Impact of Aviall on Real Estate and Corporate Transactions

By Larry Schnapf

In the 25-year history of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[1], few cases have received as much attention as the United States Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.* ("Aviall").[2] It seems that not a week does not pass without an article in the legal media or a law firm newsletter speculating on the impact of the case.

Since *Aviall* overturned twenty years of CERCLA jurisprudence, it will impact litigation and settlement strategy. Some commentators have lamented that Aviall will mean the end of voluntary cleanups. The decision may indeed discourage owners or operators of contaminated properties from implementing so-called "at-risk" cleanups that are performed without state or federal oversight. Aviall may also encourage some generator PRPs who were not sued or ordered by an agency to perform a cleanup to "hide in the weeds" and enter into settlements with PRP groups implementing cleanups.

However, its effect on future transactions is less clear. This article will discuss how *Aviall* and the half-dozen cases that have interpreted the decision will impact corporate and real estate transactions, including negotiating strategies, liability allocation as well as drafting purchase and sale agreements.[3]

Overview of CERCLA Right of Contribution

When CERCLA was originally enacted in 1980, it did not contain an express right of contribution among PRPs. Most courts addressing the issue in early years of the CERCLA program found that that §107(a)(4)(B) contained an implied right of action for contribution that allowed private parties to recover their response costs.[4] Despite this weight of authority, there was still some doubt about the validity of an implied right of contribution under §107(a)(4)(B) because of two United States Supreme Court decisions refusing to find implied rights of action under other statutes in the absence of express Congressional direction.[5]

Congress codified this implicit right of contribution when it added §113(f) to CERCLA as part of the 1986 Superfund Amendments and Reauthorization Act ("SARA").[6] Section 113(f) authorizes parties to recover response costs that are disproportionate to their liability in two circumstances. Section §113(f)(1) provides that a person "may" seek contribution during or following civil actions brought under CERCLA §§106 or 107.[7] Meanwhile, §113(f)(3) created a right of contribution for persons who enter into administrative or judicially approved settlements.[8] To further encourage settlements and expedite, Congress added §113(f)(2) that provides contribution protection to parties that resolved their CERCLA liability.[9] SARA also added two corresponding three-year limitations periods for contribution actions §113(g). One limitation period starts from the date of judgment[10] while the other begins to run from the date of a settlement.[11]

In the decade following SARA, the federal courts struggled with the interplay of §107(a)(4)(B) and §113(f). One line of cases held that a §107 claim by a PRP was subsumed within the §113(f) right of contribution[12] while others found that §§107(a) and §113(f) created two causes of actions that could be used by PRPs, [13] partially because of some loose language in *Key Tronic v. United States* where the United States Supreme Court seemed suggested in what might be viewed as *dicta* that §107 had "similar and somewhat overlapping remedy" as the contribution cause of action in §113.[14] The courts adopting the view that §107(a)(4)(B) contains an implied right of contribution point also find support in the savings clause of §113(f)(1) that preserves all state and federal rights (such as the implied right of contribution) that pre-existed SARA.

Most courts liberally interpreted §113(f) to allow potentially responsible persons ("PRPs") to bring contribution actions without having to wait until being sued or entering into a formal cleanup agreement. With the development of state brownfield and voluntary cleanup agreements in the early to mid-1990s, it soon became common for parties to voluntarily perform cleanups and then bring contribution actions under §113(f) to recover their response costs from other PRPs. Perhaps because of the availability of §113(f) relief, a majority rule soon emerged that only innocent parties could bring §107(a)(4)(B) cost recovery actions.[15]

While the federal judiciary was developing the contours of the private cost recovery under §107(a)(4)(B), Aviall learned that the four Texas aircraft engine maintenance facilities it had acquired from Cooper Industries were contaminated with hazardous substances. Upon learning of the contamination, Aviall notified the Texas Natural Resources Commission (the "Commission) who advised Aviall that the Commission would institute an enforcement action if the company did not remediate the contamination. Aviall incurred $5 million to remediate the sites under the voluntary cleanup program. In August 1997, filed an action against Cooper Industries to recover its response costs.[16] The district court ruled that Aviall was not entitled to bring a contribution action because it had not been sued under §106 or §107, or entered into an administrative settlement or judicial order resolving its liability. Initially, the Fifth Circuit affirmed the decision, concluding that the savings clause merely preserved the right of PRPs to bring contribution claims based on state law . After a rehearing *en banc*, the Fifth Circuit reversed, finding that the savings clause of §113(f)(1) was not limited to state-based claims. The court noted that Congress specifically referred to state law in the savings clause of §152(d).[17] Since Congress knew how to refer to state law when it intended to do so, the court concluded that the savings clause of §113(f)(1) was not limited to state claims. Based on the plain language of §113(f)(1), the court ruled that a contribution action was not dependent on the existence of a prior or pending action. The court also pointed out that allowing a PRP to bring a contribution action anytime during the cleanup process advanced the statutory goal of expediting cleanups.[18]

In a 7-2 decision, though, the United States Supreme Court reversed the Fifth Circuit Writing for the majority, Judge Clarence Thomas rejected the notion that "may" should be read permissively so that the "during or following" language was only one of the circumstances under which a plaintiff may seek contribution. Instead, the majority

opinion said that the "natural meaning" of §113(f)(1) was that a plaintiff could only bring a contribution action during or following one of the specified civil actions. In other words, the majority said that "may" should be read to mean "may only".[19] Adopting Aviall's interpretation, the Court said, would violate a fundamental principal of statutory construction that a court should construe a statute to give every word some operative meaning. The Court also drew further support for its holding from §113(g)(3) since this section did not have any limitations periods when there was not a judgment or settlement, such as a voluntary cleanup. Having found Aviall had no right of contribution §113(f)(1), the Court remanded the case for further determination on whether Aviall might have an implied right of contribution under §107(a)(4)(B). [20]

