NOTES

Aviall Services v. Cooper Industries: The Fifth Circuit's Decision to Limit the Availability of Contribution Actions Under CERCLA May Discourage Voluntary Cleanups

I. OVERVIEW OF THE CASE

In the course of operating an aircraft engine maintenance business, Cooper Industries, Inc. (Cooper) polluted several industrial facilities with "petroleum and other hazardous substances."[1] In 1981, Cooper sold the business, along with the contaminated facilities, to Aviall Services, Inc. (Aviall).[2] The pollution persisted under Aviall's management.[3] A few years later, Aviall reported the contamination to the Texas Natural Resource Conservation Commission, who then notified Aviall that it was in violation of state laws.[4] In 1984, Aviall initiated a multimillion-dollar cleanup of the hazardous waste sites that would continue for the next several years.[5] Although Aviall ultimately sold the facilities, it retained contractual responsibility for the environmental remediation.[6]

In 1997, after unsuccessful efforts to obtain reimbursement, Aviall sued Cooper for contribution under § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[7] The district court held that either a § 106 federal administrative abatement action or a § 107(a) cost recovery action under CERCLA must first have been filed against a party before it may bring a

1. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 136 (5th Cir. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*; CERCLA, 42 U.S.C. §§ 9601-9675 (1994).

§ 113(f)(1) claim for contribution under the same act.[8] Aviall was not party to any prior or pending CERCLA claims brought by either the Environmental Protection Agency (EPA) or any private party with respect to the contaminated facilities.[9] Thus, the district court dismissed the § 113(f)(1) contribution claim without prejudice.[10]

The plaintiff appealed, arguing that a prior CERCLA action against it was unnecessary either because it voluntarily instituted the cleanup, or else because it did so at the prompting of a state agency.[11] The court rejected these arguments and affirmed the judgment of the district court, *holding* that a party must first be either actually liable or threatened with liability under CERCLA before bringing a § 113(f)(1) claim for contribution. *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134, 135 (5th Cir. 2001).

II. BACKGROUND

Congress enacted CERCLA in 1980 intending "(1) to encourage the prompt and voluntary cleanup of hazardous waste sites, and (2) to impose the costs of cleanup on parties responsible for the contamination."[12] The goal was to impose responsibility for repairing environmental damage on the people who used and profited from using the hazardous substances that caused the pollution.[13] However, as originally enacted, CERCLA did not provide parties found liable under the statute with an express right of contribution against other parties that may also have been responsible for some of the environmental harm.[14]

Before CERCLA was amended in 1986, the § 107(a) cost recovery provision was the primary means by which polluters could be compelled to pay for environmental remediation costs.[15] Section 107(a) of CERCLA imposes strict joint and several liability on "potentially

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8. *See* Aviall Servs., Inc. v. Cooper Indus., Inc., No. CIV.A.397CV1926D, 2000 WL 31730, at *4 (N.D. Tex. Jan. 13, 2000).

9. *Id.* at *4 n.4.

10. *Id.* (dismissing the case without prejudice because "Aviall arguably can bring such a claim against Cooper in the future if Aviall becomes subject to a CERCLA enforcement action that gives rise to a right of contribution").

11. *Aviall*, 263 F.3d at 136.

12. Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 86 (1997).

13. Karen L. Demeo, *Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493, 496-97 (1994).

14. Hernandez, *supra* note 12, at 95.

15. *See generally* United States v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 346-47 (D.N.J. 1999) (describing the history of contribution under CERCLA).

responsible parties" (PRPs) for environmental cleanup.[16] Defenses to § 107(a) actions are restricted to limited circumstances such as acts of God, war, or third parties.[17] PRPs include all of the following: "(1) the owner and operator of . . . a facility, (2) any person who . . . owned or operated any facility at which hazardous substances were disposed of, (3) any person who . . . arranged for disposal or treatment . . . of hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport."[18] Perhaps because of the harsh consequences of the provisions for PRPs, some courts decided to imply a federal common law right of contribution from § 107(a).[19]

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA), which continued to encourage environmental cleanups by reenacting CERCLA and clarifying certain provisions.[20] Specifically, SARA codified an express right of contribution against PRPs in § 113(f)(1).[21] However, the extent of this right was to some extent ambiguously articulated in the language of the statute, particularly regarding exactly when and to whom the cause of action was available.[22]

Close examination of the text of the statute reveals that two clauses in § 113(f)(1) can be construed to conflict with each other.[23] The first sentence of the provision reads: "Any person may seek contribution 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."[24] It is possible to argue that this clause restricts contribution claims to those brought by parties against whom cost recovery or contribution actions have already been filed.[25] In other words, this language could indicate that a party suing for contribution under CERCLA must itself have been sued under the same statute first.

