HB

269

**Representative Jay Ramras**
**Co-Chair, House Resources**
**V-Chair, Economic Develop.**
**Tourism & Trade**
**House State Affairs**
119 N. Cushman St. Suite 207
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

# Alaska State Legislature

While in Session
**State Capitol, Room 104**
**Juneau, Alaska 99801-1182**
(907) 465- 3004
Fax: 465-2070
Toll Free: (877) 465-3004

**House District 10**

## House of Representatives

# MEMO

To: Representative Lesil McGuire, Chair House Judiciary Committee

Fm: Jane Pierson JWP

Date: April 25, 2005

Re: House Bill 269 – Hazardous Substance Release Liability

Please accept this memo as a request for the House Judiciary Committee to hear HB 269. "An Act relating to contribution actions relating to the release of a hazardous substance; and providing for an effective date."

Thank you in advance for scheduling HB 269 before the House Judiciary Committee.

Attachments to this memo:

- Sponsor Statement
- Original Copy of HB 269 – 24-LS0879\A
- Sectional for HB 269 - 24-LS0879\A
- DEC Fiscal Note - 0
- LAW Fiscal Note - 0
- Applicable statute – AS 46.03.822
- Relevant Cases
  - *Cooper Industries, Inc. v. Aviall Services, Inc.*
  - *Federal Deposit Insurance Corp. v. Laidlaw Transit, Inc.*

Representative_Jay_Ramras@legis.state.ak.us

**Representative Jay Ramras**
**Co-Chair, House Resources**
**V-Chair, Economic Develop.**
**Tourism & Trade**
**House State Affairs**
119 N. Cushman St. Suite 207
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

# Alaska State Legislature

While in Session
**State Capitol, Room 104**
**Juneau, Alaska 99801-1182**
(907) 465- 3004
Fax: 465-2070
Toll Free: (877) 465-3004

**House District 10**

## House of Representatives
## Sponsor Statement
## HB 269

House Bill 269 addresses contribution actions relating to the costs of environmental cleanups and the damages associated with hazardous substance releases. Current statutes impose joint and several liability associated with hazardous substance releases. They are known as responsible parties. A party who incurs cleanup costs and damages may bring a court action against other potentially responsible parties to have them pay for their fair share of the environmental cleanup.

Voluntary cleanups form the vast majority of the cleanups conducted in the State of Alaska. Voluntary cleanups allow the State of Alaska to focus its limited resources on monitoring responsible party cleanup actions, instead of undertaking costly administrative or judicial enforcement actions to force cleanups, or undertaking cleanups at public expense. The right to these contribution actions creates an important incentive for voluntary cleanups by allowing responsible parties to undertake effective cleanups themselves, and then be able to share the costs and other related damages with other responsible parties, who may be unwilling to voluntarily undertake or assist with the cleanup.

The United States Supreme Court, in *Cooper Industries v. Aviall Services*, found that a responsible party could not bring a contribution action until such time as it has been sued by the state or federal government, or had entered into a formal administrative settlement of liability. The *Aviall* decision has created confusion as to the contribution rights of responsible parties who undertake voluntary cleanups, and has placed in jeopardy the process of voluntary cleanups under AS 46.03.822.

Furthermore, the *Aviall* decision is in conflict with an earlier Alaska Supreme Court decision in, *Federal Deposit Insurance Corporation v. Laidlaw Transit*, and, in the absence of legislative action, responsible parties in Alaska may be fearful of undertaking voluntary cleanups at their own expense.

The purpose of HB 269, is to respond to the *Aviall* and *Laidlaw* decisions by clarifying the language in AS 46.03.822(j), ensuring that responsible parties who conduct voluntary cleanups may bring contribution actions against other responsible parties.

*****

**Representative Jay Ramras**
**Co-Chair, House Resources**
**V-Chair, Economic Develop.**
**Tourism & Trade**
**House State Affairs**
119 N. Cushman St. Suite 207
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

# Alaska State Legislature

While in Session
**State Capitol, Room 104**
**Juneau, Alaska 99801-1182**
(907) 465- 3004
Fax: 465-2070
Toll Free: (877) 465-3004

**House District 10**

## House of Representatives
## Sectional Summary
## HB 269
## Work Order 24-LS0879\A

**Section 1.** Describes the Legislative Findings and Purpose of this bill. The United States Supreme Court, in *Cooper Industries v. Aviall Services*, found that a responsible party could not bring a contribution action unless a state or the federal government had brought a suit against them, or had entered into a formal administrative settlement of its liability. The *Aviall* decision has created confusion as to the contribution rights of responsible parties, who have or will conduct voluntary cleanups, and has placed in jeopardy the process of voluntary cleanups under AS 46.03.822.

