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Courts of Appeals Narrow Liability

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Litigators who defend and prosecute claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, should be prepared to address four recent courts of appeals decisions bearing on core liability and standing issues under CERCLA. These decisions limit CERCLA liability and hence will prove useful to those defending CERCLA claims. In particular, a key Fifth Circuit decision, if it stands, undermines the well-accepted right of potentially responsible parties ("PRPs") under CERCLA to bring contribution actions against other PRPs in private party litigation under the statute. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001). Motions to dismiss contribution actions are now being filed in many cases based on *Aviall*.

Three other decisions in 2001 limit CERCLA liability on issues of causation, successor liability, and liability for "passive migration" of hazardous substances during ownership of land. The Sixth Circuit has suggested that proof that a PRP's waste caused environmental response costs may be necessary to impose liability under CERCLA, in opposition to much existing precedent. *Bob's Beverage, Inc. v. Acme, Inc.* 264 F.3d 692 (6th Cir. 2001). In *United States v. Davis*, the First Circuit has held that state law, not more expansive federal common law, governs the liability of successor corporations for the CERCLA liability of their predecessors, sharpening a split among the circuits on this issue. *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001). Finally, an *en banc* Ninth Circuit has joined most circuits in ruling that passive migration of underground hazardous substances during a PRP's ownership of land does not constitute a "disposal" event under CERCLA triggering liability. *Carson Harbor Village, Ltd. v. Unocal Corp*., 2001 WL 1269178 (9th Cir. Oct. 24, 2001) (*en banc*). While practitioners must be cognizant of authority conflicting with these decisions, some within the circuits themselves, these cases provide important new precedent for those fighting CERCLA liability.

PRPs Can Only Bring Contribution Actions When Sued or Ordered to Undertake Cleanups

In the most dramatic CERCLA decision of 2001 (and the one most likely to be reversed), a divided Fifth Circuit panel held that a government or private party ("innocent" landowner) lawsuit or federal administrative order under CERCLA is a necessary prerequisite to a PRP seeking contribution from other PRPs for cleanup costs. *Aviall*, 263 F.3d at 145. *Aviall* undermines over a decade of accepted practice under CERCLA that PRPs subject to state cleanup orders, private party suits for cleanup costs, or those that voluntarily assume responsibility for cleanup can seek contribution from other PRPs under CERCLA §113 (42 U.S.C. §9613).

Aviall Services, Inc. ("Aviall") sought contribution from Cooper Industries, Inc. ("Cooper") for costs it incurred cleaning up hazardous substances at three industrial facilities it bought from Cooper in 1981. *Id.* at 136. Aviall voluntarily undertook a cleanup of the facilities after notifying the Texas Natural Resource Conservation Commission of the contamination and receiving letters that it was in violation of Texas environmental laws. *Id.*

In 1997, Aviall filed a contribution action against Cooper as a prior owner/operator of the three contaminated facilities. *Id*. The district court granted summary judgment in favor of Cooper, holding that "Aviall could not assert a §113(f)(1) contribution claim unless it was subject to a prior or pending CERCLA action involving either §106 (federal administrative abatement action) or §107(a) (cost recovery action by the government or a private party)." *Id*. (footnote omitted). On appeal, Aviall argued that it could seek contribution under §113(f)(1) based either on the state's threatened enforcement action or on its voluntary cleanup. *Id*.

The Fifth Circuit narrowly read the contribution provisions of CERCLA to reach a decision affirming the district court. CERCLA §113(f)(1) states, in part, that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)] of this title." The Fifth Circuit interpreted "may" to mean shall or must, creating an exclusive cause of action. *Id*. at 138-39.

The panel found, moreover, that "it would have been pointless for Congress to have expressly limited contribution suits to 'during or following' a CERCLA action if a party could ignore that limitation and still seek contribution." *Id*. at 139.

The savings clause of §113(f)(1) reads: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106] of this title or [Section 107]." Aviall argued that the clause shows Congress' intent "to allow contribution suits, regardless of whether the parties are CERCLA defendants in a §106 or §107(a) action." *Id*. The court disagreed, stating that the clause was likely intended to preserve contribution actions based on state law but not federal law. *Id.* at 140.

