New York Law Journal

Web address: http://www.nylj.com

VOLUME 234—NO. 116 FRIDAY, DECEMBER 16, 2005 ALM

OUTSIDE COUNSEL

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'Con Ed v. UGI': Is the Supreme Court's 'Aviall' Now Irrelevant?

In *Cooper Industries Inc. v. Aviall Services Inc.*, 125 SCt 577 (2004), the Supreme Court held that a person who voluntarily cleans up contaminated property does not have a contribution claim against the person who caused the contamination under §113 (f) (1) of the Superfund Law.

The decision was criticized for discouraging voluntary cleanup. A recent decision by the U.S. Court of Appeals for the Second Circuit holds that volunteers who do not have a §113 (f)(1) contribution claim under *Aviall* can have a cause of action for contribution under §107(a) of the Superfund Law. *Consolidated Edison v. U.G.I. Utilities, Inc.*, (04-2409 August 2005) (*Con Ed*).

This article will examine the *Con Ed* decision and its potential impacts, particularly how its impacts interact with those of the Supreme Court's *Aviall* decision.

'Voluntary Cleanup'

The suit arose out of the remediation of several manufactured gas facilities. Con Ed performed remedial work pursuant to a "voluntary cleanup agreement" with the New York State Department of Environmental Conservation (DEC). Prior to entering into the agreement with the state, Con Ed sued UGI to recover its costs, alleging that it had incurred and would incur cleanup costs at the site and that UGI was responsible for the remediation as a former owner or operator. The district court granted UGI's motion for summary judgment and

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Con Ed appealed. While the appeal was pending, the Supreme Court rendered its decision in *Aviall*, which limited the rights

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of volunteers to bring a contribution against polluters and the Second Circuit asked for rebriefing in light of *Aviall*.

After the rebriefing, the Second Circuit provided a thorough analysis of the CERCLA (Comprehensive Environmental Response, Compensation and Liability Act, also known as Superfund) right to contribution post-*Aviall* and decided that even though *Aviall* would bar Con Ed's §113 (f)(1) claim for contribution, Con Ed could have a claim under §107(a). The Second Circuit also examined the relevant policy implications and, less than a year after the Supreme Court in *Aviall* appeared to discourage voluntary cleanups, issued a decision clearly aimed at encouraging voluntary cleanups.

The Court began its analysis of contribution rights under CERCLA by noting that the goals of CERCLA include furthering the recovery of cleanup costs from "persons liable therefore" and inducing voluntary response actions. The Court stated that three sections of CERCLA contribute to those goals: §107(a), §113(f)(1), and §113(f)(3)(B). Much of the Court's discussion is devoted to explaining how these three sections work together to foster the goals of CERCLA.

Section 107(a) is the basic liability section. It lists the types of persons, such as owners and operators, that may be held liable for "costs of removal or remedial action." The government routinely uses this provision to recover its response costs, but §107(a) also provides a private right of action because it authorizes actions against parties who may be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." §107(a)(4)(B).

Section 113 (f)(1) expressly provides a right of contribution. It is the provision addressed by the Supreme Court in *Aviall*, where the Court held that the provision is limited to contribution claims that are brought "during or following" a civil action. Con Ed clearly had no §113(f)(1) claim for contribution because it was never a defendant in the required civil action.

Section 113(f)(3)(B) provides a contribution claim for settling parties. It states that a person who has "resolved its liability to the United States or a state" may seek contribution from any other person.

Difficult Issue

The issue of what parties have resolved

their liability is a difficult one. In practice the distinction between a volunteer and a person resolving his or her liability is almost nonexistent. Typically the state informs a party that it has liability and offers a consent order. The party can then either: (1) agree to remediate pursuant to a consent order (as Aviall did), (2) let the state clean it up and wait to be sued, or (3) join the voluntary program (the current version of which is the Brownfield's program) on the theory that there are cost-related benefits to appearing to be a volunteer. A consent order can be crafted in a way that makes clear that the intent is to resolve CERCLA liability and thus, preserve §113(f)(3)(B) contribution rights. Indeed that has been the post-*Aviall* practice.

Con Ed negotiated a voluntary agreement with the state, which referred to state law and not CERCLA and based on that, the Court concluded that this voluntary agreement did not resolve CERCLA liability.