Furthermore, the *Aviall* decision is in conflict with an earlier Alaska Supreme Court decision, *Federal Deposit Insurance Corporation v. Laidlaw Transit*, and in the absences of legislative actions, responsible parties in Alaska may be fearful of undertaking voluntary cleanups.

Voluntary cleanups form the vast majority of the cleanups conducted in the State of Alaska. Voluntary cleanups allow the State of Alaska to focus its limited resources on monitoring responsible party cleanup actions, instead of undertaking costly administrative or judicial enforcement actions to force cleanups, or undertaking cleanups at public expense. The right to these contribution actions creates an important incentive for voluntary cleanups, by allowing responsible parties to undertake effective cleanups themselves, and then be able to recover some of those costs with other potentially responsible parties, who may fail to voluntarily undertake or assist with the cleanup.

**Section 2.** Ensures that a party may seek contribution from any other person who is liable for the contamination after the issuance of a potential liability determination by the Department of Environmental Conservation.

**Section 3.** Defines "potential liability determination".

**Section 4.** States that the changes made in sections 2 and 3 apply to liability for the release or threatened release of hazardous substances that occurred before or after this law takes effect.

**Section 5.** States that this Act will take effect immediately.

Representative_Jay_Ramras@legis.state.ak.us

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## COOPER INDUSTRIES, INC. *v.* AVIALL SERVICES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02–1192. Argued October 6, 2004—Decided December 13, 2004

The enabling clause of §113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as added by the Superfund Amendments and Reauthorization Act of 1986 (SARA), provides that any person "may" seek contribution from any other person liable or potentially liable under CERCLA §107(a) "during or following any civil action" under CERCLA §106 (which authorizes the Federal Government to compel responsible parties to clean up contaminated areas, see *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814), or CERCLA §107(a) (which empowers the Government to recover its response costs from potentially responsible persons (PRPs)). Section 113(f)(1)'s saving clause provides: "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" §106 or §107. SARA also created a separate express right of contribution, §113(f)(3)(B), for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement."

Cooper Industries, Inc., owned four Texas properties until 1981, when it sold them to Aviall Services, Inc. After operating those sites for several years, Aviall discovered that both it and Cooper had contaminated them when hazardous substances leaked into the ground and ground water. Aviall notified the State of the contamination, but neither the State nor the Federal Government took judicial or administrative measures to compel cleanup. Aviall cleaned up the properties under the State's supervision and sold them to a third party, but remains contractually responsible for $5 million or more in cleanup

Syllabus

costs. Aviall filed this action against Cooper to recover such costs. The original complaint asserted, *inter alia*, a claim for cost recovery under §107(a) and a separate claim for contribution under §113(f)(1). Aviall later amended the complaint to, among other things, combine its two CERCLA claims into a single, joint claim that, pursuant to §113(f)(1), sought contribution from Cooper as a PRP under §107(a). Granting Cooper summary judgment, the District Court held that Aviall had abandoned its freestanding §107 claim, and that contribution under §113(f)(1) was unavailable because Aviall had not been sued under §106 or §107. The Fifth Circuit ultimately reversed, holding that §113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has been sued under §106 or §107. The court reasoned in part that "may" in §113(f)(1)'s enabling clause did not mean "may only."

*Held:* A private party who has not been sued under CERCLA §106 or §107(a) may not obtain contribution under §113(f)(1) from other liable parties. Pp. 6–12.

