Analysis&Perspective

SUPERFUND

CONTRIBUTION CLAIMS

In the wake of the U.S. Supreme Court's decision in Cooper Industries Inc. v. Aviall Services Inc., many stakeholders have discussed the effect the ruling will have on litigation and settlement strategy. However, according to the author of this article, the ruling's effect on future transactions is less clear. As such, the author discusses how Aviall and recent court rulings interpreting the decision will affect corporate and real estate transactions, including negotiating strategies, allocating liability, and drafting purchase and sale agreements. He says purchasers who use the environmental due diligence period to evaluate thoroughly the environmental liabilities associated with a transaction should be in a position to minimize the potential loss of any superfund contribution action by using the information generated during due diligence and exploring some of the suggestions discussed in this article.

Effect of 'Cooper Industries' Decision on Real Estate, 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 U.S. Supreme Court's decision in *Cooper Industries Inc. v. Aviall Services Inc.*. (*Aviall*).[2] It seems that a week does not pass without an article in the legal media or a law firm newsletter speculating on the impact of the case.

[1] 42 USC 9601 et seq.
[2] 125 S. Ct. 577, 59 ERC 1545 (2004).

This article was written by Larry Schnapf, an environmental attorney based in New York City with more than 20 years of national environmental experience with Fortune 500 corporations and a number of major New York-based law firms. He also is an adjunct professor of environmental law at New York Law School. Schnapf concentrates primarily on environmental issues associated with corporate and real estate transactions, commercial lending, and securitizations. Schnapf can be reached by e-mail at Lawrence.Schnapf@srz.com. The opinions expressed here do not represent those of BNA, which welcomes other points of view.

Because *Aviall* overturned two decades 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 indeed may tempt owners or operators of contaminated properties to implement so-called "at-risk" cleanups performed without state or federal oversight that may not comply with applicable cleanup standards. *Aviall* also may encourage some potentially responsible parties, particularly generators, 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; and how purchase and sale agreements are drafted.[3]

[3] *W.R. Grace & Co. v. Zotos International*, No. 98-CV-838S(F) (W.D.N.Y. May 3, 2005), *Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005); *City of Waukesha v. Viacom International Inc.*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005); *Esso Standard Company v. Perez*, 2005 U.S. Dist. LEXIS 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.*, 59 ERC 2071 (S.D.N.Y. Jan. 31, 2005); *AMW Materials Testing, Inc. v.*

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Overview of CERCLA Right of Contribution

Historical Look at Contribution. When CERCLA originally was enacted in 1980, it did not contain an express right of contribution among PRPs. Most courts addressing the issue in the early years of the CERCLA program found that Section 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 still was some doubt about the validity of an implied right of contribution under Section 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 implied right of contribution when it added Section 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 Section 106 or 107.[7] Meanwhile, Section 113(f)(3) created a right of contribution for persons who enter into administrative or judicially approved settlements.[8] To further encourage settlements and to expedite cleanups, Congress added Section 113(f)(2), which provides contribution protection to parties that resolved their CERCLA liability.[9] SARA also added two corresponding three-year limitations periods for contribution actions found at Section 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 Section 107(a)(4)(B) and Section 113(f). One line of cases held that a Section 107 claim by a PRP was subsumed within the Section 113(f) right of contribution,[12] while others found that Sections 107(a) and Section 113(f) created two causes of actions that could be used by PRPs.[13] The latter interpretation partially was based on *Key Tronic v. United States* where the U.S. Supreme Court seemed to suggest in what might be viewed as *dicta* that Section 107 had a "similar and somewhat overlapping remedy" to the contribution cause of action in Section 113.[14] The courts adopting the view that Section 107(a)(4)(B) contains an implied right of contribution also found support in the savings clause of Section 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 Section 113(f) to allow 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 perform cleanups voluntarily and then bring contribution actions under Section 113(f) to recover their response costs from other PRPs. Perhaps because of the availability of Section 113(f) relief, a majority rule soon

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Town of Babylon, 348 F. Supp. 2d 4, 59 ERC 1677 (E.D.N.Y. 2004).