In an interesting post-Aviall decision, the federal district court for the eastern district of Texas provided a rationale for reviving the morbid §107 private right of action. In *Vine Street LLC v. Keeling*,[21] the court distinguished the cases limiting PRPs to a §113(f) contribution action. The court found that in all of those cases, the issue was whether a PRP with a claim under §113(f) could bring a concurrent claim under §107(a). Thus, in the court's opinion, those decisions held that because the PRP could bring an §113(f) action, it could not bring a claim under §107. Thus, the court concluded, this line of authority did not apply to situations where a party could not bring a §113(f) claim because it had performed a voluntary cleanup. The court said that §113(f) did not create contribution actions and was not intended to be the only way to recover response costs. Rather than hold a pool of defendants jointly and severally liable, and then having to determine if the liability was divisible, the court said §113(f) allowed courts to apportion liability to specific defendants after damages had been determined in a civil or administrative action. In contrast, the court said that the plain language of §107 clearly encompassed a wider range of actions, including contribution actions for costs incurred pursuant to a voluntary cleanup.[22]

Following *Vine*, the federal district court for the northern district of Illinois also adopted the view that there is an implied right of contribution under §107(a)(4)(B). In *Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp*.,[23] a predecessor of the defendant entered into a long-term lease with the defendant during the 1940s and 50s where it operated an industrial chemical storage, mixing and packaging facility. After learning that the property was contaminated, the plaintiff performed a voluntary cleanup at a cost of $1.8 million and sought recovery from the defendant under §§ 107 and §113(f). The court began its analysis by noting that the plaintiff did not have a cause of action under §113(f)(1) because it voluntary undertook a cleanup. Turning to the §107 claim, the court observed that there were two categories of innocent landowners: those that unknowingly acquire contaminated property and those whose property is contaminated by third parties. Because the plaintiff knew the defendant's predecessor would store and process chemicals at the site, the court held that the plaintiff did not qualify for the innocent landowner defense. Therefore, it could not maintain a §107 cost recovery action. However, as a party that performed a voluntary cleanup, the court held that the plaintiff fell with the subset of plaintiffs who may have an implied right of contribution under §107(a)(4)(B) and denied the defendant's motion to dismiss on this count of the complaint.

Impact of Due Diligence

Some commentators have suggested that Aviall may make it more difficult to sell corporate assets or contaminated real estate.[24] It may be some less sophisticated parties may occasionally be scared away from some transactions. However, because parties and their lenders rarely proceed with a transaction solely on the basis that they might have a right of contribution if they encounter unexpected environmental liabilities, the more practical view seems to be that Aviall should not materially impair the marketability of property or corporate assets.

That being said, the impact of Aviall on transaction will largely depend on how much due diligence parties perform, how they address the liabilities identified during due diligence, and possibly the states where the contaminated facilities or properties are located. Purchasers and their lenders have traditionally performed environmental due diligence to preserve the various liability defenses available under CERCLA. In general, purchasers must perform an "All Appropriate Inquiry" ("AAI") to be able to assert the innocent purchaser defense,[25] to satisfy the "due care" obligations of the CERCLA third party defense,[26] or the "continuing obligations" of the bona fide prospective purchaser (BFPP)[27] and contiguous property owner ("CPO") defenses. Because Aviall did not affect the right of innocent parties to bring §107(a)(4)(B) cost recovery actions, the CERCLA defenses as well as their state counterparts may now take on greater importance in transactions.

Many transacting parties perform due diligence not to preserve what may be perceived as illusory defenses but to identify and allocate material environmental liabilities associated with a particular transaction or business. These parties tend to perform environmental due diligence that goes well beyond AAI. *Aviall* will probably not have a significant impact on purchasers, equity investors and lenders that thoroughly investigate current and historical environmental liabilities since they should be able contractually address those material liabilities or structure some form of risk transfer mechanism prior to the closing.

Because of the increasing size and speed of corporate transactions, many purchasers and their lenders are only performing cursory environmental due diligence that focuses on remedial obligations at current facilities, largely ignores potential historical or environmental legacy liability associated with former facilities or business units, overlooks disposal sites that may have been used by corporate predecessors and fails to evaluate environmental liabilities that may have been assumed contractually or by operation of law (e.g., successor liability). Investors and lenders who conduct such surficial environmental due diligence should seriously consider re-examining their business practices or approaches to transactions to minimize the potential impact of *Aviall*.

During the past decade, nearly all states have established brownfield voluntary cleanup programs that have modified the liability provisions of the state superfund laws to encourage the redevelopment of contaminated sites. Some of the incentives that states

have added include new defenses for purchasers of these properties and replacing the strict liability regime with proportional liability. Since states bring over 70% of the enforcement actions and the vast majority of contaminated sites are remediated under these state programs, it has become increasingly important to identify the particular requirements of these state programs during due diligence. Thus, in the wake of *Aviall*, purchasers should also carefully review the requirements for bringing contribution actions under state environmental or common laws, which can differ from CERCLA.

A good example of the difference between CERCLA and state contributions actions was illustrated in *Johnson v. City of San Diego*.[28]In this case, the plaintiffs purchased a vacant lot where they planned to operate a recycling business. After taking title, the plaintiffs discovered the site was contaminated. They then sued the City of San Diego under the state Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"),[29] alleging that the city and its contractors had disposed hazardous materials. In rejecting the City's claim that the plaintiff did not have a right of contribution under HSAA, the court ruled that Aviall was not applicable because HSAA did not contain language requiring that HSAA contribution actions must be brought only during or after a civil action. Instead, HSAA only requires that a plaintiff incur "removal or remedial costs in accordance with this chapter or [CERCLA]".[30]