(a) Section 113(f)(1) does not authorize Aviall's suit. This Court disagrees with Aviall's argument that the word "may" in §113(f)(1)'s enabling clause should be read permissively, such that "during or following" a civil action is one, but not the exclusive, instance in which a person may seek contribution. First, the natural meaning of "may" in this context is that it authorizes certain contribution actions that satisfy the subsequent specified condition—*i.e.*, those that occur "during or following" a specified civil action –and no others. Second, reading §113(f)(1) to authorize contribution actions at any time, regardless of the existence of a §106 or §107(a) civil action, would render entirely superfluous the section's explicit "during or following" condition, as well as §113(f)(3)(B), which permits contribution actions after settlement. This Court is loath to allow such a reading. See, *e.g.*, *Hibbs* v. *Winn*, 542 U. S. ___, ___. Congress would not have bothered to specify conditions under which a person may bring a contribution claim, and at the same time allowed contribution actions absent those conditions. Section §113(f)(1)'s saving clause does not change the Court's conclusion. That clause's sole function is to clarify that §113(f)(1) does nothing to "diminish" any cause(s) of action for contribution that may exist independently of §113(f)(1), thereby rebutting any presumption that the express right of contribution provided by the enabling clause is the exclusive contribution cause of action available to a PRP. The saving clause, however, does not itself establish a cause of action, nor expand §113(f)(1) to authorize contribution actions not brought "during or following" a §106 or §107(a) civil action, nor specify what causes of action for contribution, if any, exist outside §113(f)(1). Reading the clause to authorize §113(f)(1) contribution ac-

Syllabus

tions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that the Court must, if possible, construe a statute to give every word some operative effect. In light of provisions specifying two 3-year limitations periods for contribution actions beginning at the date of judgment, §113(g)(3)(A), and at the date of settlement, §113(g)(3)(B), the absence of any such provision for cases in which a judgment or settlement never occurs also supports the conclusion that, to assert a contribution claim under §113(f), a party must satisfy the conditions of either §113(f)(1) or §113(f)(3)(B). Given the clear meaning of CERCLA's text, there is no need to resolve the parties' dispute about CERCLA's purpose or to consult that purpose at all. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79. Because Aviall has never been subject to a civil action under §106 or §107(a), it has no §113(f)(1) claim. Pp. 6–9.

(b) The Court declines to address in the first instance Aviall's claim that it may recover costs under §107(a)(4)(B) even though it is a PRP. In view of the importance of the §107 issue, the question whether Aviall waived a freestanding §107 claim, and the absence of briefing and decisions by the courts below, this Court is not prepared to resolve the §107 question solely on the basis of dictum in *Key Tronic*. Pp. 9–11.

(c) In addition, the Court declines to decide whether Aviall has an implied right to contribution under §107. To the extent that Aviall chooses to frame its §107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery), the Court notes that it has visited the subject before, see, *e.g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 638–647, and that, in enacting §113(f)(1), Congress explicitly recognized a particular set (claims "during or following" the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law, cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19. Pp. 11–12.

312 F. 3d 677, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined.

# SUPREME COURT OF THE UNITED STATES

No. 02–1192

## COOPER INDUSTRIES, INC., PETITIONER *v.* AVIALL SERVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 13, 2004]

JUSTICE THOMAS delivered the opinion of the Court.

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[1] allows persons who have undertaken efforts to clean up properties contaminated by hazardous substances to seek contribution from other parties liable under CERCLA. Section 113(f)(1) specifies that a party may obtain contribution "during or following any civil action" under CERCLA §106 or §107(a). The issue we must decide is whether a private party who has not been sued under §106 or §107(a) may nevertheless obtain contribution under §113(f)(1) from other liable parties. We hold that it may not.

I

Under CERCLA, 94 Stat. 2767, the Federal Government may clean up a contaminated area itself, see §104, or it may compel responsible parties to perform the cleanup,

[1]Section 113(f)(1) is codified at 42 U. S. C. §9613(f)(1). We refer throughout, for the most part, to sections of CERCLA rather than the U. S. Code.

see §106(a). See *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814 (1994). In either case, the Government may recover its response costs under §107, 42 U. S. C. §9607 (2000 ed. and Supp. I), the "cost recovery" section of CERCLA. Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they "shall be liable" for, among other things, "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." §107(a)(4)(A).[2] Section 107(a) further provides that PRPs shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." §107(a)(4)(B).