[4] *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 24 ERC 1545 (9th Cir. 1986); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 24 ERC 1550 (9th Cir. 1986); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 24 ERC 1985 (9th Cir. 1986); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 22 ERC 1785 (6th Cir. 1985), *United States v. New Castle County*, 642 F. Supp. 1258, 24 ERC 1705 (D. Del. 1986); *New York v. Exxon Corp.*, 633 F. Supp. 609, 24 ERC 1361 (S.D.N.Y. 1986); *Colorado v. Asarco Inc.*, 608 F. Supp. 1484, 22 ERC 1926 (D. Colo. 1985); *Wehner v. Syntex Agribusiness Inc.*, 616 F. Supp. 27, 22 ERC 1732 (E.D. Mo. 1985); *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 20 ERC 1353 (S.D. Ill. 1984); *Philadelphia v. Stephan Chemical Co.*, 544 F. Supp. 1135, 17 ERC 1977 (E.D. Pa. 1982). *But see United States v. Westinghouse Electric Corp.*, 22 ERC 1230 (S.D. Ind. 1983). A few courts also found that parties had a right of contribution under federal common law. *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 22 ERC 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, 39 ERC 1097 (1st Cir. 1994).

[7] 42 USC 9613(f)(1). The so-called "enabling clause" of Section 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 Section 9607(a) of this title."

The last sentence of Section 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 USC 9613(f)(3)(B). This section provides:

"A person who has 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 USC 9613(f)(2). This section provides as follows:

"A person who has resolved its 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. *United States v. Union Gas Company*, 743 F. Supp. 1144, 31 ERC 1803 (E.D. Pa. 1990).

[10] 42 USC 9613(g)(3)(A).

[11] 42 USC 9613(g)(3)(B).

[12] *Sun Company v. Browning-Ferris, Inc.*, 124 F.3d. 1187, 45 ERC 1129 (10th Cir. 1997); *The Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 39 ERC 1243 (D. Conn. 1994). Under this interpretation, Section 113(f) basically is the apportionment mechanism for recovery of the costs specified in Section 107.

[13] *See United States v. SCA Servs. of Indiana Inc.*, 849 F. Supp. 1264, 38 ERC 1654 (N.D. 1994); *Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co. Inc.*, 814 F. Supp. 1269, 36 ERC 1111 (E.D. Va. 1992); *Rockwell Int'l v. IU Int'l Corp.*, 702 F. Supp. 1384, 29 ERC 1577 (N.D. Ill. 1988).

[14] 511 U.S. 809, 816-17, 114 S. Ct. 1960, 128 L. Ed. 2d 797, 38 ERC 1633 (1995).

emerged that only innocent parties could bring Section 107(a)(4)(B) cost recovery actions.[15]

The Aviall Case. While the federal judiciary was developing the contours of the private cost recovery under Section 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), which 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 state voluntary cleanup program. In August 1997, Aviall 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 Section 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 of Section 113(f)(1) 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 was not limited to state-based claims. The court noted that Congress specifically referred to state law in the savings clause of Section 152(d).[17] Because Congress knew how to refer to state law when it intended to do so, the court concluded that the savings clause was not limited to state claims. Based on the plain language of Section 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 U.S. Supreme Court reversed the Fifth Circuit. Writing for the majority, Justice Clarence Thomas rejected the notion that "may" should be read permissively so 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 Section 113(f)(1) was that a plaintiff could bring a contribution action only 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 Section 113(g)(3) because 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 under Section 113(f)(1), the Court remanded the case for further determination on whether Aviall might have an implied right of contribution under Section 107(a)(4)(B).[20]

Post-Aviall Rulings. In an interesting post-*Aviall* decision, the U.S. District Court for the Eastern District of Texas provided a rationale for reviving the moribund Section 107 private right of action. In *Vine Street LLC v. Keeling*,[21] the court distinguished the cases limiting PRPs to a Section 113(f) contribution action. The court found that in all of those cases, the issue was whether a PRP with a claim under Section 113(f) could bring a concurrent claim under Section 107(a). In the court's opinion, those decisions held that because the PRP could bring a Section 113(f) action, it could not bring a claim under Section 107. Thus, the court concluded, this line of authority did not apply to situations where a party could not bring a Section 113(f) claim because it had performed a voluntary cleanup. The court said that Section 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 determine if the liability was divisible, the court said Section 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 Section 107 clearly encompassed a wider range of actions, including contribution actions for costs incurred pursuant to a voluntary cleanup.[22]