Review Applicable CERCLA and State Environmental Law for Particular Facilities

It would be an understatement to say that CERCLA is not a clarity of model draftsmanship. Thus, it is not too surprising that federal circuit courts have adopted varying interpretations on the scope of some of the CERCLA defenses. For example, the Seventh Circuit has explicitly held that a PRP who does not qualify for the defenses under § 9607(b)(3) may nonetheless pursue an action under §9607(a) if it qualifies as a "non-polluting PRP" who is not responsible or otherwise cause the contamination.[31] Likewise, federal courts in New York have consistently narrowly interpreted the meaning of "contractual relationship," thereby allowing parties to successfully assert the third party defense.[32] Similarly, the operators of properties located in states subject to the jurisdiction of the Court of Appeals for the Fourth Circuit may argue that portions of a site may not have been under their control or that their property should not be considered part of the "facility" where the hazardous substances were located.[33]

If the due diligence reveals environmental liability at one or more facilities, purchasers of assets that will own or operate the facility should carefully review the relevant federal appellate CERCLA decisions and state environmental law to determine if there are defenses to liability that could be asserted. A party that is otherwise unable to bring a §113(f) contribution action might be able to circumvent this limitation and bring a CERCLA §107(a)(4)(B) or state cost recovery action if it can qualify for one of the CERCLA defenses or a defense under state law. As part of this process, a purchaser should also carefully evaluate the requirements for asserting the BFPP or CPO defenses as well as any particular state requirements for preserving liability defenses. [34]

Using State Cleanup Agreements To Preserve Contribution Rights

Most state remediation programs now issue no further action ("NFA") or closure letters that confirm that a cleanup has attained the state remediation goals and identify any continuing post-remedial operation and maintenance obligations that must be implemented. In the pre-*Aviall* world, a purchaser or lender might have been satisfied to obtain a no further action letter after the closing.

However, because a run-of-the-mill NFA letter will not qualify as an "administrative settlement" under §113(f)(3), such a document may no longer be satisfactory to a purchaser or its lender since it will not be enable a purchaser to preserve its contribution rights. Purchasers should scrutinize agreements with regulatory agencies to determine if they qualify as "administrative settlements." Purchasers should also determine if there are pending orders or enforcement actions so that they might possibly be resolved as administrative settlements. On the other hand, in deals that are moving at an accelerated pace, a purchaser may be willing to accept a quick NFA letter or stipulation of agreement with a state agency and hope that this document passes muster

There are very few cases interpreting what constitutes an "administrative settlement". Most of the decisions involving administrative settlements have focused on the scope of contribution protection under §113(f)(2). Many courts have held that to qualify as an "administrative settlement", an agreement must satisfy the procedural requirements of CERCLA section 122[35] governing settlements.[36] Because such settlements would extinguish contribution claims, the chief concern of the courts in these cases seems to be that the settlement process contained sufficient procedural due process such as opportunity for public comment or public hearings.[37]

Thus, just because an agreement is stylized as an administrative settlement does not mean that a court will automatically hold that a purchaser is entitled to bring a contribution action. Defendants in a contribution action will likely challenge agreements that are characterized as administrative settlement to cut off the plaintiff's contribution action.

To qualify as an "administrative settlement", the agreement must resolve the settlor's CERCLA liability. EPA has broad powers under §104 to take response actions and may issue administrative orders under §106. In contrast, unless a state has entered into a cooperative agreement under §104(d)(1), a state is not authorized to bring a CERCLA enforcement action. However, if a state agency incurs response costs, it may bring a cost recovery action under §107(a)(4)(B) just like any other party. Because of deficiencies in some state superfund laws, a few states used to take response actions under their own state environmental authority and then bring a cost recovery action under §107. In many cases, these actions were resolved pursuant to consent orders where the defendant agreed to complete the investigative or remedial actions at the site. This type of settlement raises the question whether the consent order resolve the defendant's CERCLA liability or only its liability under state law.

One of the first things a court will look to is if the agreement contains any references to CERCLA. In the past, some states agreed to insert language in their voluntary cleanup agreements ("VCAs") that the agreement constituted an administrative settlement for purposes of contribution protection under §113(f)(2). [38] The absence of any reference to CERCLA was fatal in *W.R. Grace v. Zotos International*[39] and *City of Waukesha v. Viacom International, Inc*[40].

Another important factor to look for is whether the state agency has incurred any response costs. If the state has not entered into a §104 cooperative agreement with EPA, the only basis for the state to invoke CERCLA action would be a §107(a)(4)(B) cost recovery action. In the absence of any state incurred response costs, non-settling PRPs could argue that the agreement is not an "administrative settlement" since there was no CERCLA liability to resolve. [41]

So what is a purchaser to do? If an existing settlement that does not reference §113(f) on its face, the purchaser should request the regulatory agency to modify the agreement so that it refers to CERCLA and states that the intent of the parties is that the agreement shall constitute an administrative settlement under §113(f)(3).[42] If the state is unwilling to modify an existing agreement, another approach might be to have the existing agreement terminated and to enter into a new agreement that would contain the appropriate CERCLA reference. Given limited enforcement resources, state agencies may be reluctant or unable to comply with such requests. As a result, parties may have to offer some sort of "carrots" to state agencies to justify diverting limited resources, by performing a more comprehensive cleanup that would be required or perhaps implementing a supplemental environmental project ("SEP").

Three recent post-Aviall decisions shed some light on what is required for a state agreement to qualify as an "administrative settlement".

