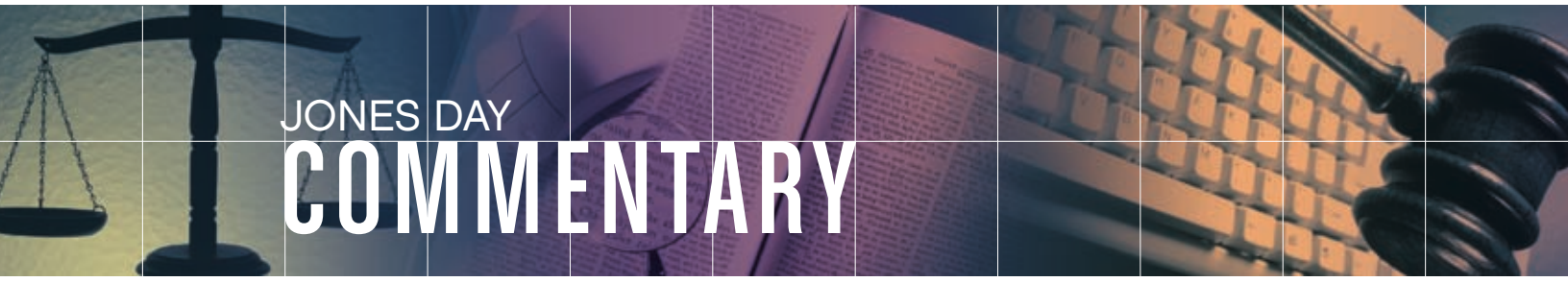
SEPTEMBER 2006



A POST-*AVIALL* CIRCUIT SPLIT: A CHANCE FOR THE SUPREME COURT TO DECIDE WHETHER CERCLA § 107 PROVIDES A RIGHT TO CONTRIBUTION UNDER CERCLA

Quickly undercutting the recent precedent available to private parties wishing to pursue environmental contribution claims against the federal government (or other parties) under CERCLA § 107 (*See* the August 2006 *Jones Day Commentary* entitled "Litigating Environmental Claims Against the United States: One Post-*Aviall* Bar Removed"), the Third Circuit recently held that a private party that voluntarily incurs response costs at a site may *not* seek contribution against the federal government under § 107. *E.I. DuPont De Nemours and Co. v. United States*, No. 04-2096, 2006 WL 2474339 (3rd Cir. August 29, 2006). The DuPont ruling comes less than three weeks after the Eighth Circuit ruled that "a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107." *Atlantic Research Corp. v. United States*, No. 05-3152, 2006 WL 2321185 at *6 (8th Cir. August 11, 2006). Both decisions address the question on which the Supreme Court reserved judgment in *Cooper Industries, Inc. v. Aviall Services Inc.*, 543 U.S. 157 (2004), *i.e.,* whether parties that are not subject to an action under CERCLA § 106 or § 107 may seek relief against other parties under CERCLA § 107(a)(4)(B). These two decisions, creating a clear circuit split, seemingly foreshadow that the ultimate resolution of this question will be by the United States Supreme Court.

DuPont, and the other appellants in the Third Circuit case, are owners and operators of 15 industrial facilities located in nine states at which they had voluntarily cleaned up contamination. Appellants admitted their responsibility for some of the contamination at each of the sites but alleged the United States government was also responsible for some part of the contamination because of the government's use of the facilities at various times during World War I, World War II, and/or the Korean War.

In January 1997, the appellants brought an action under both CERCLA § 107(a) and § 113(f)(1) seeking contribution from the United States toward the costs

of their voluntary cleanup at the sites. In May 1997, the Third Circuit decided *New Castle County v. Halliburton NUS Corp.,* 111 F.3d 1116 (3d Cir. 1997), in which it held that CERCLA limits parties that are responsible for some portion of contamination at a site to a cause of action under CERCLA § 113 only (thus barring them from causes of action under CERCLA § 107(a)). In June 1997, the Third Circuit decided *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997), in which it held that CERCLA § 113 created an exclusive statutory remedy for parties responsible for some portion of contamination to obtain contribution toward their cleanup costs (thus barring them from implied or common-law causes of action for contribution). Consistent with these holdings, the appellants voluntarily dismissed their CERCLA § 107(a) claim without prejudice, leaving only their CERCLA § 113(f)(1) claim for contribution.