Lastly, the court rejected Aviall's "general policy argument that the district court's ruling would discourage voluntary cleanups…." *Id*. at 144. The court believed its interpretation of the statute to be consistent with the policy goals of CERCLA and that it was not Congress' intent to allow a federal contribution action merely because a state agency had found a party to have violated a state environmental law. *Id*.

Under the *Aviall* decision, therefore, CERCLA defendants will only be permitted to bring contribution actions against other PRPs where the United States issues a §106 administrative order for a cleanup or where the United States, a state government, or an "innocent" landowner files a §107 action. Given CERCLA's restrictive exemptions to liability, however, few private parties qualify as an "innocent" landowner who can bring a §107 action.

The detailed dissent to the panel opinion argues that the majority opinion is not a "full and fair reading of §113(f)(1) in the context of CERCLA as a whole." *Id.* at 145. In particular, the dissent stresses the savings clause of §113, which on its face preserves broad contribution rights. *Id*. at 146-50. By requiring federal action first, the majority opinion "*encourages* PRPs to postpone, defer, or delay remediation and to 'lie behind the log' until forced to incur cleanup costs by governmental order." *Id*. at 156 (emphasis in original).

Aviall challenges accepted practice in CERCLA contribution litigation and a significant body of precedent, which allows private parties to pursue §113 contribution actions. See, *e.g., Crofton Ventures LP v. G&H P'ship*, 258 F.3d 292, 297-300 (4th Cir. 2001); *Bedford Affiliates v. Sills*, 156 F.3d 416, 427-29 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 615-16 (7th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1305-06 (9th Cir. 1997); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 88-89 (3d Cir. 1988). Indeed, state-mandated environmental cleanups increasingly constitute a large portion of all environmental cleanups, as the Superfund regulatory scheme has matured and state agencies take the lead on spurring environmental remediation by PRPs. A resort to state law contribution rights would plainly be insufficient when compared to the powerful incentive for cleanups and settlement of private party contribution claims under CERCLA §113 because of weak, inconsistent, or non-existent state laws. Particularly in such states, potential PRPs will spurn voluntary cleanup efforts until forced to take action.

Until reversed, however, PRPs defending against private party CERCLA contribution actions (except in the limited circumstances where "innocent" private parties or states sue under §107) or state enforcement orders have a powerful precedent to seek dismissal or pressure favorable settlements. The Fifth Circuit has yet to rule on Aviall's Petition for Rehearing filed on September 4, 2001.

Sixth Circuit Suggests that Causation of Response Costs is an Element of CERCLA Liability

Another pillar of CERCLA precedent and practice has been the principle that CERCLA's liability scheme does not impose a causation requirement, but instead imposes strict liability. Accordingly, a CERCLA plaintiff need not prove that a defendant's particular activity (knowing ownership of contaminated land or disposal or transport of hazardous substances) actually was a cause of the environmental clean up costs incurred by the plaintiff. 42 U.S.C. §9607(a); Alan J. Topol & Rebecca Snow, Superfund Law and Procedure §4.3 (1992). Nevertheless, a recent Sixth Circuit decision seemingly has reintroduced causation into the liability stage of CERCLA litigation (although causation has played a role traditionally in the allocation stage of CERCLA liability). In *Bob's Beverage*, the Sixth Circuit held that a party cannot be found liable under CERCLA unless the plaintiff demonstrates that a release by that party (or during that party's ownership of a site) "affected the incurrence of response costs." 264 F.3d at 696.

The original owners of the subject property, the Hitchcoxes, leased the property to Acme, Inc., which ran a business on the site that used chlorinated solvents ("CVOCs"). *Id*. at 694. Acme also stored 55-gallon drums containing hazardous wastes at the site, many of which were in poor condition and leaking. *Id*. Acme abandoned the drums at the site when it ceased operations there. *Id*.

The property eventually came to be owned by the Merkels, who used the site to store automobiles. *Id*. The Merkels never conducted an environmental investigation of the property. *Id.* During their tenure as owners, the Merkels installed a new septic system where the drums had previously been stored and also had six drums of "waste oil" removed from the property. *Id*. at 694-95.