In *City of Waukesha v. Viacom*,[43] the plaintiff filed a contribution action against the three successors of a company that had allegedly arrange to dispose hazardous substances at a landfill owned and operated by the city. In 2002, the court determined that the city could maintain its contribution action even though it had not been sued under CERCLA § 106 or § 107(a). The court based its holding on the existing caselaw and its own interpretation of §113(f)(1). Following *Aviall*, the defendants filed a motion to dismiss the earlier ruling. The city also filed a motion for leave to file an amended complaint to add a contribution claim under §113(f)(3)(B), arguing that its cost share pilot program with the Wisconsin Department of Natural Resources ("WDNR") was an "administrative settlement." The city also submitted a separate administrative settlement agreement to the WDNR that explicitly resolved the city's liability under state law and CERCLA. The court first ruled that it had to dismiss the City's §113(f)(1) contribution in light of the Supreme Court's Aviall decision. Then, the court found that the contract was not an administrative or judicially approved settlement that resolved the city's liability to Wisconsin. The court noted that the contract did not refer to CERCLA and that the Wisconsin statute authorizing the WDNR to enter into the contract provided that it did not effect any common law or other liability under other statutes for damages arising

from a site. The fact that the city filed the unsigned administrative settlement also suggested to the court that the city had not resolved its CERCLA liability to the state.[44]

Pharmacia Corporation v. Clayton Chemical Acquisition LLC [45] illustrates how narrowly a court may interpret what constitutes an "administrative settlement". In this case, the plaintiff along with 18 other PRPs entered into an Administrative Order by Consent ("AOC") under § 106 to undertake a remedial investigation/feasibility study ("RI/FS") for an second operable at the Sauget superfund site known as Sauget Area 2. EPA subsequently issued a Unilateral Administrative Order ('UAO"). After incurring nearly $3 million to implement the AOC and the UAO, the plaintiffs brought a contribution action against other PRPs who had not been named under the UAO or executed the AOC. In holding that the AOC was not an "administrative settlement" entitling the plaintiffs to bring a contribution action, the court noted that CERCLA §122 authorized EPA to enter into "administrative settlements" but that the AOC was issued under § 106. If the AOC was intended to be an administrative settlement, the court concluded, the document would have stated in the caption that it was issued pursuant to §122(d)(3). The court also said that the AOC did not mention anywhere in its 25 pages that it was a "settlement" but instead always referred to "order". Also significant to the court was that the AOC contained a provision for stipulated penalties that were based on §106 and that the AOC contained the standard boilerplate disclaimer that AOC did not constitute an admission of liability by any of the parties. The court also ruled that neither the UAO or the AOC qualified as civil actions under §113(f)(1). The court pointed out that §106 authorized bringing an action in district court or taking "other action…including such orders…" Since Congress clearly delineated between bringing a civil action and an order, the court found that the UAO did not constitute a civil action under §113(f)(1)

In *W.R. Grace & Co. v. Zotos International*, the plaintiff purchased the assets of Evans Chemetics Inc. in 1978 which included a manufacturing facility in Waterloo, New York where disposal of hazardous substances had taken place during the 1950s. W.R. Grace ("Grace") entered into administrative orders on consent in 1984 and 1988 with the New York Department of Environmental NYDEC to perform a remedial investigation/feasibility study ("RI/FS"). After implementing the remedy at a cost $1.7 million, Grace filed a contribution action under §113(f)(1). After a non-jury trial, the Supreme Court issued its *Aviall* opinion, prompting a round of post-trial supplemental briefing where Grace filed a motion to amend its complaint to add a claim under §113(f)(3). In entering a judgment in favor of the defendant, the federal district court for the western district of New York found it significant that the consent orders did not contain any reference to CERCLA but simply cited to the state superfund law known as the Inactive Hazardous Waste Disposal Site Act.[46] Moreover, the court noted that the consent orders did not indicate that NYDEC was exercising any authority under CERCLA, did not indicate that EPA concurred with the selected remedy and did not provide for any release of CERCLA liability. As a result, the court found that the consent orders only resolved Grace's liability under state law and that Grace could therefore not bring a contribution claim against the defendant.

In a pending case out of the western district of New York, the state of New York has gone on the record that it believes its orders on consent constitute an administrative settlement under §113(f)(3). [47] In *Senaca Meadows, Inc v. ECI Liquidating, Inc.*,[48] the defendants filed a motion to dismiss arguing that a series of orders on consent entered into between the NYDEC to investigate and remediate the Tantalo Landfill in Seneca Falls, New York did not constitute a "settlement agreement" under §113(f)(3) because the consent orders only resolved state claims. Attorney General of the State of New York has filed an *amicus curiae* memorandum of law opposing the motion to dismiss. The state argues that a core element of the CERCLA framework is to allow states to perform cleanups and then recover their response costs from PRPs, and that CERCLA is the core authority that the New York of New York relied upon to recover its response costs. The memorandum of law goes on to say that the NYDEC settled both CERCLA and state claims under the consent orders. Specifically, the states notes that second consent order provided contribution protection to the plaintiff under §113(f)(2) for matters addressed by the order, the third consent order released the plaintiff from all claims that NYDEC might have under statutory or common law involving the investigative or remedial activities at the site related to disposal of hazardous wastes. In addition, the 2004 consent order specifically provided that to the extent authorized by the §113(f)(3), plaintiff was entitled to seek contribution from any person except those entitled to contribution protection under §113(f)(2). Moreover, the state noted that the federal district court for the district of New York had previously ruled that similar orders of consent issued by NYDEC constituted "administrative settlements" under §113(f)(3).[49] The state distinguished AMW case on the grounds that the contribution plaintiffs had not entered into any agreements with the NYDEC and Pharmacia on the basis that the order in that case was issued under the authority of §106. [50]

As these cases illustrates, simply claiming that an agreement is an administrative settlement does not mean that a court will necessarily agree. Plaintiffs should expect defendants to vigorously challenge the validity the agreement as an “administrative settlement”. State VCAs may be particularly vulnerable to attack since they usually refer to a agency’s authority under a state law to enter into the agreement and, thus, have an even more tenuous link to CERCLA.[51] A purchaser contemplating entering into a state VCA should ask the state to include such language in the agreement. An example of such an agreement is the two model forms developed by the Wisconsin Department of Natural Resources. The forms state it is the intention of the parties that the agreement constitutes an administrative settlement for purposes of §113(f)(3). In any event, the settlement agreement should be subject to public comment to satisfy procedural due process concerns.

Even if an agreement can qualify as an administrative settlement, purchasers should determine if the agreement is in effect and if the settlor remains in compliance with the agreement. For example, some agreements may become effective upon execution while others may provide that the covenant not to sue (which may be the basis for determining that a party has “resolved its liability”) may not take effect until the work is completed. It is also important to determine if there are any conditions that could trigger reopeners that could eviscerate any liability immunity.