Following *Vine*, the U.S. District Court for the Northern District of Illinois also adopted the view that there is an implied right of contribution under Section

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[15] *See Bedford Affiliates v. Sills*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998); *Centerior Serve. Co. v. Acme Scrap & Metal Corp.*, 153 F.3d 344, 47 ERC 1285 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point T & D. R. Co.*, 142 F.3d 769, 46 ERC 1481 (4th Cir. 1998); *Pinal Creek Group v. Newton Mining Corp.*, 118 F.3d 1298, 45 ERC 1588 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 44 ERC 1513 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d. 1489, 43 ERC 1196 (11th Cir. 1996); *U.S. v. Colorado & E.R. Co.*, 50 F.3d 1530, 40 ERC 2109 (10th Cir. 1995); and *United Technologies Corp. v. Browning-Ferris Industries*, 33 F.3d 96, 39 ERC 1097 (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 USC 9652(d).

[18] The "savings clause" refers to the last sentence of Section 9613(f)(1), which 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 not to address the issue of whether there was an implied right of contribution under Section 107(a)(4)(B) but did not appear to dispute the majority opinion's principal holding. Thus, it appears all nine justices apparently agreed Section 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 action, such as a PRP notice, that has legal consequences but falls short of being an actual judicial action qualifies as a "lawsuit." The analogy in *Aviall* may be whether an administrative action, such as a Section 106 unilateral order or a letter from a state agency threatening to bring an enforcement action, qualifies as a "civil action" under Section 113(f)(1).

[21] 362 F. Supp. 2d 754 (E.D. Tex. 2005).

[22] The court suggested the First Circuit opinion in *In re Hemingway Transportation, Inc.*, 993 F.2d 915, 36 ERC 1665 (1st Cir. 1993) supported this view. The court pointed to language indicating Section 107(a)(4)(B) serves as the "pre-enforcement analog to the impleader contribution action permitted under Section 9613(f)."

  ER ISSN 0013-9211

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 for a parcel with the defendant during the 1940s and 1950s where it operated an industrial chemical storage, mixing, and packaging facility. After learning the property was contaminated, the plaintiff performed a voluntary cleanup at a cost of $1.8 million and sought recovery from the defendant under Section 107 and 113(f). The court began its analysis by noting that the plaintiff did not have a cause of action under Section 113(f)(1) because it voluntarily undertook a cleanup. Turning to the Section 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 Section 107 cost recovery action. However, as a party that performed a voluntary cleanup, the court held that the plaintiff fell within the subset of plaintiffs who may have an implied right of contribution under Section 107(a)(4)(B) and denied the defendant's motion to dismiss on this count of the complaint.

Impact on Due Diligence

Some commentators have suggested that *Aviall* may make it more difficult to sell corporate assets or contaminated real estate.[24] It is possible that some less sophisticated parties occasionally may be scared away from some transactions because of their inability to pursue a contribution action. However, because most 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 transactions largely will 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 traditionally have performed environmental due diligence to preserve the various liability defenses available under CERCLA. In general, purchasers perform "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[27] and contiguous property owner defenses. Because *Aviall* did not affect the right of innocent parties to bring Section 107(a)(4)(B) cost recovery actions, the CERCLA defenses as well as their state counterparts now may take on greater importance in transactions.

Many transacting parties perform due diligence not to preserve what may be perceived as illusory defenses but rather 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* probably will not have a significant impact on purchasers, equity investors, and lenders that thoroughly investigate current and historical environmental liabilities because they should be able to address those material liabilities contractually or structure some form of risk transfer mechanism before the closing.

Because of the increasing size and speed of corporate transactions, many purchasers and their lenders are performing only 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 superficial environmental due diligence seriously should consider re-examining their business practices or approaches to transactions to minimize the potential impact of *Aviall*.

State Contribution Requirements. 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 replacement of the strict liability regime with proportional liability. Because states bring over 70 percent of 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 also should 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 contribution actions was recently 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 California's Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA),[29] alleging 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 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]

[23] 365 F. Supp. 2d 913, 60 ERC 1508 (N.D. Ill. 2005).

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

[25] 42 USC 9601(35).

[26] 42 USC 9607(b)(3).

[27] 42 USC 9601(40).

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

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

[30] *Id.* at 25363(e).