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16. Hernandez, *supra* note 12, at 83, 91.
17. *Id.*
18. CERCLA, 42 U.S.C. § 9607(a) (1994).
19. Demeo, *supra* note 13, at 506.
20. *Id.* at 497-98.
21. *Id.* at 498.
22. *See, e.g.*, Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) ("The parties dispute the application of this provision to Rockwell's contribution claim.").
23. *Id.*
24. CERCLA, 42 U.S.C. § 9613(f)(1).
25. *See* Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983, 989-90 (C.D. Ill. 1998) (relying on dicta in Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1241 (7th Cir. 1997)).

The last sentence of § 113(f)(1) reads: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."[26] This clause, sometimes referred to as the "savings clause,"[27] arguably permits parties to bring contribution claims at any time, regardless of their litigation status.[28] In contrast to the first sentence of the provision, this phrase could signify that the right to sue for contribution is entirely unrestricted.

The legislative history of § 113(f)(1) provides little assistance in resolving the apparent contradiction between its first and last clauses. Its legislative history explicitly states, "The section should encourage private party settlements and cleanups" (as opposed to litigation).[29] Nevertheless, it also refers to use of the action while a § 106 or § 107(a) action is already taking place.[30] Apart from these broad hints, the legislative history does not specifically entertain the issue and thus does not resolve whether or not contribution is an exclusive right.[31] As a result of this deficiency, courts have been compelled to render decisions on the matter on a case-by-case basis.[32]

In practice, the discrepancy between the two clauses is commonly raised when a party cleans up a hazardous waste site voluntarily or at the insistence of a state agency.[33] The issue is largely a technical one: whether such parties should have standing to sue for contribution.[34] In cases that have directly addressed the issue, some courts have denied

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26. 42 U.S.C. § 9613(f)(1).

27. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 139 (5th Cir. 2001).

28. *See* Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684, 690-91 (N.D. Ind. 1997) (rejecting dicta in *Rumpke*, 107 F.3d at 1241).

29. *See* United States v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 348 n.6 (D.N.J. 1999). "The section contemplates that if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may be brought in such an action." *Id.* (citing H.R. REP. No. 253(I), at 80 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2862).

30. *See Compaction Sys. Corp.*, 88 F. Supp. 2d at 348 n.6 (quoting H.R. REP. No. 253(I), at 80 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2862) ("The section contemplates that if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may be brought in such an action.").

31. *Id.*; *see also id.* at 347 n.3 (citing additional legislative history of CERCLA § 113(f)(1)).

32. William D. Evans, Jr., *The "Cape Fear" Features of Superfund Contribution Litigation: The Available Remedies and Extent of Liability*, 75 MICH. BUS. L.J. 1170, 1171 (1996) ("[CERCLA]'s legislative history is sparse and its drafting unclear, forcing the judiciary to fill in the statutory gaps.").

33. *See, e.g.*, Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983, 985-86 (C.D. Ill. 1998) (allowing plaintiff to bring § 113(f)(1) contribution claim after being ordered to clean up property by state agency).