Another possible avenue for preserving contribution rights may be the federal enforcement bar provision of CERCLA §128. Under this section, a party who performs a cleanup at a "eligible response site" in compliance with a “state response program” will not be subject to federal administrative or judicial enforcement action except in limited circumstances.[52]

There are a number of requirements that must be met to qualify for the so-called federal enforcement bar of §128. If a purchaser plans on relying on the §128, it should verify that the criteria of $128 have been met during due diligence. Among the key issues that need to be reviewed are does the state program qualify as a "state response program"[53], does the contaminated property qualifies as an " eligible response site", has EPA notified the state that EPA intends to take enforcement action regarding the particular site and has the state complied with the 48-hour response period for advising EPA that the state intends to address the contamination under its own program.[54]

While §128 specifically only addresses the federal enforcement but arguably the party performing the cleanup under a state response program will have “resolved its liability” to EPA and could claim that it has met the requirements of §113(f)(3). Section 128 does not require the remediator to enter into a specific type of agreement with the state but simply perform a response action in compliance with the state response program. While not a §128 action, the ruling by the United States Court of Appeals for the Tenth Circuit in *Morrison Enterprises v. McShares, Inc.*[55] illustrates how this might work. In that case, a general partnership that owned and operated land with a grain storage facilities in Salina, Kansas from the 1950s until 1980 when it then leased the property to a another corporation. In 1988, the Kansas Department of Health and Environment ("KDHE") determined that residential wells within the vicinity of the property were contaminated with carbon tetrachloride, which had been used as a grain fumigant. After the plaintiff provided alternative water supplies to area residents, KDHE issued an administrative order to the plaintiff to implement a investigation. In 1992, the plaintiff entered into a consent order with the KDHE to conduct further investigation and implement a corrective action. While the plaintiff was completing the tasks required and approved by KDHE, the agency developed a "state deferral pilot program" with EPA Under this cooperative agreement, EPA determined that the KDHE response program met federal requirements and that sites addressed by KDHE would not be added to the federal National Priorities List ("NPL"). The plaintiff's property was admitted into the program in 1995. The plaintiff then filed a contribution action against its supplier of grain fumigants because of a 1963 spill that had occurred during the delivery of liquid grain fumigant. The defendant argued that the plaintiff had not complied with the National Contingency Plan ("NCP"). The court found that KDHE oversight and implementation of cleanups under the deferral program was consistent with the NCP and was functionally-equivalent to the going through federal superfund process with EPA. In addition, the court noted that EPA had never disapproved any cleanup activities supervised by KDHE or ordered any of the covered sites from the program. Since all of the work had been performed under a KDHE consent order, and that KDHE has approved all of the documents prepared by the

plaintiff since the site was accepted into the deferral program, the court held that the cleanup was entitled to a presumption of compliance with the NCP.

However, to invoke §113(f), the remediator presumably will still have to be performed pursuant to an agreement that qualifies as an "administrative settlement" or judicially approved settlement. Thus, a purchaser hoping to pursue this route should ensure that the cleanup agreement undergo some form of public comment or have the state agency file a "friendly" complaint that is resolved in a judicial consent decree to preserve a right of contribution.

Another option might be to explore the possibility of entering into a prospective purchaser agreement ("PPA"). While states do not have authority to enter PPAs under CERCLA, a PPA issued by a state under a program that qualifies as a §128 "state response program" might provide a purchaser with a basis to argue that it may bring a §113(f)(3) contribution action.

Even if a purchaser determines that a state agreement qualifies as a VCA, the purchaser will still have the burden of establishing that its costs were "necessary" and in substantial compliance with the NCP.[56] Because one of the incentives of state brownfield and VCPs is to streamline the site remediation process, cleanups performed under these programs may not comply with the NCP. While some cases have held that cleanups performed pursuant to a cleanup agreement are entitled to a presumption of NCP consistency, [57]purchasers should nevertheless be vigilant to make sure that cleanups that are acceptable to a state agency under its brownfield or VCP substantially complies with NCP. In a number of states, purchasers concerned about preserving their contribution rights may have to do more work than required by the state. In particular, purchasers should pay close attention to public participation requirements and state administrative procedures for settlement agreements.

In the absence of any governmental action, a purchaser might also consider bringing a RCRA 7002 citizen suit.[58] While plaintiffs may not recover cleanup costs, they may commence action for injunctive relief parties seeking to compel cleanups as well as recover their attorneys' fees As a result, RCRA 7002 can be a very important tool for property owners. Parties who are barred by Aviall from bring contribution claims may try to use RCRA 7002 to force PRPS to participate in cleanups.[59] To bring a RCRA 7002 action, a plaintiff must establish that the defendant (1) was contributing or have contributed to the handling, storage, treatment, transportation or disposal of solid or hazardous wastes which may present an (2) imminent and substantial endangerment to human health or the environment. To show that there is "imminent" harm, the plaintiff does not have to establish that actual harm will occur immediately but simply allege that there is a risk of threatened harm. Sometimes, the mere presence of contaminants in groundwater is enough to demonstrate there is an "imminent" harm. To establish "substantial endangerment", a plaintiff does not have to present proof of actual harm or present risk assessments that quantify the risk but simply show a threatened or potential harm.

Status of State Contribution Rights

The wave of environmental legislation enacted in the 1980s was largely in response to the perception that common law remedies such as trespass, nuisance and strict liability were not well-suited for resolving liability for complex cleanups at sites with historical contamination. However, Aviall is causing PRPs to re-examine the viability of state common law and statutory remedies. Unfortunately, they may be in for disappointed in what they find.

