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LITIGATING ENVIRONMENTAL CLAIMS AGAINST THE UNITED STATES: ONE POST-*AVIALL* BAR REMOVED

As experienced environmental litigation counsel know, since *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) (holding that the plain language of CERCLA § 113(f) does not allow parties to bring a contribution claim unless and until a related civil action is brought under § 106 or § 107), where the federal government shares potential CERCLA liability with other parties at a site, it frequently has exploited that decision by either issuing or threatening to issue unilateral administrative orders ("UAOs") to private parties for the cleanup of those sites. The net effect of the government's actions has been to unfairly create the classic "Hobson's choice" for private parties with liability at these sites, *i.e.*, immediately comply with that UAO or "bet the company" on the party's ultimate entitlement to a "sufficient cause" defense as a way to avoid $32,500 for each day of noncompliance and punitive damages of up to three times the costs ultimately incurred by the government to clean up the site (should the government seek to compel compliance with the UAO in federal court). *See, e.g., Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. May 26, 2006) (discussing unfairness of administrative order regime and allowing § 107 claim, but rejecting constitutional challenge). With no right to preenforcement review of the government's UAO, under *Aviall*, the federal government's strategic issuance of a UAO in lieu of undertaking the cleanup itself and filing suit effectively insulates the federal government from having to litigate, much less pay for, its own CERCLA liability at the numerous sites where it has liability. *See* Gen. Accounting Office, *Groundwater Contamination: DOD Uses and Develops Range of Remediation Technologies to Clean Up Military Sites* (No. 05-666, June 2005) (estimating that the Department of Defense has in excess of 6,000 sites where groundwater contamination exists, thereby necessitating the need for a cleanup). Since CERCLA contains an explicit waiver of sovereign immunity for the federal government, such disingenuous use of UAOs has been criticized by members of the environmental defense bar. Fortunately, however, with the recent decision by the Eighth Circuit Court of Appeals in *Atlantic Research Corp. v. United States*, – F.3d – ,

No. 05-3152, 2006 WL 2321185 (8th Cir. August 11, 2006), the government's ability to use the *Aviall* decision in this fashion can now be effectively checked.

Atlantic Research was a government contractor that retrofitted rocket motors for the United States for a limited period of time. The work included using high-pressure water spray to remove rocket propellant that, once removed, was burned. Residue from burnt rocket fuel ultimately contaminated soil and groundwater near the plant in Arkansas. Atlantic Research voluntarily investigated and cleaned up the contamination, incurring costs in the process, and then sought to recover a portion of these costs from the United States by invoking CERCLA §§ 107(a) and 113(f). Atlantic Research and the government began to negotiate in an effort to resolve the matter. But, not surprisingly, those negotiations ended when the U.S. Supreme Court issued its decision in *Cooper Industries, Inc. v. Aviall Services, Inc*., 543 U.S. 157 (2004). With its § 113(f) claim foreclosed by *Aviall*, Atlantic Research amended its complaint to rely solely on § 107(a) and federal common law as the basis for its cost-recovery claim. The government moved to dismiss, arguing that the Eighth Circuit's pre-*Aviall* decision in *Dico, Inc. v. Amoco Oil Co*., 340 F.3d 525 (8th Cir. 2003) ("*Dico*") (holding that a liable party could maintain a claim only under § 113 of CERCLA, not § 107), foreclosed Atlantic's § 107 claim. The district court agreed. Atlantic Research appealed. The court of appeals reversed. *Atlantic Research Corp. v. United States*, 2006 WL 2321185, at *1.