Review Applicable CERCLA and State Environmental Law for Particular Facilities. It would be an understatement to say CERCLA is not a model of clarity in draftsmanship. Thus, it is not too surprising that federal circuit courts have adopted varying interpretations of 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 Section 9607(b)(3) nonetheless may pursue an action under Section 9607(a) if it qualifies as a "non-polluting PRP" who is not responsible for or otherwise causes the contamination.[31] Likewise, federal courts in New York have consistently interpreted the meaning of "contractual relationship" narrowly, thereby allowing parties to successfully assert the third-party defense.[32] Similarly, the property owners in states subject to the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit may argue that portions of a site were not under their control or that their property should not be considered part of the "facility" where the hazardous substances were located.[33]

If due diligence reveals environmental liability at one or more facilities, asset purchasers that will own or operate the facility should review carefully 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 otherwise is unable to bring a Section 113(f) contribution action might be able to circumvent this limitation and bring a CERCLA Section 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 also should carefully evaluate the requirements for asserting the bona fide prospective purchaser or contiguous property owner defenses as well as any particular state requirements for preserving liability defenses.[34]

[31] *See Nutrasweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 784, 51 ERC 1161 (7th Cir. 2000); *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 44 ERC 1065 (7th Cir. 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764, 39 ERC 1013 (7th Cir. 1994).

[32] In *New York v. Lashins Arcade*, 91 F.3d 353, 43 ERC 1001 (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 the former dry cleaner tenant who had discharged hazardous substances into the ground 15 years before the current owner's acquisition.

[33] *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 35 ERC 1005 (4th Cir. 1992) (operator of subdivided parcel was not responsible for contamination associated with former UST because the contaminated area was not part of the subdivided parcel so the tenant had no authority over the area where hazardous substances were 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. Rev. Stat. Section 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 Assessment (BEA) to preserve their immunity from liability (Mich. Comp. Laws Section 324.20102a.(1)(a)).

Using State Cleanup Agreements to Preserve Contribution Rights

Administrative Settlements. Most state remediation programs now issue no further action (NFA) or closure letters that confirm 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 Section 113(f)(3), such a document no longer may be satisfactory to a purchaser or its lender because it will not enable a purchaser to preserve its contribution rights. Purchasers should scrutinize agreements with regulatory agencies to determine if they qualify as "administrative settlements." Purchasers also should determine if there are pending orders or enforcement actions so they possibly might 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 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 Section 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 protections, such as opportunity for public comment or public hearings.[37]

To qualify as an "administrative settlement," the agreement must resolve the settlor's CERCLA liability. EPA has broad powers under Section 104 to take response actions and may issue administrative orders under Section 106. In contrast, unless a state has entered into a cooperative agreement under Section 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 Section 107(a)(4)(B) just like any other party. Because of defi-

[35] 42 USC 9622. CERCLA authorizes judicially approved consent decrees with PRPs to perform cleanups under 42 USC 9622(d). Administrative or judicially approved de minimis settlements are authorized under 42 USC 9622(g) and cost recovery settlements are authorized under 42 USC 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 USC 9622(i).

[36] *See United States v. Cannons Engineering Corp.*, 899 F.2d 79, 31 ERC 1049 (1st Cir. 1990); *American Special Risk Insurance Company v. City of Centerline*, 180 F. Supp. 2d 903, 52 ERC 1443 (E.D. Mich. 2001); *General Time Corporation v. Bulk Materials, Inc.*, 826 F. Supp. 471, 37 ERC 1763 (M.D. Ga. 1993); *United States v. Serafini*, 781 F. Supp. 336, 34 ERC 1320 (M.D. Pa. 1992).

[37] *CPC International, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 34 ERC 1274 (W.D. Mich. 1991).

  ER ISSN 0013-9211

ciencies 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 Section 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 resolved 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 a state order. The absence of any reference to CERCLA was fatal in *W.R. Grace v. Zotos International*[38] and *City of Waukesha v. Viacom International, Inc.*[39] It should be noted that 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 Section 113(f)(2).[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 Section 104 cooperative agreement with EPA, the only basis for the state to invoke CERCLA action would be a Section 107(a)(4)(B) cost recovery action. In the absence of any state-incurred response costs, nonsettling PRPs could argue that the agreement is not an "administrative settlement" because there was no CERCLA liability to resolve.[41]

So what is a purchaser to do? If an existing settlement does not reference Section 113(f) on its face, the purchaser should request that the regulatory agency modify the agreement so it refers to CERCLA and states that the intent of the parties is that the agreement shall constitute an administrative settlement under Section 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 than normally would be required or perhaps implementing a supplemental environmental project.