Under the Supremacy Clause of Article VI of the United States Constitution. Congress may enact laws that pre-empt state or local laws. Courts have ruled that CERCLA generally does not expressly preempt state law but may prohibit PRPs from recovering compensation for the same removal costs or damages under both CERCLA or a state law. Some courts have because Congress crafted a comprehensive framework for encouraging settlements when it enacted §113(f), state common law claims for contribution are preempted by CERCLA.[60]

For example, in *Grace*, supra, the plaintiff amended its complaint to add a state contribution claim.[61] Grace's claim did not plead any state tort claims but simply asserted that the defendant was liable as an arranger under CERCLA.[62] Noting that CERCLA established a comprehensive remedial scheme that provided for contribution in specific circumstances, the court said it found no reason to deviate from the general rule that the source of a state contribution claim must be state law. The court found that CERCLA did not provide a right of contribution to Grace, that Grace had failed to identify any state law under which the defendant could be liable under state law. The court said it was bound by the limitations on contribution established by CERCLA and that Grace could not use state contribution law to undermine the statutory limitations on the CERCLA right of contribution.

Impact on Contract Negotiations

One obvious response to Aviall would be for buyers to seek greater contractual remedies for environmental liabilities such as environmental indemnities, letters of credits, escrows and price reductions. However, as the saying goes "It's good work if you can get it." Because of marketplace conditions, buyers seeking such concessions would likely encounter strong resistance. With attractive assets becoming increasingly hard to find and buyers anxious to put cash to work, sellers are actually exhibiting less willingness to provide environmental indemnities or agree to cost sharing mechanisms for environmental liabilities. sellers often are requiring buyers to waive any and all rights they may have under statutory or common law so as to cut off any state contribution claims that the buyer might otherwise be able to assert. As previously mentioned, there is some question whether a carve out for state common law or statutory rights of contribution would provide any real relief to a purchaser because of the possibility that CERCLA might pre-empt such rights.

Even when sellers agree to provide some limited contractual cost-share arrangement or indemnity, they often insist on clauses known as "no hunt" provisions that prohibit a

buyer from performing voluntary investigations or cleanups unless ordered to do so by a governmental agency. The reasoning of the sellers is that buyers should not be allowed to cause or accelerate liabilities that might not normally fall within the life of an environmental indemnity or cost-sharing agreement.

A buyer facing such a contract might be tempted to disclose the results of its environmental due diligence to the state in the hope that might prompt a regulator to take enforcement action before the closing. However, such a "whisper" campaign could be fraught with danger to a buyer since sophisticated sellers will require bidders or prospective purchasers from disclosing the information generated during due diligence to governmental agencies unless the buyer believes it is required to do so, and then the seller often wants the right to manage the disclosure process.

Contract negotiations are usually influenced by the relative bargaining powers of the parties. Unless a buyer is negotiating with a highly motivated seller, a buyer's principal contractual strategy may be to either negotiate longer environmental due diligence periods to more carefully evaluate environmental liabilities or explore some form of environmental insurance or other risk transfer mechanism for unforeseen environmental liabilities that might spring up in the future.

With the environmental insurance becoming increasingly expensive and policies offering less coverage, it is unclear how attractive an option environmental insurance may be to a buyer. Moreover, environmental insurance policies now frequently require that the insured be "legally obligated" to perform a cleanup for the policy to be triggered. Thus, an insured who performs a voluntary cleanup may not have coverage under its policy. Because of this trend, some insureds have requested that prior voluntary cleanups be amended so that they are captioned as settlements or ask the state to file a "friendly" lawsuit so that the insured could assert that the cleanup was not voluntary. However, courts have not appears to be too receptive to these machinations.[63]

What buyers may want to do is to determine if the property is eligible for a state cleanup fund such as a UST or dry cleaner trust fund., or if the buyer would be qualify for brownfield financial incentives. While these state programs have been used can be used to absorb a significant portion of the "first dollars" of liability for properties, buyers need to review the eligibility requirements of these programs and also assess their financial viability. For example, while some state UST funds are flush with cash, others are insolvent.

Conclusion

Until the issue of an implied right of contribution under §107 is resolved, there is no doubt that Aviall will significantly effect CERCLA litigation practice as waves of defendants bring motions to dismiss existing §113(f)(1) contribution claims. However, the impact on transactions will largely depend on the conduct of the parties. Purchasers who use the environmental due diligence period to thoroughly evaluate environmental liabilities associated with a transaction should be in a position to minimize the potential

loss of any CERCLA contribution action by strategically using the information generated during diligence and exploring some of the suggestions discussed in this article.

In the meantime, environmental lawyers and their clients should stay tuned and closely monitor the post-*Aviall* case law. It is quite possible that in another year or two, Aviall find itself once again before the United States Supreme Court on the issue of the implied right of contribution under §107. As that noted American philosopher Yogi Berra once said "It Ain't Over Till its Over".

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[1] 42 U.S.C. 9601 et seq.

[2] No. 02-1192 (12/13/04)

[3] Vine Street LLC v. Keeling, 2005 U.S. Dist. LEXIS 4653 (E.D. Tex. March 24, 2005); City of Waukesha v. Viacom International, Inc., 2005 U.S. Dist. LEXIS 5560 (E.D. Wis. March 23, 2005); Esso Standard Company v. Perez, 2005 U.S. Dist. 4267 (D.P.R. March 21, 2005); Pharmacia Corporation and Solutia Inc. v. Clayton Chemical Acquisition LLC, 2005 U.S. Dist. LEXIS 5286 (March 8, 2005); Johnson v. San Diego, 2005 Cal. App. Unpub. LEXIS 1979 (Cal. App. March 4, 2005); Elementis Chemicals Inc v. T.H. Agriculture and Nutrition, L.L.C., 2005 U.S. Dist. LEXIS 1404 (S.D.N.Y. January 31, 2005); AMW Materials Testing, Inc. v. Town of Babylon, 2004 U.S. Dist. LEXIS 25511 (E.D.N.Y. December 20, 2004)

