by the *Aviall* decision include, among others:

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?

6. What impact, if any, does *Aviall* have on contribution rights under state law?

III. POST-*AVIALL* JURISPRUDENCE

A. The *Aviall* Case

1. On remand from the U.S. Supreme Court, the United States Court of Appeals for the Fifth Circuit declined to rule on the 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 that court permit Aviall to amend its complaint to clearly state a Section 107(a) cause of action.

2. 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.

B. *Elementis Chemicals, Inc. v. TH Agriculture and Nutrition, L.L.C., et al*, 2005 WL236488 (S.D.N.Y. 2005) ("*Elementis*")

1. In this case, the district court 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).

2. 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 it.

C. *AMW Materials Testing v. Town of Babylon*, 348 F. Supp. 2d 4 (E.D.N.Y. 2004) ("*AMW Materials*")

1. The district court here reached a holding in line with *Elementis*, barring a claim under Section 107(a) for indemnification because the plaintiffs were responsible parties without such a claim under pre-*Aviall* Second Circuit precedent.

2. The *AMW Materials* court did not address whether *Aviall* implicitly overruled Second Circuit precedent.

D. *Vine Street LLC v. Keeling,* 2005 U.S. Dist LEXIS 4653 (E.D. Tex. March 24, 2005) ("*Vine Street*")

1. In contrast to the *Elementis* and *AMW Materials* courts, 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).

2. 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". Id. at *20-21. 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". Because the Supreme Court reversed the Fifth Circuit's *en banc* decision in *Aviall* that PRPs may bring a Section 107(a) claim in the absence of such a civil action or settlement, the *Vine Street* court -unlike the *Elementis* and *AMW Materials* courts -was not bound by Circuit precedent not allowing such suits.

E. *Pharmacia Corporation and Solutia, Inc. v. Clayton Chemical Acquisition LLC, et al.*, 2005 WL 615755 (S.D. Ill. March 8, 2005) ("*Pharmacia*")

1. The *Pharmacia* court held first that an administrative order on consent ("AOC") entered into with the U.S. Environmental Protection Agency ("EPA") 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:

   (i) the order stated in its caption that it was issued pursuant to Section 106, which provision does not reference administrative settlements;

   (ii) the document was entitled an "Administrative Order by Consent", rather than an "Administrative Settlement";

   (iii) 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);

   (iv) 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

   (v) the document nowhere refers to itself as a "settlement" but rather as an "order".

2. 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.

F. CERCLA "Wartime Claims" Litigation

1. 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).

2. Because those cases do not arise in the context of a Section 106 or 107(a) civil action, or often 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*. See, e.g., *General Motors Corp. v. United States of America,* 2005 WL 548266 (D.N.J. 2005) (holding that (i) *Aviall* required a determination that 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) motion for leave to amend complaint to assert 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 in the pending *DuPont* appeal (discussed in Section III.E.3 below) CERCLA Section 107(a) precedent in light of *Aviall*).

3. These cases are likely to be battlegrounds regarding the causes of action available to PRPs for recovery of response costs in the wake of *Aviall* and will also provide a perspective on the view of the United States regarding the impact of that decision and causes of action now available to PRPs under CERCLA. For example, in the "wartime claims" case brought by DuPont and other parties and now before the U.S. Court of Appeals for the Third Circuit in *E.I. DuPont de Nemours, et al. v. United States of America,* Docket No. 04-2096 ("*DuPont*"), DuPont filed a brief on February 7, 2005 requesting the Third Circuit to rule on the question, among others, 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 government's reply brief is due on April 8, 2005.

G. Overview of Post-*Aviall* Judicial Decisions

1. Given (i) the clear Congressional purpose, enunciated 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 (and the indication in the dissenting opinion in *Aviall* and in dicta and the dissenting opinions in the Supreme Court decision in *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994) (*"Key Tronic")* that at least four justices on the Supreme Court appear inclined to a ruling that PRPs can recover a proportionate share of their response costs under Section 107(a)(4)(B)), one would have thought that federal courts might be favorably inclined to assist PRPs in the search for sources of contribution rights either within the scope of Section 113(f) or elsewhere in CERCLA.

2. Nonetheless, though post-*Aviall* decisions are sparse and the jury is clearly "still out", the district court decisions to date generally are not encouraging to those seeking such rights and indicate that considerable appellate court 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 determined.

IV. OPTIONS FOR SEEKING TO AVOID OR MITIGATE THE IMPACT OF *AVIALL*

A. *Pursue a Section 107(a) Cost Recovery Claim by Demonstrating "Non-Liability" Under CERCLA*

1. To date, the Seventh Circuit appears to be the only federal Circuit that has allowed PRPs in some circumstances to recover their response costs under Section 107(a)(4)(B). 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). All the other Circuits ruling on the issue appear to require a party to demonstrate that it is not a liable party itself under CERCLA in order to pursue a Section 107(a) cause of action.

2. As such, in the Seventh Circuit 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. Elsewhere, a party may seek to invoke Section 107(a) by demonstrating that it has a valid Section 107(b) defense to CERCLA liability (i.e., due to an act of God, act of war, or "third party" defense, including the "innocent landowner" and "bona fide prospective purchaser" defenses found in CERCLA, §107(b), 101(35),(40)).

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

1. 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.

2. 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* court in its opinion holding that an administrative order is not a "civil action" for purposes of Section 113(f)(l).

C. *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"*

1. 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):

   a. For the reasons 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.)

   b. 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., *Elementis*, 2005 U.S. Dist. LEXIS 1404, *20. ("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. 2004) ("*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).

c. 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.

d. 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.
It should be noted that cases addressing when contribution protection under Section 113(f)(2) becomes effective under a settlement agreement are supportive of 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 (8th Circuit 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 (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).

e. 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.