In May 1988, Bob's Beverage, Inc. ("Bob's") bought the property from the Merkels, using it for storage of petroleum products but never CVOCs. *Id*. at 695. Six months later, it was discovered that drinking water in the area was contaminated with CVOCs and heavy metals. *Id*. Bob's notified the Ohio Environmental Protection Agency, which required it to complete a Remedial Investigation and Feasibility Study for the property. *Id*. Bob's sued the Merkels, Acme, and Acme's owner in 1997. *Id*. The district court held the Acme defendants liable and ordered them to pay more than $411,000 but held the Merkels had no liability, and Bob's appealed. *Id*.

With little analysis of precedent or the implications of its ruling, the Sixth Circuit panel ruled that the CERCLA plaintiffs in *Bob's Beverage* "failed to demonstrate that a release by the Merkel Defendants affected [their] response costs." *Id*. at 696. The court reasoned that although CERCLA does not require the plaintiff to prove that the defendant caused actual

harm to the environment, CERCLA focuses on whether the defendant's release or threatened release caused harm to the plaintiff in the form of response costs. *Id.* Because the district court found no evidence that any release that occurred during the Merkels' ownership caused any increase in response costs, the Sixth Circuit affirmed. *Id. Bob's Beverage* did not address the reasoning of a majority of courts under CERCLA that establishing liability requires only that "a" release cause response costs, rather than the particular defendant's release. See, *e.g., Tosco Corp. v. Koch Indus., Inc*., 216 F.3d 886, 891 (10th Cir. 2000); *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 655-57 (6th Cir. 2000); *Prisco v. A&D Carting Corp.*, 168 F.3d 593, 606 (2d Cir. 1999); *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 264-66 (3d Cir. 1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670-71 (5th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988).

The broad invocation in *Bob's Beverage* of the necessity of a "causation inquiry" at the liability stage of litigation opens the door to what many had deemed a well-settled issue under CERCLA. Numerous courts have rejected efforts by PRPs that made a *de minimus* contribution of hazardous substances to a contaminated site to impose a requirement of causation at the liability stage that the wastes be linked to the necessity of cleanup costs. *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989); *United States v. Atlas Minerals & Chems., Inc.*, 797 F.Supp. 411, 415 (E.D.Pa. 1992); *United States v. Western Processing Co.*, 734 F.Supp. 930, 936 (W.D.Wash. 1990); *Central Illinois Public Serv. Co. v. Industrial Oil Tank & Line Cleaning Service*, 730 F.Supp. 1498, 1504-05 (W.D.Mo. 1990). The decision's failure to address fully this principle of CERCLA suggests that CERCLA plaintiffs will vigorously resist full application of this precedent, which may be limited to landowners with little role in the contamination, such as the Merkels.

First Circuit Rejects Successor Liability Based on Federal Common Law

Because CERCLA liability can reach back to waste disposal occurring anytime in the past, CERCLA plaintiffs often are confronted with identifying and pursuing corporate successors to the entities that were responsible for the waste disposal at issue. This can be difficult under state law, which tends to insulate successor corporations from liability, particularly where corporate succession is carefully documented as an asset sale. Accordingly, to effectuate CERCLA's goals, many courts have developed federal common law to more readily impose CERCLA liability on successors, using, for example, the "substantial continuity" doctrine to impose liability on companies that purchase assets of predecessors and substantially continue the business with the same employees.

While courts agree that corporate successors may be liable under CERCLA, they are divided on whether to apply state corporate law or a federal common law standard to determine if a corporation is a successor. Courts adopting federal common law typically hold that such an approach is necessary to prevent restrictive state laws from hampering CERCLA's broad, remedial goals and to create a uniform approach. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518-19 (2d Cir. 1996), *decision clarified on denial of rehearing*, 112 F.3d 88 (2d Cir. 1997); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp.*, 817 F.Supp. 225, 231-32 (D.N.H. 1993); see also *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 487 n. 9 (8th Cir. 1992) ("[T]he district court was probably correct in applying federal law.").

The Supreme Court, however, decided two cases in the 1990s that have prompted arguments that courts should reevaluate their position on successor liability under CERCLA. *O'Melveny and Myers v. FDIC*, 512 U.S. 79, 85, 87 (1994); *United States v. Bestfoods*, 524 U.S. 51, 63 (1998). The First Circuit in *Davis* viewed these precedents as an indication that it should now apply state law to the issue of successor liability in CERCLA actions. However, the Supreme Court expressly reserved this issue in *Bestfoods*, and other courts have remained steadfast in their application of federal common law. *Bestfoods*, 524 U.S. at 63 n. 9; *see North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 651 (7th Cir. 1998); *State of New York v. Westwood-Squibb Pharm. Co., Inc.*, 62 F.Supp.2d 1035, 1046 (W.D.N.Y. 1999); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 12 F.Supp.2d 391, 405 (M.D.Pa. 1998); *cf. Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 306-07 (7th Cir. 1999) (applying federal law to CERCLA contribution action).

