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Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. --, 2004 WL 2847713 (Dec. 13, 2004).

The U.S. Supreme Court recently decided the issue of whether a private party who has not been sued under §106 or §107(a) of CERCLA may nevertheless obtain contribution under CERCLA §113(f)(1) from other liable parties. *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. --, 2004 WL 2847713, *3 (Dec. 13, 2004). Reversing the Fifth Circuit, the Court answered this question in the negative and held that a party may not bring a contribution action under § 113 when it has not been sued under § 106 or § 107(a). *Id.*

Writing for a 7-2 majority, Justice Thomas relied on the express language of § 113(f)(1), which states that "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." *Id.* at * 5 (quoting 42 U.S.C. § 9613(f)(1)). He noted that the natural meaning of this sentence is that "contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Id.* at *6. In doing so, he rejected Aviall's argument that the "may" should be read permissively, such that "during or follow" a civil action is one, but not the exclusive, instance in which a party may seek contribution. *Id.* Justice Thomas also recognized that if the Court were to interpret the statute as allowing a contribution action at any time, it would render the "during or following" language superfluous, which the Court is loath to do. *Id.*

Justice Thomas reached this conclusion despite the language of the savings clause of § 113, which states 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." *Id.* at *7 (quoting 43 U.S.C. § 9613(f)(1)). He read this provision as clarifying that § 113 does not diminish any cause of action that may exist independently of § 113, but it neither establishes a cause of action nor expands § 113 to authorize contribution actions not brought during or following a § 106 or 107(a) civil action. *Id.* Thus, the majority concluded that, because Aviall, as the current landowner, had never been subject to a civil action under § 106 or 107(a), it had no section 113(f)(1) contribution claim against previous landowners or other PRPs.

The majority declined to address a number of issues that would have helped to clarify this area of law. First, it refused to consider the contention that, in the alternative to an action for contribution under § 113, Aviall could recover costs under § 107(a), even though it is a PRP. *Id.* at *8-*9.

Second, the majority refused to address whether Aviall has an implied right of contribution under § 107. *Id.* at *10. However, it gave some indication that such an implied right would not likely be sustained if the issue were before the Court, in light of two previous Supreme Court decisions in which such an implied right of contribution was rejected under other statutes. *Id.* The majority also noted that, in enacting § 113(f)(1), Congress explicitly recognized a particular set of the contribution rights previously implied by courts from provisions of CERCLA and the common law. *Id.* Thus, although the issue was not directly decided, any attempt to assert an implied right of contribution under § 107 to avoid the constraints of § 113 now would likely fail.

Finally, in a footnote, the majority noted that because Aviall had not been subject to an administrative order under § 106, the Court did not have to decide whether such an order would qualify as a "civil action" under § 106 or 107 for purposes of § 113. *Id.* at *7 n.5. Thus, it remains unclear whether a party could pursue a § 113 contribution action if EPA issued an administrative order under § 106, rather than pursuing the matter in court.

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