

***Environs* Hot Sheet --  
Breaking Developments in Environmental Law**

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**“Volunteer” Cleanups Get Boost From California Court**

Property owners in a quandary about whether to conduct an environmental cleanup voluntarily (and risk being barred from recovery from other responsible parties) or wait for a lawsuit or agency action in order to seek contribution recently got an encouraging word from a federal court in California in favor of volunteering. In one of the first cases to be decided since the U.S. Supreme Court ruled in December 2004 that a volunteer who incurred environmental response costs without a court case or agency settlement could not seek recovery for those costs under the federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), a district court judge ruled that a property owner still has an implied right of contribution under CERCLA and can use that to seek recovery of cleanup costs when there is no pending court case or order.

In *Kotrous v. Goss-Jewett Co. of N. Calif.*, No. Civ.S02-1520 (June 16, 2005), U.S. District Court Judge Frank C. Damrell, Jr. rejected a defendant’s motion to dismiss a CERCLA contribution claim. *Kotrous* involved a property leased for 26 years by Goss-Jewett, which sold and distributed dry cleaning chemicals including perchloroethylene (“perc”). Goss-Jewett did not comply with two state agency orders to cleanup soil and groundwater contamination resulting from perc releases during deliveries to the site. One of the property owners, Kotrous, who also was subject to the agency order, sued Goss-Jewett and Bayer Cropscience, the successor to the company that delivered the chemicals to the property. Kotrous asserted claims under CERCLA’s contribution provision, Section 107(a), as well as the state statute and various common law theories.

Bayer moved to dismiss the CERCLA contribution claim because Kotrous had not incurred any response costs as the result of: (a) a pending court case against him, or (b) an administrative or judicially approved settlement. Citing the Supreme Court’s decision in *Cooper Industries v. Aviall*, Bayer contended the absence of a court case or settlement meant that Kotrous lacked standing to bring a contribution claim.

*Aviall* was a 7-2 decision by Supreme Court Justice Thomas. He wrote that the plain language of CERCLA Section 113(f), the private right of action provision, does not authorize a potentially

responsible party (“PRP”) to bring a contribution action against a past owner of the property to recover costs incurred during a voluntary cleanup of hazardous substance contamination. The Court concluded that prerequisite to a party’s right of contribution against other potentially responsible parties under the federal law is an administrative order or lawsuit seeking to hold the party responsible for environmental cleanup costs.

Judge Damrell in *Kotrous* held that, notwithstanding *Aviall’s* ruling on Section 113(f), Ninth Circuit precedent previously established an *implied* private right of action under Section 107(a) and does not require a pending court case or an administrative order before a party can seek contribution for response costs. Under Judge Damrell’s reasoning, *Kotrous* could maintain a contribution claim under Section 107 because the enactment of Section 113 did not replace the implicit private right of action that the Ninth Circuit had recognized in a line of cases that began in 1986. The judge noted while the Supreme Court’s decision in *Aviall* had “expressed considerable skepticism” about the implied right of contribution under Section 107, the Court did not expressly decide the issue and, therefore, Ninth Circuit cases recognizing the implied right of action are still good law even after *Aviall*.

By reaffirming the implied right of action under Section 107, the court in *Kotrous* reopened, at least temporarily, a door that the Supreme Court had seemingly shut. The decision in *Kotrous* gives property owners reassurance that they may not have to make a choice between voluntarily cleaning up a property (and bearing the costs themselves), or waiting for a court case or agency order so that they can obtain recovery from other responsible parties.

The ruling in *Kotrous*, however, is a trial court level decision and not binding on anyone other than the parties to the case until an appeal is decided. Trial courts in other circuits, for example, the Seventh Circuit covering Illinois, Indiana and Wisconsin, have come down on both sides of the issue, and the original trial court in *Aviall* will be taking up the implied right of action exception on remand from the Supreme Court. The Supreme Court ultimately may decide whether the implied right of action constitutes a valid exception to the *Aviall* ruling. For now, *Kotrous* provides an insight into how at least one court in the Ninth Circuit addressed what some landowners perceived as a flaw in the *Aviall* decision, limiting the contribution right to only a very narrow type of cleanups.

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