After CERCLA's enactment in 1980, litigation arose over whether §107, in addition to allowing the Government and certain private parties to recover costs from PRPs, also allowed a PRP that had incurred response costs to recover costs from other PRPs. More specifically, the question was whether a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that §107(a)(4)(B) and its predecessors authorized such a cause of action. See, *e.g.*, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F. 2d 887, 890–892 (CA9 1986); *Walls* v. *Waste Resource Corp.*, 761 F. 2d 311, 317–318 (CA6 1985); *Philadelphia* v. *Stepan Chemical Co.*, 544 F. Supp. 1135, 1140–1143 (ED Pa. 1982).

After CERCLA's passage, litigation also ensued over the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by

---

[2]The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA) pursuant to CERCLA §105, 42 U. S. C. §9605 (2000 ed. and Supp. I). The plan is codified at 40 CFR pt. 300 (2004).

another PRP) could obtain contribution from other PRPs. As originally enacted in 1980, CERCLA contained no provision expressly providing for a right of action for contribution. A number of District Courts nonetheless held that, although CERCLA did not mention the word "contribution," such a right arose either impliedly from provisions of the statute, or as a matter of federal common law. See, *e.g.*, *United States* v. *New Castle County*, 642 F. Supp. 1258, 1263–1269 (Del. 1986) (contribution right arises under federal common law); *Colorado* v. *ASARCO, Inc.*, 608 F. Supp. 1484, 1486–1493 (Colo. 1985) (same); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (ED Mo. 1985) (contribution right is implied from §107(e)(2)). That conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 638–647 (1981) (refusing to recognize implied or common-law right to contribution in the Sherman Act or the Clayton Act); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 90–99 (1981) (refusing to recognize implied or common-law right to contribution in the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

Congress subsequently amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, to provide an express cause of action for contribution, codified as CERCLA §113(f)(1):

> "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

> In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 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 9606 of this title or section 9607 of this title." *Id.*, at 1647, as codified in 42 U. S. C. §9613(f)(1).

SARA also created a separate express right of contribution, §113(f)(3)(B), for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." In short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, §107(a), and separate rights to contribution in other circumstances, §§113(f)(1), 113(f)(3)(B).[3]

## II

This case concerns four contaminated aircraft engine maintenance sites in Texas. Cooper Industries, Inc., owned and operated those sites until 1981, when it sold them to Aviall Services, Inc. Aviall operated the four sites for a number of years. Ultimately, Aviall discovered that both it and Cooper had contaminated the facilities when petroleum and other hazardous substances leaked into the ground and ground water through underground storage tanks and spills.

Aviall notified the Texas Natural Resource Conservation Commission (Commission) of the contamination. The

---

[3] In *Key Tronic Corp.* v. *United States*, 511 U. S. 809 (1994), we observed that §107 and §113 created "similar and somewhat overlapping" remedies. *Id.*, at 816. The cost recovery remedy of §107(a)(4)(B) and the contribution remedy of §113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.

Commission informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and threatened to pursue an enforcement action if Aviall failed to undertake remediation. Neither the Commission nor the EPA, however, took judicial or administrative measures to compel cleanup.

Aviall cleaned up the properties under the State's supervision, beginning in 1984. Aviall sold the properties to a third party in 1995 and 1996, but remains contractually responsible for the cleanup. Aviall has incurred approximately $5 million in cleanup costs; the total costs may be even greater. In August 1997, Aviall filed this action against Cooper in the United States District Court for the Northern District of Texas, seeking to recover cleanup costs. The original complaint asserted a claim for cost recovery under CERCLA §107(a), a separate claim for contribution under CERCLA §113(f)(1), and state-law claims. Aviall later amended the complaint, combining its two CERCLA claims into a single, joint CERCLA claim. That claim alleged that, pursuant to §113(f)(1), Aviall was entitled to seek contribution from Cooper, as a PRP under §107(a), for response costs and other liability Aviall incurred in connection with the Texas facilities.[4] Aviall continued to assert state-law claims as well.