34. *Id.* at 989.

parties this right.[35] These decisions appear to emphasize the first sentence of § 113(f)(1), in which the "during or following" language seems to act as a constraint on when contribution actions are available.[36]

On the other hand, a number of courts have permitted parties that have cleaned up contaminated property without CERCLA-induced prompting to sue other PRPs for contribution.[37] These decisions indicate that the court regards the final sentence of § 113(f)(1) as a true savings clause that affirms the availability of contribution actions in the absence of prior CERCLA actions.[38]

Yet, still other courts completely ignore the potential contradiction between the two clauses.[39] In a number of cases in which the statutory inconsistency of § 113(f)(1) might have been cause for concern, contribution claims were permitted to proceed without question.[40] For whatever reason, the parties simply did not contest the issue and as a result, many courts that might have weighed in on the issue have failed to address it in their opinions.[41]

III. THE COURT'S DECISION

In the noted case, the court based its decision on three sources of insight as to the availability of contribution under § 113(f)(1): the text and structure of the statute, the legislative history of the statute, and prior case law interpreting the statute. The court began by examining the text of the provision, emphasizing "[a] plain language reading of the

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35. *Id.* at 990 (dismissing a § 113(f)(1) claim for lack of a § 106 or § 107(a) proceeding against the plaintiff); *see also* Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 928 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2592 (2001); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 351 (6th Cir. 1998).

36. *Estes*, 16 F. Supp. 2d at 989; *see also Geraghty*, 234 F.3d at 928; *Centerior Serv.*, 153 F.3d at 351.

37. Johnson County Airport Comm'n v. Parsonitt Co., 916 F. Supp. 1090, 1095 (D. Kan. 1996) ("Nothing in the language of section 113(f) restricts contribution actions to parties who have incurred liability under section 107."); Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684, 691 (N.D. Ind. 1997) ("PRP can bring a section 113 action even when no prior or pending section 106 or 107 civil actions have occurred."); Mathis v. Velsicol Chem. Corp., 786 F. Supp. 971, 975-76 (N.D. Ga. 1991) ("Velsicol has a cause of action for contribution . . . regardless of the existence of a civil action under sections 9606 or 9607.").

38. *See, e.g.*, *Mathis*, 786 F. Supp. at 975-76.

39. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 144 (5th Cir. 2001).

40. *See generally* Crofton Ventures Ltd. P'ship v. G. & H. P'ship, 258 F.3d 292 (4th Cir. 2001); Amoco Oil v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610 (7th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); *Centerior Serv.*, 153 F.3d 344; Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997).

41. *Aviall*, 263 F.3d at 144. *See generally Crofton*, 258 F.3d 292; *Amoco*, 889 F.2d 664; PMC, Inc., 151 F.3d 610, *cert. denied*, 525 U.S. 1104 (1999); *Centerior Serv.*, 153 F.3d 344; *Sun Co.*, 124 F.3d 1187.

statute."[42] In an effort to arrive at an analysis that was "tethered and true to the text," the court conducted a systematic investigation of the potential meanings of certain key words and phrases used in § 113(f)(1).[43]

First, the court pointed to the legal definition of the word "contribution" in support of its conviction that "the commonly accepted definition of contribution requires a tortfeasor to first face judgment before it can seek contribution from other parties."[44] Applying this analysis to the facts of the case, the court found that Aviall, as plaintiff and tortfeasor, should thus first be obliged to "face judgment" under some provision of CERCLA before being permitted to obtain payment assistance for the environmental cleanup from Cooper, as PRP and defendant. Although the court considered its interpretation of the word "contribution" to be conclusive, it continued its statutory analysis to rebut other arguments by the plaintiff.[45]

The court next examined the use of the word "may" in the statute.[46] "May" can refer to either "an exclusive means for contribution (as in a party 'may only' or 'must' . . .), or a non-exclusive means for contribution (as in a party 'may choose one of several ways' . . .)."[47] The court found that "when a statute creates a cause of action, we must narrowly read the word 'may' as establishing an exclusive enabling provision."[48] Proper interpretation of § 113(f)(1) requires the addition of the limiting word "only" to read, "[a]ny person may *only* seek contribution . . . during or following any civil action under [CERCLA]."[49] The court reached this conclusion based on one of the listed dictionary definitions of the word "may" and another case interpreting its use in a statutory provision that also created a cause of action.[50] Furthermore, from a public policy standpoint, an unrestricted right of contribution would "open the floodgates" for litigation.[51]

