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## U.S. SUPREME COURT DECIDES TO REVIEW FIFTH CIRCUIT'S *AVIALL* DECISION

The United States Court of Appeals for the Fifth Circuit, in *Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677 (5th Cir. 2002), initially held that a volunteer cannot seek cleanup cost contribution under Section 113 of the Compensation Environmental Response, Compensation and Liability Act ("CERCLA"). Rather, the court concluded that, before a party has the right of contribution against other potentially responsible parties, the party must be subject to an administrative order or lawsuit seeking to hold it responsible for environmental cleanup costs. In the case, *Aviall* undertook various cleanup actions based upon letters from the Texas Natural Resources Conservation Commission (now the Texas Commission of Environment Quality), but its efforts were not in response to an actual order or to a prior lawsuit concerning the cleanup.

Although the Fifth Circuit originally affirmed the district court's decision barring contribution claims absent an order or lawsuit, in an *en banc* decision, the Fifth Circuit reversed, holding the opposite. It concluded that a party has the right to assert a contribution claim based on its voluntary cleanup efforts notwithstanding the lack of a pending administrative order or lawsuit against it related to the cleanup.

Responding to the Fifth Circuit's *en banc* decision, Cooper Industries applied to the United States Supreme Court for certiorari. The high court then invited the United States Justice Department, through the Solicitor General, to assert its position with respect to the request for cert. In its amicus brief, the Justice Department argued against the *en banc Aviall* decision and urged the Court to grant certiorari. The Department reasoned that, like the emergence of voluntary cleanup programs under the CERCLA Brownfield amendments, to permit the independent assertion of contribution claims raised the specter of a multitude of plaintiffs who voluntarily cleanup and then seek cost recovery in federal courts against a multitude of potential defendants. It opined that this would burden the federal judiciary, arguing that, in a voluntary cleanup scenario, the overtaxed federal judiciary would have to decide potential liability of the third parties when nobody was directly liable to either the United States or a state agency. The Supreme Court granted certiorari in the *Aviall* case on January 9, 2004. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 124 S.Ct. 981 (2004).

*By: Stan Millan and Alida C. Hainkel*

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## U.S. SUPREME COURT DECIDES EPA'S POWER TO OBJECT TO OR VETO STATE'S CLEAN AIR ACT PERMITS

In *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 2004 U.S. Lexis 820 (2004), the EPA objected to Alaska's issuance of a prevention of significant deterioration ("PSD") air quality permit to Teck Cominco Alaska, Inc. to operate a zinc concentrate mine. The PSD program deals with areas in the country that meet EPA's national air quality standards for certain air pollutants, like nitrogen oxides, etc. and bars construction of any major air pollutant facility not equipped with "the best available control technology" ("BACT"). The basis for EPA's objection to Alaska's issuance of a PSD air quality permit was that the state failed to justify dropping from more sophisticated air emission control technology (selective catalytic reduction or SCR, reducing nitrogen oxide emissions by 90%) to less sophisticated control technology (Low NOx that achieves a 30% reduction in nitrogen oxide pollutants). Cominco did not submit justification for Low NOx to the Alaskan Department of Environmental Conservation ("ADEC") because of its concerns about disclosure of confidential financial or commercial information.

The air control standard in the Clean Air Act for PSD permits requires that the state permitting agency use BACT. BACT requires a "top-down" approach, under which the state permitting agency negotiates the most strict air control standards possible. BACT, however, grants a state discretion to determine whether a given technology is not available in a particular area based on economics and other factors.

The ADEC flip flopped on whether SCR or Low NOx was BACT in this case. Nevertheless, without obtaining economic justification from the permittee, Cominco, the state approved Low NOx as BACT for Cominco's diesel electric generators. The EPA objected to the state permit under provisions of the Clean Air Act that allow review of air permits issued by states to which EPA had delegated clean air permitting authority.

Specifically, the EPA had found that the ADEC's acceptance of Low NOx as BACT lacked evidentiary support. EPA therefore issued orders both to ADEC and Cominco preventing the construction of the mining facilities. ADEC and Cominco argued on appeal that EPA only has authority to object to a state permit based on a state's failure to follow "requirements" under the Clean Air Act and further contended that BACT determinations lie within a state permit agency's discretion. ADEC argued that a particular BACT found to be available at a facility is not a "requirement" that is subject to EPA review, approval or veto.

The Court rejected the arguments of ADEC and Cominco, finding that the EPA orders were reasonable and valid under the Clean Air Act and that the EPA's stop-construction order was a final agency action subject to judicial review. The Court afforded respect, but not deference, to the EPA's interpretation of various Clean Air Act provisions in its interpretive guides, under which EPA construed its oversight function in the Clean Air Act to include making findings with respect to state BACT determinations. The Court agreed that the ADEC BACT determination in this case was arbitrary on the basis that ADEC did not obtain factual input from Cominco to justify the less stringent BACT of Low NOx imposed by the permits in this case.

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The dissent pointed out that broadly interpreting the word “requirements” contained in the Clean Air Act provision diluted the state’s permit authority under the Clean Air Act. The dissent also expressed concern with the prospect of EPA taking similar action years after the fact against permittees. The dissent further took aim at the majority decision for its relegation of the states to the role of mere provinces or political corporations instead of co-equal sovereigns entitled to dignity and respect.

This ruling is somewhat contrary to trends in the Court to restrict the federal government’s use of the Commerce Clause in regulating local activity. On the other hand, this decision appears consistent with recent circuit and district court decisions that have allowed EPA to “over file” or otherwise threaten enforcement action notwithstanding a delegated state’s enforcement position.

