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SUPREME COURT SHOCKER – DECISION  
RESTRICTS CERCLA CONTRIBUTION ACTIONS  
BROUGHT BY POTENTIALLY RESPONSIBLE PARTIES

On December 13, 2004, the Supreme Court of the United States issued its opinion in Cooper Industries, Inc. v. Aviall Services, Inc., which changes significantly the legal landscape for certain contribution claims brought under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA,” or “Superfund”) for costs incurred responding to a contaminated site. The import of Aviall is that parties engaging in voluntary cleanups without first being sued by or settling with the state or federal government cannot maintain a contribution action against other polluters.

In a 7-2 opinion rejecting the settled law in nearly every federal circuit, the Supreme Court held in Aviall that a private party may not seek contribution from other liable parties under CERCLA section 113(f)(1) unless that party first has been sued by the government under either section 106 or 107(a). Up until yesterday, section 113(f)(1) contribution actions commonly were brought by parties who had not been subjected to government-initiated civil actions. However, Aviall will not impact a private party’s right to seek contribution under section 113(f)(3)(B), an alternative right to contribution under CERCLA, so long as that party has resolved its liability for a response action by entering into a consent order or judicially-approved settlement with the government.

The bottom line, then, is that if a private party initiates a private cleanup and incurs CERCLA response costs without first being sued by, or entering into a settlement with, the federal or state government, that party may not recover contribution costs from other potentially responsible parties under section 113(f)(1).

Sive, Paget & Riesel, P.C. can discuss this important new development with its clients that are either involved in or contemplating a CERCLA cleanup or contribution action.