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42. *Aviall*, 263 F.3d at 138.
43. *Id.* (citing United States v. Alvarez-Sanchez, 511 U.S. 350, 356 (1994)).
44. *Id.* (quoting BLACK'S LAW DICTIONARY 329 (6th ed. 1990)).
45. *Id.*
46. *Id.*; CERCLA, 42 U.S.C. § 9613(f)(1) (1994) ("Any person may seek contribution . . . .").
47. *Aviall*, 263 F.3d at 138.
48. *Id.* at 139.
49. 42 U.S.C. § 9613(f)(1) (1994) (emphasis added).
50. *Aviall*, 263 F.3d at 139 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993)); Resolution Trust Corp. v. Miramon, 22 F.3d 1357, 1361 (5th Cir. 1994).
51. *Aviall*, 263 F.3d at 140 (citing *Resolution Trust Corp.*, 22 F.3d at 1361).

The court then addressed the savings clause of § 113(f)(1).[52] The court held that this section of "the statute does not affect a party's ability to bring contribution actions based on *state* law."[53] Proper interpretation of the statute requires the addition of the word "state" to read "[n]othing in this subsection shall diminish the right of any person to bring a[] *state* action for contribution."[54] The court reached this conclusion based on several principles: (1) provisions should not be rendered inoperative, (2) the specific should govern the general, and (3) language from a case decided in another circuit.[55] In addition, the court hinted that to construe the savings clause otherwise might serve to "gut" other provisions of CERCLA.[56]

Considering the legislative history of CERCLA,[57] the court explained that Congress "intended only a *limited* federal right of contribution."[58] This conclusion was based on language from a House of Representatives conference report on SARA that strengthens the court's analysis.[59] In addition, any mention of an express right to sue for contribution prior to being sued under CERCLA is conspicuously absent from the legislative history.[60] For these reasons, the court found that the legislative history of CERCLA "overwhelmingly support[ed]" its interpretation.[61]

Finally, the court addressed relevant case law.[62] In support of its decision, the court cited a number of district court cases from other circuits that have directly addressed the issue and found that the right to file a contribution action is limited.[63] The court also emphasized

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52. *Id.* at 139-40.

53. *Id.* at 139.

54. CERCLA, 42 U.S.C. § 9613(f)(1) (emphasis added).

55. *See Aviall*, 263 F.3d at 140 (citing *Resolution Trust*, 22 F.3d at 1361) (referring to the first two principles); *id.* at 140 (relying on PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 618 (7th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1389 (N.D. Ill. 1998) (viewing the savings clause as saving state law contribution claims)).

56. *Aviall*, 263 F.3d at 140 (quoting *PMC, Inc.*, 151 F.3d at 618).

57. *Id.*

58. *Id.* at 140-41 (quoting H.R. REP. NO. 00-253(1) (1985), *reprinted in* 1985 U.S.C.C.A.N. 2835 ("[T]his section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties.").

59. *Id.* at 141.

60. *Id.*

61. *Id.* at 140.

62. *Id.* at 141.

63. *Id.* at 141-42 (citing Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983, 989-90 (C.D. Ill. 1998); Deby, Inc. v. Cooper Indus., No. 99C2464, 2000 WL 263985, at *6 (N.D. Ill. Jan. 13, 2000); United States v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 349-51 (D.N.J. 1999); Southdown v. Allen, 119 F. Supp. 2d 1223, 1245 & n.41 (N.D. Ala. 2000)).

language from two cases in other circuit courts that have suggested the same result in dicta.[64]

The court rejected the analysis of district court cases holding that a contribution claim may be filed before a § 106 or § 107(a) action.[65] These decisions stressed the savings clause of § 113(f)(1), which the court had already found was "only intended to preserve state-based contribution actions."[66] The court also rejected language from other cases supporting the unrestricted availability of § 113(f)(1) actions by factually distinguishing cases cited by the plaintiff from the case at hand.[67] Referring to the circuit court cases that permitted § 113(f)(1) claims to proceed without prior CERCLA actions against the plaintiffs, the court pointed out that "these cases [were] not dispositive for the simple fact that the parties for whatever reason did not raise the specific issue presented in our case."[68]

The court concluded that from a public policy standpoint, its decision might discourage voluntary cleanups.[69] However, because "the text trumps policy preferences, . . . [the court] cannot substitute Congress' wishes with [its] own."[70] Furthermore, the court noted that its decision would not necessarily discourage voluntary cleanups, because the availability of cost recovery actions under state environmental laws remains unrestricted.[71]

IV. ANALYSIS

Although the court claimed to rely on the plain language of the statute, its decision ultimately hinges on the strategic insertion of two fairly meaningful words into its text.[72] In another context, the addition of two such words would almost unquestionably result in a significant change in the originally intended meaning of the statute. However, the

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64. *Id.* at 142 (citing Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1241 (7th Cir. 1997); OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1582 (5th Cir. 1997)).