In *Davis*, the First Circuit has rejected the federal common law approach and reiterated that state law governs who is a liable corporate successor under CERCLA. *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001). *Davis* addressed which of two non-settling PRPs should be held liable as the corporate successor to a company that sent hazardous substances to the Davis Superfund site. *Id*. at 52.

The court first had to decide whether to follow state law (in this case, the law of Connecticut) or federal common law to determine the proper successor. The court relied on an earlier First Circuit case in concluding "that the majority rule is to apply state law 'so long as it is not hostile to the federal interests animating CERCLA.'" *Id.* at 54, citing *John S. Boyd Co., Inc. v. Boston Gas Co*., 992 F.2d 401, 406 (1st Cir. 1993) (applying Massachusetts contracts law to determine an issue of successor liability). The court saw "no evidence that application of state law to the facts of this case would frustrate any federal objective" and so applied Connecticut's "mere continuation" test for determining successor liability in the context of an asset sale. *Id*. In most states, however, the "mere continuation" test requires showing a continuity in the ownership of assets from predecessor to successor, which is not required under the "substantial continuity" test. The "substantial continuity" test is more equitable, preventing a company that purchases an ongoing business from avoiding responsibility for the business' prior waste disposal by structuring the transaction as a sale of assets.

The *Davis* panel's brief discussion of this issue does not address the practical problems of looking to corporate law of 50 states to determine successor liability under CERCLA, and the dichotomy

between state corporate law and the needs of CERCLA's retroactive liability scheme. The need to compel assistance for expensive environmental cleanups ensures that CERCLA plaintiffs will continue to push for the more flexible, equity based federal standard for successor liability under federal common law.

Ninth Circuit Rejects Passive Migration of Hazardous Substances as Basis for Liability

The Ninth Circuit, sitting *en banc*, recently held that passive migration of contaminants does not constitute a "disposal" under CERCLA §107(a)(2), shielding many landowners from liability. *Carson Harbor Village, Ltd. v. Unocal Corp*., 2001 WL 1269178 (9th Cir. Oct. 24, 2001) (*en banc*). The Ninth Circuit's *en banc* decision, consistent with the majority of courts to have considered this issue, probably settles this issue—passive migration of waste during prior ownership does not trigger CERCLA liability. See *ABB Indus. Systems Inc. v. Prime Tech. Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000); but *cf. Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992).

In *Carson Harbor*, the current owner of a mobile home park sued the previous owner (the "Partnership Defendants") for costs associated with the cleanup of tar-like and slag materials found in wetlands on the property. Another previous owner, Unocal Corporation, which had held a leasehold interest in the property and used it for petroleum production, allegedly dumped the materials.

Carson Harbor Village, Ltd. ("Carson") argued that the Partnership Defendants were owners of the property "at the time of disposal" under §107(a)(2). *Id*. at *9. The statute defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water…." *Id*. The *en banc* court in *Carson Harbor* turned to the plain meaning of the statutory language. *Id*. at *12. The court found that the only term "that might remotely describe the passive soil migration here is 'leaking.'" *Id*. at *14. The court considered the qualities of the tar-like and slag materials and some evidence that the tar-like material moved through the soil. *Id*. The court concluded there was no "disposal," and therefore the Partnership Defendants were not PRPs because "[t]he circumstances here are not like that of [a] leaking barrel or underground storage tank envisioned by Congress… or a vessel or some other container that would connote 'leaking.'" *Id*. In the end, the court adopted the approach of the Third Circuit in *United States v. CDMG Realty Co*., 96 F.3d 706 (3d Cir. 1996), acknowledging the possibility that under other circumstances the terms in the definition of "disposal" might encompass passive migration, but for the most part closing this as a potential basis for liability. *Carson Harbor*, 2001 WL 1269178, at *14. ♦