[4] See Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir 1986); NL Industries, Inc. v. Kaplan, 792 F.2d 896 (9th Cir. 1986); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312 (9th Cir. 1986); Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985), U.S. v. New Castle County, 642 F. Supp. 1258 (D.Del. 1986); New York v. Exxon Corp., 633 F.Supp. 609 (S.D.N.Y. 1986); Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D.Col. 1985); Wehner v. Syntex Agribusiness Inc., 22 ERC (BNA) 1732 (E.D. Mo. 1985); U.S. v. A&F Materials Co., 578 F.Supp. 1249 (S.D. Ill. 1984); Philadelphia v. Stephan Chemical Co., 544 F.Supp. 1135 (E.D. Pa. 1982). *But see* U.S. v. Westinghouse Electric Corp., 22 ERC (BNA) 1230 (S.D.Ind. June 29, 1983). A few courts also found that parties had a right of contribution under federal common law. Colorado v. Asarco, Inc., 22 ERC (BNA) 1926 (D.Col. 1985)

[5] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)(finding no implied right of contribution under antitrust laws); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981)(declining to find implied right of contribution under either Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

[6] United Technologies Corporation v. Browning-Ferris Industries, Inc., 33 F.3d 96 (1st Cir. 1994)

[7] 42 U.S.C. 9613(f)(1). The so-called "enabling clause" of §113(f)(1) provides that:
"Any person may seek a contribution action from any other person who is liable or potentially liable under section 9607(a) of this title during or following any civil action under section 9606 of this title or under 9607(a) of this title.

The last sentence of §113(f)(1) is the so-called "savings clause" and provides that:

"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 9606 of this title or section 9607 of this title."

[8] 42 U.S.C. 9613(f)(3)(B). This section provides:
"A person who has its resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2)."

[9] 42 U.S.C. 9613(f)(2). This section provides as follows:

"A person who has resolved is liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement."

In evaluating the scope of the matters addressed by the settlement, a court will examine the particular hazardous substance at issue, the location or site in question, the time frame covered by the settlement and the cost of the settlement. U.S. v. Union Gas Company, 743 F.Supp. 1144 (E.D.Pa. 1990).

[10] 42 U.S.C. 9613(g)(3)(A)

[11] 42 U.S.C. 9613(g)(3)(B)

[12]Sun Company v. Browning-Ferris, Inc., 124 F.3d. 1187 (10th Cir. 1997); The Companies for Fair Allocation v. Axil Corp., 853 F.Supp. 575 (D.Conn. 1994). Under this interpretation, §113(f) is basically the apportionment mechanism for recovery of the costs specified in §107.

[13] See U.S. v. SCA Servs. of Indiana, Inc., 849 F.Supp. 1264 (N.D. 1994); Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal, Co., Inc., 814 F.Supp. 1269 (E.D.Va. 1992); Rockwell Int'l v. IU Int'l Corp., 702 F.Supp. 1384 (N.D.Ill. 1988).

[14] 511 U.S. 809, 816-17, 128 L.Ed.2d 797, 114 S.Ct. 1960 (1995).

[15] See Bedford Affiliates v. Sills, 156 F.3d 416 (2nd Cir. 1998); Centerior Serve. Co. v. Acme Scrap & Metal Corp., 153 F.3d 344 (6th Cir. 1998); Pneumo Abex Corp. v. High Point T & D. R. Co., 142 F.2d 769 (4th Cir. 1998); Pinal Creek Group v. Newton Mining Corp., 118 F.3d 1298 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3rd Cir. 1997); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d. 1489 (11th Cir. 1996); U.S. v. Colorado & E.R. Co., 50 F. 3d 1530 (10 Cir. 1995) and United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96 (1st Cir. 1994) .

[16] The complaint originally had separate claims for cost recovery under section 107(a)(4)(B) and contribution under section 113(f)(1) but subsequently amended its complaint to combine the CERCLA claims.

[17] 42 U.S.C. 9652(d)

[18] The "savings clause" refers to the last sentence of §9613(f)(1) that states "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 9606 of this title or section 9607 of this title."

[19] The dissenting opinion disagreed with the decision to not address the issue of whether there was an implied right of contribution under §107(a)(4)(B) but did not appear to dispute the majority opinion's principal holding. Thus, it appears all nine justices apparently agreed that §113(f)(1) does not authorize contribution actions in the absence of a civil action, or an administrative or judicially approved settlement.

[20] In some respects, the Aviall decision resembles the environmental insurance case law interpreting the meaning of "lawsuit", which triggers the insurer's duty to defend. In these cases, the question before the court is whether an actions such as PRP notices that has legal consequences but falls short of being an actual judicial action qualify as a "lawsuit". The analogy in Aviall may be whether an administrative action such as a §106 unilateral order qualify as a "civil action" under §113(f)(1).

[21] 2005 U.S. Dist. LEXIS 4653 (March 24, 2005).

[22] The court suggested that the First Circuit opinion In re Hemingway Transportation, Inc., 993 F.2d 915 (1st Cir. 1993) supported this view. The court pointed to language indicating that §107(a)(4)(B) serves as the "pre-enforcement analog to the impleader contribution action permitted under section 9613(f)."

[23] 2005 U.S. Dist. LEXIS 6948 (April 12, 2005)

[24] See "Supreme Court Decision to Affect Management of Corporate Environmental Liabilities" March 2005 Katten Muchin Zavis Rosenman Client Advisory.

[25] 42 U.S.C. 9601(35)

[26] 42 U.S.C. 9607(b)(3)

[27] 42 U.S.C. 9601(40)

[28] 2005 Cal. App. Unpub. LEXIS 1979 (Cal. App. March 4, 2005)

[29] Cal. Health & Safety Code §25300 et seq.

[30] Id. at 25363(e)

[31] See Nutrasweet Co. v. X-L Eng'g Co., 227 F.3d 776, 784 (7th Cir. 2000); Rumpke of Indiana, Inc. v. Cummins Engine Co., 107 F.3d 1235 (7th Cir. 1997); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994).