65. *Aviall*, 263 F.3d at 143.

66. *Id.* (referring to PMC, Inc. v. Sherwin Williams Co., 151 F.3d 610, 618 (7th Cir. 1998)).

67. *Id.* at 143-44 (citing Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 914, 922 (5th Cir. 2000); Sun Co., v. Browning-Ferris, Inc., 124 F.3d 1187, 1191 (10th Cir. 1997); United Tech. Corp. v. Browning-Ferris, Indus., Inc., 33 F.3d 96, 99 n.8 (1st Cir. 1994); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 355 (6th Cir. 1998)).

68. *Id.* at 144.

69. *Id.*

70. *Id.*

71. *Id.* at 145.

72. *See id.* (Wiener, J., dissenting).

legislative history of CERCLA is particularly unhelpful in ascertaining congressional intent.[73] In this case, it is virtually impossible to discern the exact meaning of the statute from the specific legislative history that is available.[74] For this reason, it is somewhat disconcerting that the court places so much emphasis on scattered phrases from the legislative history of § 113(f)(1) in reaching its decision.[75]

A qualitative examination of the district court cases cited positively in the opinion reveals that many are factually quite distinct from the case at issue.[76] Likewise, the language from the circuit court cases cited in the opinion does not in reality offer overwhelming support for its decision.[77] For these reasons, the discussion of prior case law in the opinion is not persuasive. According to the dissent:

> [T]he majority's claim of widespread jurisprudential support for its textual analysis vanishes like the mist when exposed to the sunshine of objective scrutiny. If one robin does not make a spring, then surely a light dusting of equivocal district court cases and a wisp of dicta from another circuit does not persuasive authority make.[78]

Nevertheless, faced with potentially contradictory terms in the statute, the inadequate legislative history and lack of relevant prior case law allowed the court some discretion to render its decision either way. It decided to restrict the availability of future § 113(f)(1) contribution actions to parties against whom § 106 or § 107(a) actions have already been filed. The result of this decision is that while a PRP may still voluntarily clean up a hazardous waste site for which it is partially responsible, it must now wait until it is sued under CERCLA before being able to hold other PRPs liable for part of the cleanup costs under federal law.

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73. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) (quoting United States v. Mottolo, 605 F. Supp. 898, 902, 905 (D.N.H. 1985) ("[B]ecause the final version was enacted as a 'last-minute compromise' between three competing bills, it has 'acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.'")).

74. *Aviall*, 263 F.3d at 151-52 (Wiener, J., dissenting).

75. *Id.* at 151 (Wiener, J., dissenting) (claiming that the majority "resort[s] to legislative history to shore up its problematical reading of the statute").

76. *Id.* at 153-54 (Wiener, J., dissenting) ("[T]he majority cobbles together a hodgepodge of other district court cases, none of which is apposite.").

77. *Id.* at 154-55 (Wiener, J., dissenting).

78. *Id.* at 155 (Wiener, J., dissenting).

V. CONCLUSION

The decision in the noted case relies on somewhat questionable interpretations of the statutory language, legislative history, and case law dealing with § 113(f)(1) of CERCLA. Yet even if all the authorities the court cite supports its opinion, its decision conflicts with the underlying purpose of CERCLA: to encourage the cleanup of pollution by the responsible parties. This new limitation on the right to contribution offers polluters an additional incentive to wait until they are sued before cleaning up environmental damage. Moreover, even if this decision does not eventually serve to discourage voluntary cleanups, it does and will create the necessity for additional litigation in future CERCLA cases.

Andrea Kang