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 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).

f. 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 an event that would trigger the statute of limitations under Section 113(g)(3), which the Supreme Court in *Aviall* arguably turned to to define the contribution rights established in Sections 113(f). But see *Pfohl Brothers*, 255 F.2d at 154-155.

2. To the extent the case at hand involves a state administrative settlement, the discussion in Section IV.C.1 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 Section IV.C.1.b above), 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), 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 which seems at odds with the language of Section 113(f)(3)(B), which allows for a settlement with the United States *or* a *S*tate).

3. Given the scarcity of case law 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.

D. *Seek and Obtain Modifications to an Existing Settlement Agreement So That It Qualifies As a Section 113(f)(3)(B) "Settlement"*

1. 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).

2. 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.

E. *Enter Into A New "Administrative or Judicially Approved Settlement" That Qualifies As a Section 113(f)(3)(B) Settlement*

1. 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, now have additional incentives to enter into an "administrative settlement" with EPA or the relevant state to "resolve its liability" for response actions and costs at issue.

2. 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".

   a. For example, 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 as a Section 113(f)(3)(B) "settlement" if a current owner or prospective purchaser is contemplating pursuit of other PRPs for a portion of response costs incurred.

b. 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 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 Brothers Landfill Site v. Allied Waste Sys.*, 255 F. 2d 134, 154-155 (W.D.N.Y. 2003) (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)].")

c. 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 arguably an open question, a "settlement agreement" reached under other federal statutes would appear to qualify as a Section 113(f)(3)(B) "settlement" as long as it "resolves" a PRP's liability under CERCLA.

F. *Conduct a "Voluntary" Cleanup Under a State "Brownfields Program" and Rely on the "Enforcement Bar" Under Section 128(b) of CERCLA*

1. 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."

2. 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.

3. 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 "settlement agreement" with the State under that program (see Section IV.C.,E, above) 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).

4. The argument in item (iii) above 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. One response to that argument 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. 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, 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.

G. *Bring a Section 107(a) Action Against Other PRPs For Less Than All Response Costs Incurred*

1. As noted above, 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 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, if 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.

2. Accordingly, despite virtually uniform federal Circuit Court case law to the contrary, PRPs could file claims under Section 107(a) and seek to recover a proportionate share of their response costs from other PRPs on the theory that Section 107(a) provides a right of action for such costs.

3. Arguments that may be made in favor of such a cause of action can be found, for example, in the aforementioned brief of DuPont in the Third Circuit *DuPont* case.

4. 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 *Elementis, supra.*

H. *Bring a Cost Recovery Action on the Theory That There Is an Implied Right of Contribution Under Section 107(a) of CERCLA*

1. In *Aviall*, the Supreme Court expressly declined to decide as well 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. 603, 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.

2. However, as is evident from the brief filed by DuPont in the *DuPont* case, cogent arguments can be made that the factors set forth in *Texas Industries* and *Northwest Airlines* for evaluating whether an implied right of contribution should be found in a federal statute weigh in favor of finding such an implied right in Section 107(a)(4)(B).

3. Accordingly, 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).

I. *Pursue a Common Law Right of Contribution*

1. A PRP might also 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.

2. Arguments in favor of finding a federal common law right of contribution would include the following:

   a. a federal rule of decision is necessary to protect several uniquely federal interests in CERCLA, including the waiver of sovereign immunity therein; and

   b. 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.

   c. The argument in favor of a federal common law right of contribution will be tested in *DuPont* (and no doubt elsewhere), where the brief of the United States in opposition to DuPont will

set forth the federal government's position on the impact of *Aviall* and these alternative theories for a right of PRPs to seek contribution from sources other than Section 113(f) of CERCLA.

J. *Pursue Available Rights Of Contribution Under State Law*

1. 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.

2. Arguments that may be advanced against such claims include, but certainly are not limited to, the following:

   a. State law contribution actions are preempted because they conflict with the CERCLA contribution scheme. See, e.g., *In re Reading*, 115 F. 3d 1111, 1117 (3rd Cir. 1990); and

   b. 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).

V. PROSPECTS FOR CONGRESSIONAL RELIEF FROM *AVIALL*

A. For at least the following three reasons, it is unlikely that Congress will move swiftly at this juncture to enact amendments to Superfund to overturn the *Aviall* decision or reduce the uncertainty created by it:

   a. Congress will likely first wait to see whether the courts will craft acceptable "remedies" to fill the gaps in contribution rights created by *Aviall*;

   b. Federal agencies and departments such as the U.S. Departments of Defense and Energy, who have clearly benefited from *Aviall's* limitation on contribution rights, will vigorously oppose such Congressional action and may render it very difficult for the Bush Administration to support such action; and

   c. many other parties may 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).

2. Notwithstanding those forces, the U.S. Department of Justice ("DOJ") has formed a new workgroup that is examining both legislative changes to CERCLA and increased enforcement funding to address concerns that the *Aviall* decision may unduly hinder the pace of "voluntary" cleanups.

B. Given (i) the fact that it is likely to 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 strong federal policy and need (given limited available federal funding) to encourage private party cleanups, and (iii) the parallel interest of state and municipal governments in promoting "voluntary cleanups" (especially where significant economic benefits will thereby accrue from resulting redevelopment), there is likely to be considerable ongoing pressure on both Congress and DOJ/EPA to take steps to expand the availability of contribution rights in the wake of Aviall.