Next, the Court analyzed Con Ed's potential §107(a) claim. The Court set out to explain how §107(a) and §113(f) relate to each other. When CERCLA was enacted in 1980, it did not contain a contribution provision. Nevertheless, many courts construed §107(a) to permit persons who were liable under §107(a) to recover response costs from others who are also responsible under §107(a).

Congress amended CERCLA in 1986 adding the contribution provision contained in §113(f)(1). The Second Circuit addressed the relationship between §§107 and 113(f)(1) in *Bedford Affiliates v. Sills,* 156 F3d 416 (2d Cir. 1998). Bedford sought recovery under both §107(a) and §113 (f)(1) and the Court concluded that Bedford had a claim under §113(f)(1), but not under §107(a) because to permit a contribution claim under §107(a) would render §113(f)(1) meaningless. Id. at 424.

A Role for §107(a)

The Supreme Court in *Aviall,* while rejecting a §113(f)(1) claim, took the position that there could be a §107(a) contribution claim for a party that did not have §113(f)(1) claim—indicating that the two provisions are "clearly distinct" 125 SCt at 582. The lesson of *Aviall,* according to the Second Circuit, is that §107(a) and §113(f)(1) contribution claims are distinct and provide a right of contribution to parties who are in different procedural circumstances.

Because §113(f)(1) is limited to persons who have been sued, there is a role for recovery under §107(a). Further, the Court noted that even though many courts limited claims under §107(a) to government parties and innocent parties, the "plain language" of §107(a) contains no such limitation and should permit Con Ed to sue, since they are a "person" who has "incurred response costs."

The Court explained why there is a role for §107(a) in light of *Aviall.* The Court did not explain, why, if they are correct, there is any point to §113(f)(1). That is, it is easy to see why, after *Aviall,* there is a need for persons who have no §113(f)(1) claim to have some claim and §107 meets that need. Once there is a contribution claim under §107(a), however, it is difficult to see what the right of contribution provided in §113 adds or what need there is for it.

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Next, the Court addressed the *Bedford Affiliates* decision in which the Second Circuit had decided that a potentially responsible party cannot bring a contribution action under §107(a). The Court stated that its decision was not inconsistent with *Bedford Affiliates,* because Bedford Affiliates had entered into consent orders to fund a cleanup, it did not perform a cleanup. Its costs may thus have been the result of liability, not costs of responding to contamination. Additionally, Bedford Affiliates placed its degree of liability at issue by executing a consent order.

By distinguishing *Bedford Affiliates,* instead of simply reconsidering it in light of *Aviall,* the Court has drawn a distinction that did not exist in the prior law. Indeed the *Aviall* Court sited several circuit court decisions, which had held that §107(a) does not provide a cause of action for contribution, including *Bedford Affiliates.* The Second Circuit, by distinguishing cases in which a party has performed a cleanup from those cases in which a party merely funded a cleanup, acknowledges that its view is in conflict with at least one other circuit.

For practitioners, the *Bedford Affiliates* issue is very important. Prior to *Aviall,* most assumed that one could clean up a site and sue responsible parties for contribution or one could enter into a consent order to either cleanup a site or fund a portion of the cleanup and have a cause of action under §113. *Aviall* essentially said that §113 will not provide a cause of action for the person who performs a voluntary remediation, but §107 might. This may have been encouraging in some jurisdictions, but in New York, the Second Circuit had already addressed that issue in *Bedford Affiliates* and said no. Now, the reinterpretation of *Bedford Affiliates* opens the door for use of §107 for a contribution claim specifically where *Aviall* did not permit a claim.

Conclusion

To sum up, this decision does as much to redraw the map regarding CERCLA contribution as *Aviall* did and does so in a manner that almost totally eliminates the impacts of *Aviall.* After *Aviall,* one could divide the potential contribution plaintiffs into three categories: volunteers, settling parties and others against whom a CERCLA claim has been made. Volunteers had no contribution claim, except for the possibility of under §107(a), but many courts (including the Second Circuit) had already held that a person with CERCLA liability did not have a claim under §107(a). The other two groups had contribution claims under §113. Who was a volunteer was somewhat up in the air.

Now, there are two types of volunteers. Those who voluntarily perform a cleanup have expended response costs and have a §107(a) claim. Those who fund a cleanup, but do not perform the work, may not have a §107(a) claim and whether they have a §113 claim depends upon whether their agreement to fund a cleanup resolves liability.

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