Both parties moved for summary judgment, and the District Court granted Cooper's motion. The court held that Aviall, having abandoned its §107 claim, sought contribution only under §113(f)(1). The court held that §113(f)(1) relief was unavailable to Aviall because it had

---

[4]Aviall asserts that it framed its claim in the manner compelled by Fifth Circuit precedent holding that a §113 claim is a type of §107 claim. *Geraghty & Miller, Inc.* v. *Conoco, Inc.*, 234 F. 3d 917, 924 (CA5 2000); see also, *e.g.*, *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F. 3d 344, 349–353 (CA6 1998); *Sun Co., Inc.* v. *Browning-Ferris, Inc.*, 124 F. 3d 1187, 1191 (CA10 1997); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F. 3d 1298, 1301–1302 (CA9 1997).

not been sued under CERCLA §106 or §107. Having dismissed Aviall's federal claim, the court declined to exercise jurisdiction over the state-law claims.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed. 263 F. 3d 134 (2001). The majority, relying principally on the "during or following" language in the first sentence of §113(f)(1), held that "a PRP seeking contribution from other PRPs under §113(f)(1) must have a pending or adjudged §106 administrative order or §107(a) cost recovery action against it." *Id.*, at 145. The dissent reasoned that the final sentence of §113(f)(1), the saving clause, clarified that the federal common-law right to contribution survived the enactment of §113(f)(1), even absent a §106 or §107(a) civil action. *Id.*, at 148–150 (opinion of Wiener, J.).

On rehearing en banc, the Fifth Circuit reversed by a divided vote, holding that §113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has been sued under §106 or §107. 312 F. 3d 677 (2002). The court held that "[s]ection 113(f)(1) authorizes suits against PRPs in both its first and last sentence[,] which states without qualification that 'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action." *Id.*, at 681. The court reasoned in part that "may" in §113(f)(1) did not mean "may only." *Id.*, at 686–687. Three members of the en banc court dissented for essentially the reasons given by the panel majority. *Id.*, at 691–693 (opinion of Garza, J.). We granted certiorari, 540 U. S. 1099, and now reverse.

## III

### A

Section 113(f)(1) does not authorize Aviall's suit. The first sentence, the enabling clause that establishes the right of contribution, provides: "Any person *may* seek

contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title," 42 U. S. C. §9613(f)(1) (emphasis added). The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, "during or following" a specified civil action.

Aviall answers that "may" should be read permissively, such that "during or following" a civil action is one, but not the exclusive, instance in which a person may seek contribution. We disagree. First, as just noted, the natural meaning of "may" in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others.

Second, and relatedly, if §113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a §106 or §107(a) civil action, then Congress need not have included the explicit "during or following" condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do. See, *e.g.*, *Hibbs* v. *Winn*, 542 U. S. ___, ___ (2004) (slip op., at 10). Likewise, if §113(f)(1) authorizes contribution actions at any time, §113(f)(3)(B), which permits contribution actions after settlement, is equally superfluous. There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.

The last sentence of §113(f)(1), the saving clause, does not change our conclusion. That sentence provides: "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 9606 of this title or section 9607 of this title." 42 U. S. C. §9613(f)(1). The sole function of the sentence is to clarify that §113(f)(1) does nothing to "diminish" any cause(s) of action for contribution that may exist independently of §113(f)(1). In other words, the

sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand §113(f)(1) to authorize contribution actions not brought "during or following" a §106 or §107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside §113(f)(1). Reading the saving clause to authorize §113(f)(1) contribution actions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect. See *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 35–36 (1992).

Our conclusion follows not simply from §113(f)(1) itself, but also from the whole of §113. As noted above, §113 provides two express avenues for contribution: §113(f)(1) ("during or following" specified civil actions) and §113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State). Section 113(g)(3) then provides two corresponding 3-year limitations periods for contribution actions, one beginning at the date of judgment, §113(g)(3)(A), and one beginning at the date of settlement, §113(g)(3)(B). Notably absent from §113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup. The lack of such a provision supports the conclusion that, to assert a contribution claim under §113(f), a party must satisfy the conditions of either §113(f)(1) or §113(f)(3)(B).

Each side insists that the purpose of CERCLA bolsters its reading of §113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: "[I]t is ultimately the provisions of our laws rather than the

principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998). Section 113(f)(1), 100 Stat. 1647, authorizes contribution claims only "during or following" a civil action under §106 or §107(a), and it is undisputed that Aviall has never been subject to such an action.[5] Aviall therefore has no §113(f)(1) claim.