[38] *Supra*, n. 3.

[39] 362 F. Supp. 2d 1025 (E.D. Wis. 2005).

[40] *See United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 40 ERC 2109 (10th Cir. 1995); *Comerica Bank-Detroit v. Allen Industries, Inc.*, 769 F. Supp. 1408, 34 ERC 1102 (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).

[41] *See W.R. Grace & Co. v. Zotos International, supra*, n. 3.

[42] *Firemen's Fund Insurance Co. v. City of Lodi*, 296 F. Supp. 2d 1197, 58 ERC 1062 (E.D. Cal. 2003); *Pfohl Brothers Landfill Site v. Allied Waste Sys.*, 255 F. Supp. 2d 134 (W.D.N.Y. 2003).

Recent Case Law on Administrative Settlements. 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 allegedly had arranged to dispose of 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 Section 106 or 107(a). The court based its holding on the existing case law and its own interpretation of Section 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 Section 113(f)(3)(B), arguing that its cost share pilot program contract with the Wisconsin Department of Natural Resources (WDNR) was an "administrative settlement." The city also submitted a separate administrative settlement agreement to 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 Section 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 the Wisconsin statute authorizing WDNR to enter into the contract provided that it did not affect 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 on consent (AOC) under Section 106 to undertake a remedial investigation/feasibility study (RI/FS) for an operable unit 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 the AOC. In holding that the AOC was not an "administrative settlement" entitling the plaintiffs to bring a contribution action, the court noted that while CERCLA Section 122 authorized EPA to enter into "administrative settlements," the AOC was issued under Section 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 Section 122(d)(3). The court also said 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 was

[43] 362 F. Supp. 2d 1025 (E.D. Wis. 2005).

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

[45] 2005 U.S. Dist. LEXIS 5286 (N.D. Ill. March 8, 2005).

based on Section 106 and the AOC contained the standard boilerplate disclaimer that the AOC did not constitute an admission of liability by any of the parties. The court also ruled that neither the UAO nor the AOC qualified as civil actions under Section 113(f)(1). The court pointed out that Section 106 authorized bringing an action in district court or taking "other action . . . including such orders." Because Congress clearly delineated between bringing a civil action and an order, the court found that the UAO did not constitute a civil action under Section 113(f)(1).

In *W.R. Grace & Co. v. Zotos International,*[46] the plaintiff purchased the assets of Evans Chemetics Inc. in 1978 that included a manufacturing facility in Waterloo, N.Y., 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 Conservation (NYDEC) to perform an RI/FS. After implementing the remedy at a cost of $1.7 million, Grace filed a contribution action under Section 113(f)(1). After a nonjury 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 Section 113(f)(3). In entering a judgment in favor of the defendant, the U.S. 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.[47] Moreover, the court noted that the consent orders did not indicate NYDEC was exercising any authority under CERCLA, did not indicate 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 therefore Grace could not bring a contribution claim against the defendant.

In a pending case out of the western district of New York, the state has gone on record that its orders on consent constitute administrative settlements under Section 113(f)(3).[48] In *Seneca Meadows, Inc v. ECI Liquidating, Inc.*,[49] the defendants filed a motion to dismiss arguing that a series of orders on consent entered into with NYDEC to investigate and remediate the Tantalo Landfill in Seneca Falls, N.Y., did not constitute "settlement agreements" under Section 113(f)(3) because the consent orders only resolved state claims. The state attorney general 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 New York relied upon to recover its response costs. The memorandum of law goes on to say NYDEC settled both CERCLA and state claims under the consent orders. Specifically, the state notes that the second consent order provided contribution protection to the plaintiff under Section 113(f)(2) for matters addressed by the order, while the third consent order released the plaintiff from all claims NYDEC might have under statutory or common law involving the investigative or remedial activities at the site related to the disposal of hazardous wastes. In addition, the 2004 consent order specifically provided that to the extent authorized by the Section 113(f)(3), plaintiff was entitled to seek contribution from any person except those entitled to contribution protection under Section 113(f)(2). Moreover, the state noted that the U.S. District Court for the Western District of New York previously had ruled similar orders of consent issued by NYDEC constituted "administrative settlements" under Section 113(f)(3).[50] The state distinguished the *AMW* case on the grounds that the contribution plaintiffs had not entered into any agreements with NYDEC or *Pharmacia* on the basis that the order in that case was issued under the authority of Section 106.[51]