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## U.S. SECOND CIRCUIT REJECTS SUBSTANTIAL CONTINUITY TEST IN ASSET TRANSFER

*State of New York v. Nat'l Services Industries, Inc.*, 2003 U.S. App. Lexis 25411 (Dec. 17, 2003)

In *National Services Industries*, the United States Court of Appeals for the Second Circuit addressed whether a corporation that purchased the assets of a company, which itself was liable for environmental response costs under CERCLA, should be held liable for those same costs as a successor corporation. The Second Circuit determined that the district court's application of the substantial continuity doctrine was erroneous, finding that the doctrine is not part of general federal common law and that it should not be relied upon when determining whether a corporation acquired CERCLA liability as the result of an asset purchase. The Second Circuit concluded that the district court should have instead applied the traditional common law rule, under which a corporation acquiring the assets of another corporation only takes on the old corporation's liabilities under certain prescribed conditions.

The Second Circuit's rejection of the application of the substantial continuity test is important because it signifies, along with cases like *United States v. Bestfoods* 524 U.S. 51 (1998), an apparent trend towards the reinstatement of a narrower, more traditional approach to imposing CERCLA liability on corporations for environmental harms caused by their corporate predecessors, affiliates, parents and/or subsidiaries. Initially, some courts took a more expansionist view, imposing liability on corporations outside of traditional corporate liability tests. Courts applying non-traditional corporate liability tests typically concluded that doing so furthered the purposes of CERCLA, including its sweeping mandate to clean up environmental contamination. Today, as indicated by *National Services Industries*, courts appear to be reversing this trend.

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**DISTRICT COURT CONCLUDES THAT BROWNFIELDS ACT AMENDMENTS TO INNOCENT LANDOWNER DEFENSE CANNOT BE APPLIED RETROACTIVELY**

**U.S. v. Domenic Lombardi Realty, Inc.  
290 F.Supp.2d 198 (D.R.I. 2003)**

The United States District Court for the District of Rhode Island, Judge Smith presiding, recently held that the amendments to the “innocent landowner” defense under CERCLA, which were enacted as part of the 2001 Brownfields Revitalization Act, could not be retroactively applied. The issue arose in *United States v. Domenic Lombardi Realty, Inc.*, 290 F.Supp.2d 198 (D.R.I. 2003), in which the Environmental Protection Agency (“EPA”) sought reimbursement for a government clean-up of PCB contamination at the Robin Hollow Road Superfund Site near Greenwich, Rhode Island.

The *Lombardi Realty* case is the culmination of a decade-long battle between the landowner and state and federal regulatory officials over the site’s contamination and the methods used by the landowner to clean up the site. In 1987, state officials first issued a Notice of Violation in response to complaints of unlicensed solid waste disposal on the site. Of particular concern was the dumping of electrical transformers on the site and the resulting PCB contamination. After years of inaction with respect to clean-up and evidence of continued dumping by the landowner, EPA finally instituted a CERCLA Removal Action in 1995, in which the agency removed approximately 900 tons of contaminated soil from the site. EPA initiated this reimbursement action three years later.

The landowner responded to the lawsuit by seeking to avoid liability by asserting the “innocent landowner” defense, which applies to landowners who, innocently and in good faith, purchase property without knowledge that previous owners had contaminated the site. 42 U.S.C. 9607(b)(3). Under CERCLA, to assert the defense, the landowner must prove that: (1) the contamination occurred prior to his ownership; (2) he had no reason to know of the contamination; (3) he undertook all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practices; and, (4) once the contamination was discovered, he exercised due care with respect to the substances concerned. *Id.*

In 2001, Congress enacted the Brownfields Revitalization Act to encourage the purchase and development of property in part by easing fears associated with CERCLA’s clean-up requirements. With respect to the innocent landowner defense, the Brownfields Act made several changes: (1) it requires that inquiries into the site’s past must be in accordance with *generally accepted* good commercial and customary practices; (2) it establishes criteria for determining whether a defendant has made such inquiries; and (3) it requires a defendant to demonstrate that he took steps to prevent continuing and future releases or exposures. 42 U.S.C. 9601 (35)(B)(i)(I)-(II). In *Lombardi Realty*, the EPA argued that these new provisions should apply, even though Congress enacted the Act three years after EPA filed the lawsuit.

The court disagreed, applying the analysis set forth by the U.S. Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which recognized a presumption

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against retroactive application. In *Landgraf*, the Supreme Court established a two-part analysis for determining whether newly-enacted legislation should be applied to a pending case. First, the court must determine whether Congress explicitly limited the reach of the statute. Second, if there is no express limitation, the court must determine whether the statute would have retroactive effect – whether it would impair the rights a party had when he acted, increase a party’s liability for past conduct or impose new duties with respect to transactions already completed. If any of these result, the court must invoke the presumption of non-applicability. *Id.* at 280.

In *Lombardi Realty*, the court found that, while Congress did not impose any explicit limitation on the Brownfields Act amendments, the new amendments would impose additional, substantive requirements on the landowner. Specifically, the court found that the Act required that the landowner must provide full cooperation and access to government officials, must demonstrate that it complied with all institutional controls and land use restrictions and must take steps to prevent continuing or future releases or exposures. By applying the new standards, the court held that the landowner would be subject to new substantive obligations that did not exist when the agency’s investigation first began. Accordingly, the court held that, because of this retroactive effect, the Brownfields Act amendments to the innocent landowner defense did not apply.

Despite this finding, the court nevertheless held that the landowner in this case did not meet the requirements of the innocent landowner defense and was therefore liable for both the direct and indirect costs of the clean-up, as well as for compounded prejudgment interest.

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