The Eighth Circuit began its analysis by noting that while it, and many other Circuits, had previously held that liable parties seeking reimbursement under CERCLA must use § 113(f)(1), and may not use § 107 for that purpose, it was reconsidering whether that precedent remained "viable in the post-*Aviall* world." *Atlantic Research* at *2. Accordingly, surveying how courts, prior to *Aviall*, had sought "[t]o prevent § 107 from swallowing § 113," the court noted that in these cases "court[s] began directing traffic between the sections" and typically analyzed the sections together, "aiming to distinguish one from the other." *Atlantic Research* at *3 (citations omitted). According to the court, this "[t]raffic-directing dramatically narrowed § 107 by judicial fiat." *See id.* at *4 ("On its face, § 107(a)(4)(B) is available to 'any . . . person' other than the sovereigns listed in § 107(a)(4)(A). . . . In practice, however, courts gradually steered liable parties away from § 107 and required them to use § 113; § 107 was reserved for 'innocent' plaintiffs who could assert one of the statutory defenses to liability") (citations omitted). Thus, prior to *Aviall,* § 113 was presumed to be available to all liable parties, including those that had not faced a CERCLA action. *Id.* ("Our opinion in *Dico* was the last in this pre-*Aviall* line") (citations omitted).

Noting that the question before it as to whether one liable party could recover costs advanced, beyond its equitable share, from another liable party in direct recovery, or by § 107 contribution post-*Aviall*, had recently been decided by the Second Circuit in *Consolidated Edison Co. v. UGI Utilities, Inc*., 423 F.3d 90, 99 (2d Cir. 2005) (holding that the remedies of §§ 107 and 113 are distinct and that § 113(f)(1) is not the exclusive route by which liable parties may recover cleanup costs), the Eighth Circuit agreed with the Second Circuit's rationale and held:

> [I]t no longer makes sense to view § 113 as a liable party's exclusive remedy. This distinction may have made sense for parties such as Dico, which was allowed to seek contribution under § 113. But here, Atlantic is foreclosed from using § 113. This path is barred because Atlantic – like Aviall – commenced suit before, rather than "during or following," a CERCLA enforcement action. Atlantic has opted to rely upon § 107 to try to recover its cleanup costs exceeding its own equitable share. We conclude it may do so.
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> . . . Thus, a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107. This right is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107.

Atlantic Research at *6.

The court then addressed the suggestion in pre-*Aviall* cases that liable parties should be precluded from using § 107 because they theoretically could recover 100 percent of their costs and thereby escape any liability. *Atlantic Research* at *6. While the court agreed with that analysis, it found it was not a basis to preclude a § 107 claim. Instead, the court held that it simply precluded a liable party from using "§ 107 to recover its *full* response cost." *Id.* (emphasis added). The court noted that "CERCLA, itself, checks overreaching liable

parties: If a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under 113(f)." *Id.* at *7 (citations omitted).[1]

Finally, responding to the government's position that allowing recovery by Atlantic under § 107 would render § 113 "meaningless," the court flatly rejected that argument, noting that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality." *Atlantic Research* at *8. The court then went a step further and chastised the government for the "absurd and unjust outcome" that acceptance of the government's position would lead to. In language that will resonate most audibly for defense contractors that either have been threatened with or were the recipients of UAOs at sites where the federal government also has liability, the court excoriated the government for its unprincipled position. The court stated:

> A contrary ruling, barring Atlantic from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome. Consider: in this, of all cases, the United States is a liable party (who else has rocket motors to clean?). It is, simultaneously, CERCLA's primary enforcer at this, among other Superfund sites.
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> If we adopted the government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government itself was partially responsible for a site's contamination.
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> Congress understood the United States' dual role. When it enacted SARA, it explicitly waived sovereign immunity. CERCLA § 120(a). This waiver is part and parcel of CERCLA's regulatory scheme. It shows Congress had no intention of making private parties shoulder the government's share of liability.

Atlantic Research at *8.

In view of the *Atlantic Research* decision, the federal government's practice of issuing UAOs to private parties that share some liability with it at a given site should hopefully come to an end. But if it does not, this post-*Aviall* precedent will allow them to consider another option, *i.e.*, commencing litigation against the United States, before making a final judgment as to how to respond to those UAOs.

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1. Alternatively, the court also concluded it was satisfied that a right to contribution may be implied from the language of § 107(a)(4)(B). *Atlantic Research* at *7. ("We must next ask whether, in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107. We conclude it did not. The plain text of § 113 reflects no intent to eliminate other rights to contribution; rather, § 113's saving clause provides that '[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action' under §§ 106 or 107. § 113(f)(1).")