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## Focus

# High Court Ruling Likely Will Slow Environmental Cleanup

By Arthur Cook

On Dec. 13, 2004, the Supreme Court filed its decision in *Cooper Industries Inc. v. Aviall Services Inc.*, 125 S.Ct. 577. The 7-2 decision written by Justice Clarence Thomas opened Pandora's Box and let out some of the procedural chaos that had characterized the first quarter-century of litigation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, better known as CERCLA, 42 U.S.C. Section 9601, et seq.

It has been estimated that as much money has been spent litigating CERCLA's meaning as cleaning up contamination. After 25 years of litigation, a somewhat coherent body of federal decisional law had emerged from the chaos, giving lawyers and litigants some guidance and predictability.

In *Cooper*, the Supreme Court decided that "responsible parties" — those who are liable under the act for contamination — may not maintain an action for contribution under Section 113(f)(1) of CERCLA to recover costs they incurred in responding to contamination, unless they have been, or are being, sued under Section 106 or 107 of CERCLA.

The Supreme Court's decision overturns the law of the 9th U.S. Circuit Court of Appeals, which had expressly held otherwise in the Feb. 13, 2004, decision in *Western Property Service Corp. v. Shell Oil Co.*, 358 F.3d 678. After the Supreme Court's decision in *Cooper*, any responsible party currently litigating a cost recovery action in federal court, or contemplating doing so, should reevaluate his or her position and strategy.

Signed into law by President Carter, CERCLA sought to provide the federal government with the resources and tools to clean up contaminated sites and to recover the costs of doing so from responsible parties, as defined by the act. CERCLA was enacted as a compromise measure, under a suspension of the House rules. Members of Congress were required to give the act an up or down vote, without committee reports or the opportunity for amendments. The result was a statute that raised more questions than it answered.

Courts across the country grappled with the act, declaiming its "inartful drafting and numerous ambiguities" and calling it "vague, contradictory, and lacking in useful

contamination, and Section 107 provides that private parties, as well as governmental entities, may sue responsible parties to recover costs of responding to contamination. However, CERCLA's original language did not expressly provide whether responsible party liability was joint and several, or whether responsible parties who incurred response costs had a right of contribution against other responsible parties.

The act gave the federal courts exclusive jurisdiction over claims arising under CERCLA. Following their perceived mandate to liberally construe the act, federal courts held that responsible parties are generally jointly

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legislative history." One court complained of being "left compassless on the trackless wastes of CERCLA." Nevertheless, courts agreed that CERCLA should be interpreted liberally so as to avoid frustrating Congress' broad remedial purpose.

In pursuit of that purpose, courts have crafted a body of federal decisional law, filling in many of CERCLA's gaps and resolving some of its inconsistencies. Much of that decisional law is characterized more by its pragmatism than by its hermeneutic scholarship.

Section 106 empowers the government to compel responsible parties to clean up

and severally liable, and that responsible parties have an implied right of contribution under Section 107.

The Superfund Amendments and Reauthorization Act of 1986, or SARA, amended CERCLA, inter alia, to add express rights of contribution for responsible parties who incur response costs.

Section 113(f)(1) states, enigmatically: "Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). ...

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 106 or section 107.”

Decisional law after SARA evolved to hold that responsible parties could not maintain actions against other responsible parties for joint and several liability under Section 107. See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (1997). Whether a responsible party must be subject to a Section 106 or 107 action as a precondition to bringing a contribution action under Section 113(f)(1) remained murky.

The *Cooper* decision bars a Section 113(f)(1) claim by a responsible party who has voluntarily incurred response costs without being sued under sections 106 or 107. Thus, a responsible party who voluntarily incurs response costs may not have rights under CERCLA against other responsible parties, unless that right exists under Section 107.

One court that addressed the issue after SARA held that an action for contribution under Section 113(f)(1) would not lie without a prior or contemporaneous Section 106 or 107 action — but that a responsible party does have an action for contribution under Section 107(a)(2)(B). *Catellus Development Corp. v. L.D. McFarland Co.*, 910 F.Supp. 1509 (1995)

The *Cooper* opinion expressly declined to provide any guidance on the correctness of the Circuit Court decisions, including *Pinal Creek*, which hold that a responsible party may not sue for joint and several cost recovery under Section 107. Justice Thomas further declined to decide whether a responsible party has an implied right of contribution under Section 107, as some courts had held before the enactment of SARA and as the *Catellus* court had held more recently.

Thomas notes that SARA’s changes to Section 113 recognized only a narrow right of contribution. The opinion also cites a civil rights case and an antitrust case in which the Supreme Court declined to imply rights of contribution into the statutory schemes. With these comments, the opinion hints against the existence of an implied right of contribution under Section 107.

*Cooper* leaves lawyers and litigants in the dark as to whether a right of cost recovery or contribution under CERCLA is to be denied to a responsible party who voluntarily incurs response costs. The decision may have a chilling effect on responsible parties’ willingness to incur response costs without first being sued under sections 106 or 107. A responsible party who does so may be without a basis to invoke federal jurisdiction over its claim against other responsible parties, since no

federal question may be raised.

Unfiled cost recovery and contribution actions are obviously affected. So also are currently pending contribution actions, which now are subject to dismissal, having been stripped of a claim raising a federal question and retaining only pendant state claims.

Thomas’ opinion is narrowly focused on interpreting the text of Section 113(f)(1), rather than on the practical implications of the interpretation. In adopting his opinion, the majority of the court has turned its back on decades of judicial effort to make practical sense of CERCLA, and has relegated responsible parties back in time to the early, chaotic days of litigating CERCLA’s meaning.

Justice Ruth Bader Ginsburg, with Justice John Paul Stevens joining, dissented, saying that the court should have decided whether Aviall may pursue a Section 107 claim against Cooper. Until this issue is clarified by the Supreme Court or Congress, cleanups are likely to be delayed, and more money is likely to be spent in litigation than if the Supreme Court had simply denied certiorari in *Cooper*.

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