As these cases illustrate, simply claiming an agreement is an administrative settlement does not mean a court necessarily will agree. Plaintiffs should expect defendants to vigorously challenge the validity of the agreement as an administrative settlement. State VCAs may be particularly vulnerable to attack because they usually refer to an agency's authority under state law to enter into the agreement and thus have an even more tenuous link to CERCLA.[52] 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 WDNR. The forms state it is the intention of the parties that the agreement constitutes an administrative settlement for purposes of Section 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 a party has "resolved its liability") may not take effect until the work is completed. It also is important to determine if there are any conditions that could trigger reopeners that could eviscerate any liability immunity.

Federal Enforcement Bar. Another possible avenue for preserving contribution rights may be the federal enforcement bar provision of CERCLA Section 128. Under this section, a party who performs a cleanup at an "eligible response site" in compliance with a "state response program" will not be subject to a federal administrative or judicial enforcement action except in limited circumstances.[53]

There are a number of requirements that must be met to qualify for the so-called federal enforcement bar of Section 128. If a purchaser plans on relying on Section 128, it should, during due diligence, verify that the cri-

[46] No. 98-CV-838S(F) (W.D.N.Y. May 3, 2005)

[47] N.Y. Envtl. Conserv. Law Section 27-1301 et seq.

[48] The author has been advised that the state intends to post its memorandum of law to its Web site.

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

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

[51] The state also argued that the court's linking of Sections 106 and 122 in *Pharmacia* was flawed because it exalted form over substance.

[52] *See Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (March 24, 2005) (holding cleanup performed under Texas VCP does not constitute administrative settlement).

[53] 42 USC 9628(b).

 ER ISSN 0013-9211

teria of Section 128 have been met. Among the key issues that need to be reviewed are whether the state program qualifies as a "state response program,"[54], whether the contaminated property qualifies as an "eligible response site," if EPA has notified the state that EPA intends to take enforcement action regarding the particular site, and whether the state complied with the 48-hour response period for advising EPA that the state intends to address the contamination under its own program.[55]

While Section 128 specifically only addresses federal enforcement, 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 Section 113(f)(3). Section 128 does not require the remediator to enter into a specific type of agreement with the state but simply requires the remediator to perform a response action in compliance with the state response program. While not a Section 128 action, the ruling by the U.S. Court of Appeals for the Tenth Circuit in *Morrison Enterprises v. McShares, Inc.*[56] illustrates how this might work. In that case, a general partnership owned and operated land with grain storage facilities in Salina, Kan., from the 1950s until 1980 when it then leased the property to another corporation. In 1988, the Kansas Department of Health and Environment (KDHE) determined 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 an investigation. In 1992, the plaintiff entered into a consent order with 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 the KDHE response program met federal requirements and that sites addressed by KDHE would not be added to the federal National Priorities List. 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 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 going through the federal superfund process with EPA. In addition, the court noted that EPA never had disapproved any cleanup activities supervised by KDHE or removed any of the covered sites from the program. Because all of the work had been performed under a KDHE consent order and KDHE had 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 Section 113(f) the remediator presumably still will have to act pursuant to an agreement that qualifies as an administrative or judicially approved settlement. Thus, a purchaser hoping to pursue this route should ensure the cleanup agreement undergoes 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.

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

Even if a purchaser determines a state agreement qualifies as a VCA, the purchaser still will have the burden of establishing that its costs were "necessary" and in substantial compliance with the NCP.[57] Because one of the incentives of state brownfield programs 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,[58] purchasers nevertheless should make sure cleanups that are acceptable to a state agency under its brownfield program or VCP substantially comply with the NCP. In a number of states, purchasers concerned about preserving their contribution rights may have to do more work than the state requires. In particular, purchasers should pay close attention to public participation requirements and state administrative procedures for settlement agreements.