After the appellants' voluntary dismissal of their CERCLA § 107(a) claim, the district court designated DuPont's Louisville, Kentucky, facility as a "test case" to determine whether DuPont could seek contribution from other parties, including the United States, under CERCLA § 113(f)(1). After discovery, the United States moved for summary judgment, arguing that DuPont, as a contributor to the contamination, had no cause for contribution under CERCLA § 113 because DuPont had voluntarily incurred its cleanup costs without a preexisting cause of action under CERCLA § 106 or § 107 or a settlement of liability under CERCLA § 113(f)(3). The District Court granted the United States summary judgment on December 30, 2003, with respect to the Louisville facility. *E.I. DuPont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740 (D.N.J. 2003).

The United States thereafter sought, and was granted, judgment on the pleadings with respect to the other 14 sites identified in the appellants' original complaint. *E.I. DuPont de Nemours & Co. v. United States*, No. 97-497, slip. op. at 5 n.4 (D.N.J. March 1, 2004). DuPont and the other appellants appealed the district court's two orders, and the Third Circuit stayed the appeals pending the United States Supreme Court's decision in *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). In light of *Aviall*, the appellants argued on appeal that they could seek contribution from the United States either expressly under CERCLA § 107 or under an implied right of contribution arising from CERCLA or federal common law. Despite appellants' voluntary dismissal of their CERCLA § 107 cause of action, the Third Circuit exercised its discretion to consider the appellants' arguments on their merits because of the intervening decision by the Supreme Court. *DuPont de Nemours,* 2006 WL 2474339 at n.17.

On appeal, DuPont raised two principal arguments in support of its right to a contribution action under § 107. First, DuPont argued that § 107 expressly provides potentially responsible parties (PRPs) a cause of action to seek contribution from other PRPs independent of the remedy provided by § 113. Second, DuPont asserted alternatively that such a cause of action is implied in § 107. *Id.* at *9.

Although the Third Circuit noted DuPont's preference that the court "write its decision on a blank slate in deciding whether it may seek contribution under 107(a) [because of the intervening *Aviall* decision]," *id.*, it refused to do so. Instead, the court restricted itself to deciding the narrow question as to whether its prior decisions in *New Castle County* and *Reading* control the case or were distinguishable. *Id.* ("If [these decisions] control, we must then decide whether our panel may decline to follow those precedents in light of intervening authority even without en banc consideration.") (internal citations omitted). Acknowledging, but declining to follow, the Eighth Circuit's recent decision in *Atlantic Research*, the court concluded its prior holdings on the issue governed, regardless of *Aviall*. Consequently, the court held that DuPont could not bring a 107(a) contribution action, as that provision provides an exclusive cost-recovery remedy to non-PRPs.

In refusing to reconsider its prior holdings in *New Castle County* and *Reading,* the Third Circuit was unpersuaded that Congress intended contribution to be available under § 107(a) to PRPs. The court noted that "[w]hile it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legislative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntary cleanups." *Id.* at *15. The court rejected DuPont's position that CERCLA allows PRPs that voluntarily incur cleanup costs to have an automatic right to contribution. Employing a thorough review of CERCLA and its legislative history, the court found that

"Congress intended to allow contribution for *settling or sued PRPs* as a way to encourage them to admit their liability." *Id.* at *21 (emphasis added). Following that rationale, and a strict adherence to Third Circuit precedent, the court foreclosed parties from seeking contribution under § 107.

