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U.S. Supreme Court Changes Superfund Cost Recovery Optionsby [Robert L. Graham](#) ✉[Gabrielle Sigel](#) ✉[James A. Vroman](#) ✉[Eric W. Truett](#) ✉

The U.S. Supreme Court ruled, in a decision issued on December 13, that the contribution provisions of the Superfund Law do not authorize a private party to sue a potentially responsible party unless an enforcement action is filed against it first (*Cooper Industries, Inc. v. Aviall Services, Inc.*, U.S., No. 02-1192, 12/13/04).

In a seven-to-two decision, the Supreme Court reversed the U.S. Court of Appeals for the Fifth Circuit, which had ruled that parties who initiate private cleanups may bring contribution suits even without a prior enforcement action (*Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677, 55 ERC 1417 (5th Cir. 2002)). The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits had agreed with the Fifth Circuit that contribution suits could be brought prior to enforcement actions.

Aviall Services, Inc. ("Aviall") purchased four aircraft engine maintenance sites from Cooper Industries, Inc. ("Cooper") in 1981. Releases of hazardous substances into the soil and groundwater from underground storage tanks and spills occurred during the time that each of the parties owned the properties. Aviall informed the Texas environmental authorities, who directed Aviall to clean up the site, based on Texas environmental laws. U.S. EPA has never been involved at these sites.

After spending millions of dollars to address the contamination at the facilities, Aviall sued Cooper in 1997 in federal district court for contribution under CERCLA Section 113(f)(1), 42 U.S.C § 9613(f)(1), which states:

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. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 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.

In an opinion written by Justice Clarence Thomas, the majority of the Supreme Court held that Section 113(f)(1) of CERCLA only provides a contribution cause of action during or following a civil enforcement action brought under Section 106 (which authorizes U.S. EPA to issue

administrative orders compelling cleanups) or Section 107(a) of CERCLA (which authorizes U.S. EPA and certain private parties to recover its expenditures remediating sites from those responsible for the contamination).

The Supreme Court's textual analysis revolved around the meaning of the term "may" in Section 113(f)(1). Aviall argued that "may" is a permissive term, meaning that Section 113(f)(1) is not the exclusive mechanism for contribution actions. The majority rejected this approach for two reasons. First, it held that the "natural meaning" of "may" is exclusive when construing the enabling clause of a cause of action. Second, it concluded that a permissive meaning of "may" would defeat the provision's explicit requirement that a contribution action takes place "during or following any civil action." Aviall claimed that the "savings clause"—the last sentence in § 113(f)(1)—authorized its contribution action. The Court disagreed and construed the "savings clause" as protecting pre-existing rights rather than creating a new cause of action for contribution.

The Supreme Court majority noted that both Aviall and Cooper argued that their interpretation of Section 113(f)(1) best advanced the purposes of CERCLA. However, the Court majority did not give weight to the relative merits of the policy considerations. Rather, it concluded that because the text of Section 113(f)(1) was unambiguous, there was "no need to resolve this dispute or to consult the purpose of CERCLA at all." This was a significant departure in approach from the *en banc* majority in the Fifth Circuit, which based its decision, in part, upon policy considerations. Aviall and many of the *amicus* briefs argued that CERCLA's purpose of encouraging timely cleanups could be frustrated if parties engaged in voluntary cleanups could not sue other potentially responsible parties for contribution.

The Court majority also declined to address Aviall's alternative argument that Section 107 creates an implied cause of action for contribution. This issue was remanded to be fully briefed and argued below. The Court, however, sent mixed signals about the viability of a contribution action under § 107 or federal common law. Justice Thomas' majority opinion described as "debatable" the holdings of lower court cases accepting such implied contribution rights (in contexts involving statutory schemes other than CERCLA). The two dissenters, Justices Ginsburg and Stevens, contended that Section 107 itself expressly creates a cause of action for contribution under CERCLA, citing to the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994), as support for their view.

After *Aviall*, industry groups and others who filed *amicus* briefs in support of Aviall's position are expected to ask Congress to amend CERCLA and expressly allow parties who initiate private cleanups to bring contribution suits even without a prior enforcement action. Potentially responsible parties who are not defendants in Section 106 or 107 actions, or state civil enforcement proceedings, will also need to reevaluate their statutory and common law options in seeking recovery for the costs of cleaning up hazardous waste sites. The *Aviall* decision will also put pressure on both U.S. EPA and the States (under CERCLA Section 113(g)(3)) to initiate many more enforcement actions, expecting that the Supreme Court's ruling will significantly decrease parties' incentives to engage in "voluntary" cleanups of contaminated sites.