[32] In *New York V. Lashins Arcade*, 91 F.3d 353 (2d Cir. 1996) the Second Court allowed the current owner/purchaser of a shopping center to invoke the third-party defense even though it knew of contamination because the current owner had no contractual relationship with former the dry cleaner tenant who had discharged hazardous substances into the ground 15 years prior to the current owner's acquisition.

[33]Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992)(operator of subdivided parcel was not responsible for contamination associated with former UST since the contaminated area was not part of the subdivided parcel so that the tenant had no authority over the area where hazardous substances was located).

[34] For example, a phase I environmental site assessment that satisfies AAI may not necessarily allow a purchaser to assert the innocent purchaser defense under the New Jersey Spill Compensation and Control Act. N.J.S.A. 58:10-23.11.g.d(5). Likewise, purchasers in Michigan acquiring property after June 5, 1995 (or March 6, 1996 for releases from USTs) must perform a Baseline Environmental Assessments (BEA) o preserve their immunity from liability(MCL §324.20102a.(1)(a).

[35] 42 U.S.C. 9622. CERCLA authorizes judicially-approved consent decrees with PRPs to perform cleanups under 42 U.S.C. 9622(d) Administrative- or judicially-approved de minimis settlements are authorized under 42 U.S.C. 9622(g) and cost recovery settlements are authorized under 42 U.S.C. 9622(h). Notice of de minimis and cost recovery settlements must be published in the federal register and provide for a 30 day comment period. 42 U.S.C. 9622(i).

[36] See United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990); American Special Risk Insurance Company v. City of Centerline, 180 F.Supp.2d 903 (E.D. Mich. 2001); General Time Corporation v. Bulk Materials, Inc., 826 F.Supp. 471 (M.D.Ga. 1993); U.S. v. Serafini, 781 F.Supp. 336 (M.D.Pa. 1992).

[37] CPC International, Inc. v. Aerojet-General Corp., 759 F.Supp. 1269 (W.D.Mich. 1991)

[38] See U.S. v. Colorado & Eastern Railroad Co., 50 F.3d 1530 (10th Cir. 1995); Comerica Bank-Detroit v. Allen Industries, Inc., 769 F.Supp. 1408 (E.D.Mich. 1991)(contribution protection applies to matters addressed in state settlement); Central Illinois Public Serv. Co. v. Industrial Oil Tank and Line Cleaning Serv., 730 F.Supp. 1498 (W.D.Mo. 1990); Allied Corp. v. Frola, 730 F.Supp. 626 (D.N.J. 1990)(holding that contribution protection is limited to costs incurred within scope of consent order). But see Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994)(plaintiff claim not barred for matter not addressed by consent decree).

[39] Decision and Order, 98-CV-838S(F) (W.D.N.Y. May 3, 2005)

[40] 2005 U.S. Dist. LEXIS 5560 (March 23, 2005)

[41] See W.R. Grace & Co. v. Zotos International, supra.

[42] Firemen's Fund Insurance Co. v. City of Lodi, 296 F.Supp.2d 1197 (E.D. Cal. 2003); *Pfohl Brothers Landfill Site v. Allied Waste Sys*., 255 F.Supp.2d 134 (W.D.N.Y. 2003)

[43]2005 U.S. Dist. LEXIS 5560 (E.D. Wis. 03/23/05)

[44] The court was also unpersuaded by a letter from the WDNR that the agency and the city were in agreement on the basic terms of the settlement but were still working on some of the details of the agreement.

[45] 2005 U.S. Dist. LEXIS 5286 (N.D.Ill. 3/8/05)

[46] ECL §27-1301 et seq.

[47] The author has been advised that the state intends to post its memorandum of law to its website.

[48] No. 95-CV-6400L (W.D. N.Y.)

[49] *Pfohl Brothers Landfill Site v. Allied Waste Sys*., 255 F.Supp.2d 134 (W.D.N.Y. 2003)

[50] The state also argued that the court's linking of sections 106 and 122 in Pharmacia was flawed since it exalted form over substance.

[51] See Vine Street LLC v. Keeling, 2005 U.S. Dist. LEXIS 4653 (March 24, 2005)(holding cleanup performed under Texas VCP does not constitute administrative settlement).

[52] 42 U.S.C. 9628(b)

[53] To qualify for the "state response program", a state must either enter into a memorandum of agreement with EPA or demonstrate to the satisfaction of EPA that the state program contains certain minimum elements. 42 U.S.C. 9628(a)

[54] 42 U.S.C. 9628(b)(1)(D)

[55] 302 F.3d 1127 (10th Cir. 2002)

[56] 42 U.S.C. 9607(a)(4)(B)

[57] State agency involvement in the selection of a remedy may "substitute" for public participation and comment. See Morrison Enters. v. McShares, Inc., 302 F.3d 1127 (10th Cir. 2002); Public Serv. Co. v. Gates Rubber Co., 175 F.3d 1177 (10th Cir. 1999); Bedford Affiliates, 156 F.3d 416 (2nd Cir. 1998);

General Elec. Co. v. Litton Bus. Sys., Inc., 715 F. Supp. 949 (W. D. Mo. 1989), aff'd, 920 F.2d 1415 (8th Cir. 1990) (Litton), cert. denied, 499 U.S. 937, 113 L. Ed. 2d 446, 111 S. Ct. 1390 (1991)).

[58] 42 U.S.C. 6972

[59] See Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp., 2005 U.S. Dist. LEXIS 6948 (N.D. Ill. April 12, 2005)

[60] Bedford Affiliates v. Sills, 156 F.3d 416 (2nd Cir. 1998); In re Reading, 115 F.3d. 1111 (3rd Cir. 1990).

[61] CPLR §1401; Gen. Oblig. Law §15-108.

[62] The defendant also argued that Grace was seeking damages were essentially economic in nature and not based in tort.

[63] See American Motorist Insurance Company v. Stewart Warner Corporation, 2994 U.S. Dist. LEXIS 11802 (N.D. Ill. June 28, 2004)