While the court was not unsympathetic to DuPont's argument that denying the right to contribution to a party that voluntarily cleans up a site could allow the government to "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," it ultimately was not persuaded by this argument. *Id.* at n.18 (discussing part of the rationale for the court's holding in *Atlantic Research).* The court concluded there simply was no evidence in the record that suggested the federal government "uses its enforcement discretion to avoid subjecting other federal agencies to potential liability in a later contribution suit." *Id.*

Judge Sloviter dissented. She disagreed with the majority's conclusion that DuPont could not maintain its action against the United States for contribution for cleanup costs under CERCLA § 107 because the panel was bound by its prior decisions in *New Castle* and *Reading*. *See id.* at *23 ("Although this court adheres strictly to our precedents, we have made clear that those precedents may be reevaluated when there has been intervening authority."). Indeed, Judge Sloviter noted that "[s]uch reevaluation of precedent is appropriate here even though, as the majority correctly notes, we must be particularly cautious in revisiting cases involving questions of statutory interpretation." *Id.* Concluding that the Supreme Court's decision in *Aviall* was "such intervening authority," she believed "[i]t should impel us to reevaluate our precedent because *Aviall* weakens the conceptual underpinnings of our decisions in *Reading* and *New Castle County*." *Id.* at *24 ("In those cases, we assumed that all potentially responsible parties—those whose responsibility had been adjudicated and those who voluntarily admitted their responsibility—fell into the same category of 'potentially responsible parties' who could recoup losses by bringing suit pursuant to § 113(f)").

Judge Sloviter reasoned that the *Aviall* decision "established that our understanding of the category 'potentially responsible parties' was incorrect." *Id.* According to Judge Sloviter, *Aviall* highlights the fact that the term "potentially responsible party" is "vague and imprecise because, when no action has been filed nor fact-finding conducted, *any* person is *conceivably* a responsible party under CERCLA." *Id. (citing Consolidated Edison Co. of New York v. UGI Utilities, Inc.,* 423 F.3d 90, 97 n.8 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323)). Citing to the Eighth and Second Circuit's recent determinations that *Aviall* compelled a reconsideration of their prior precedents, Judge Sloviter believed that the Third Circuit's earlier decisions in *New Castle County* and *Reading* should "similarly [be] superseded by the [Aviall] decision." *Id. at *26.* Noting that both the Second and Eighth Circuit's decisions cited the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) (where the Court recognized that a potentially responsible party could seek recovery of response costs under § 107, but the Justices differed as to whether there was an express or implied cause of action), Judge Sloviter believed it was particularly significant that "the plaintiff in *Key Tronic* was a party responsible for polluting and was still permitted to bring suit under § 107." *Id.* Thus, Judge Sloviter concluded that § 107 and § 113 properly can and should be read to "embody mechanisms for cost recovery available to persons in different procedural postures." *Id. (citing Consolidated Edison,* 423 F.3d at 99).

Whether DuPont seeks *en banc* consideration of the Third Circuit's decision or seeks review by the United States Supreme Court may depend in part on whether the Supreme Court grants the petition for *certiorari* filed in the *Consolidated Edison* case, which the Court is scheduled to take up at its conference on September 25, 2006. *See* United States Supreme Court Docket No. 05-1323. With the Court having reserved judgment on the question in *Aviall* despite having earlier suggested the answer in *Key Tronic*, the issue is ripe for review, and hopefully the Court will finally resolve it. *See Key Tronic,* 511 U.S. at 818 ("[A]lthough § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs, that cause of action is not explicitly set out in the text of the statute"); *see also id. at* 821-22 (Scalia, J., dissenting) (disagreeing that the cause of action was implied, believing instead that the cause of action was explicitly set out in the text of § 107).

LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Donald B. Ayer
1.202.879.4689
dbayer@jonesday.com

Kevin P. Holewinski
1.202.879.3797
kpholewinski@jonesday.com

John W. Ubinger, Jr.
1.412.394.7908
jwubinger@jonesday.com

Stephanie Couhig
1.216.586.7337
sscouhig@jonesday.com

Ryan D. Dahl
1.412.394.9529
rddahl@jonesday.com