Resource Conservation and Recovery Act Citizen Suit. In the absence of any governmental action, a purchaser also might consider bringing a Resource Conservation and Recovery Act Section 7002 citizen lawsuit.[59] While plaintiffs may not recover cleanup costs, they may commence an action for injunctive relief seeking to compel cleanups as well as recover their attorneys' fees. As a result, RCRA Section 7002 can be a very important tool for property owners. Parties who are barred by *Aviall* from bringing contribution claims may try to use RCRA 7002 to force PRPs to participate in cleanups.[60] To bring a RCRA Section 7002 action, a plaintiff must establish that the defendant (1) was contributing or contributed to the handling, storage, treatment, transportation, or disposal of solid or hazardous wastes that may

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

[55] 42 USC 9628(b)(1)(D).

[56] 302 F.3d 1127, 54 ERC 1833 (10th Cir. 2002).

[57] 42 USC 9607(a)(4)(B).

[58] 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, 54 ERC 1833 (10th Cir. 2002); *Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 48 ERC 1681 (10th Cir. 1999); *Bedford Affiliates*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998); *General Elec. Co. v. Litton Bus. Sys., Inc.*, 715 F. Supp. 949, 30 ERC 1335 (W.D. Mo. 1989), *aff'd*, 920 F.2d 1415, 32 ERC 1433 (8th Cir. 1990) (Litton), *cert. denied*, 499 U.S. 937, 111 S. Ct. 1390, 113 L. Ed. 2d 446, 32 ERC 2054 (1991).

[59] 42 USC 6972.

[60] *See Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913, 60 ERC 1508 (N.D. Ill. 2005).

present an (2) imminent and substantial endangerment to human health or the environment. To show there is "imminent" harm, the plaintiff does not have to establish actual harm will occur immediately, but simply allege there is a risk of threatened harm. Sometimes the mere presence of contaminants in ground water is enough to demonstrate an imminent harm. To establish "substantial endangerment," a plaintiff does not have to present proof of actual harm or risk assessments that quantify the risk, but simply show a threatened or potential harm.

Status of State Common Law Remedies

The wave of environmental legislation enacted in the 1980s largely was 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 reexamine the viability of state common law and statutory remedies. Unfortunately, they may be disappointed in what they find.

Under the supremacy clause of Article VI of the U.S. 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 and a state law. Some courts have ruled that because Congress crafted a comprehensive framework for encouraging settlements when it enacted Section 113(f), state common law claims for contribution are preempted by CERCLA.[61] For example, in *Grace*, [62] the plaintiff amended its complaint to add a state contribution claim.[63] Grace's claim did not plead any state tort claims but simply asserted the defendant was liable as an arranger under CERCLA.[64] Noting 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 and that Grace had failed to identify any state law under which the defendant could be liable. 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* is for buyers to seek greater contractual remedies for environmental liabilities, such as environmental indemnities, letters of credit, 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 will likely encounter strong resistance. With attractive assets becoming increasingly hard to find and buyers anxious to put cash to work, sellers actually are 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 to cut off any state contribution claims that the buyer otherwise might 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 accelerate liabilities that normally might not 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 because 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 either may be to 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 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 the insured to 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 cleanup agreements be amended so they are captioned as settlements or ask the state to file a "friendly" lawsuit so the insured could assert the cleanup was not voluntary. However, courts have not appeared to be too receptive to these machinations.[65]

Buyers should also determine if the property is eligible for a state cleanup fund such as a UST or dry cleaner trust fund or if the buyer qualifies for brownfield financial incentives. While these state programs

[61] *Bedford Affiliates v. Sills*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998); *In re Reading*, 115 F.3d. 1111, 44 ERC 1865 (3d Cir. 1990).

[62] *Supra*, n. 46.

[63] N.Y. C.P.L.R. Section 1401; Gen. Oblig. Law Section 15-108.

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

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

  ER ISSN 0013-9211

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 Section 107 is resolved, there is no doubt that *Aviall* will significantly affect CERCLA litigation practice as waves of defendants bring motions to dismiss existing Section 113(f)(1) contribution claims. However, the impact on transactions largely will 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 due 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 will find itself once again before the U.S. Supreme Court on the issue of the implied right of contribution under Section 107. As that noted American philosopher Yogi Berra once said, "It ain't over till it's over."