B

Aviall and *amicus* Lockheed Martin contend that, in the alternative to an action for contribution under §113(f)(1), Aviall may recover costs under §107(a)(4)(B) even though it is a PRP. The dissent would have us so hold. We decline to address the issue. Neither the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc considered Aviall's §107 claim. In fact, as noted above, Aviall included separate §107 and §113 claims in its original complaint, but then asserted a "combined" §107/§113 claim in its amended complaint. The District Court took this consolidated claim to mean that Aviall was relying on §107 "not as an independent cause of action," but only "to the extent necessary to maintain a viable §113(f)(1) contribution claim." Civ. Action No. 3:97–CV–1926–D (ND Tex., Jan. 13, 2000), App. to Pet. for Cert. 94a, n. 2. Consequently the court saw no need to address any freestanding §107 claim. The Fifth Circuit panel likewise concluded that Aviall no longer advanced a standalone §107 claim. 263 F. 3d, at 137, n. 2. The en banc court found it unnecessary to decide whether Aviall had waived the §107 claim, because it held that Aviall could rely instead on §113. 312 F. 3d, at 685, n. 15. Thus, the court did not address the waiver issue, let alone the merits

---

[5] Neither has Aviall been subject to an administrative order under §106; thus, we need not decide whether such an order would qualify as a "civil action under section 9606 . . . or under section 9607(a)" of CERCLA. 42 U. S. C. §9613(f)(1).

of the §107 claim.

"We ordinarily do not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 109 (2001) *(per curiam)* (internal quotation marks omitted). Although we have deviated from this rule in exceptional circumstances, *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980), the circumstances here cut *against* resolving the §107 claim. Both the question whether Aviall has waived this claim and the underlying §107 question (if it is not waived) may depend in part on the relationship between §§107 and 113. That relationship is a significant issue in its own right. It is also well beyond the scope of the briefing and, indeed, the question presented, which asks simply whether a private party "may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1)." Pet. for Cert. i. The §107 claim and the preliminary waiver question merit full consideration by the courts below.

Furthermore, the parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a §107(a) action against other PRPs for joint and several liability. See, *e. g.*, *Bedford Affiliates* v. *Sills*, 156 F. 3d 416, 423–424 (CA2 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F. 3d 344, 349–356 (CA6 1998); *Pneumo Abex Corp.* v. *High Point, T. & D. R. Co.*, 142 F. 3d 769, 776 (CA4 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F. 3d 1298, 1301–1306 (CA9 1997); *New Castle County* v. *Halliburton NUS Corp.*, 111 F. 3d 1116, 1120–1124 (CA3 1997); *Reducing Carriers, Inc.* v. *Saraland Apartments*, 94 F. 3d 1489, 1496, and n. 7 (CA11 1996); *United States* v. *Colorado & E. R. Co.*, 50 F. 3d 1530, 1534–1536 (CA10 1995); *United Technologies Corp.* v. *Browning-Ferris Industries*, 33 F. 3d 96, 98–103 (CA1 1994). To hold here that Aviall may pursue a §107 action, we would have to consider whether these decisions are correct, an issue that Aviall has flagged but not briefed. And we

might have to consider other issues, also not briefed, such as whether Aviall, which seeks to recover the share of its cleanup costs fairly chargeable to Cooper, may pursue a §107 cost recovery action for some form of liability other than joint and several. We think it more prudent to withhold judgment on these matters.

In view of the importance of the §107 issue and the absence of briefing and decisions by the courts below, we are not prepared—as the dissent would have it—to resolve the §107 question solely on the basis of dictum in *Key Tronic*. We held there that certain attorney's fees were not "necessary costs of response" within the meaning of §107(a)(4)(B). 511 U. S., at 818–821. But we did not address the relevance, if any, of Key Tronic's status as a PRP or confront the relationship between §§107 and 113. In discussing §107, we did not even classify it precisely as a right of cost recovery or a right of contribution, as the dissent's descriptions of the decision reveal. *Post*, at 1–2 (opinion of GINSBURG, J.) (describing *Key Tronic* as recognizing a right to "'seek recovery of cleanup costs'" (quoting 511 U. S., at 818), but in the following paragraph saying that *Key Tronic* identified a "right to contribution"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). Aviall itself recognizes the need for fuller examination of the §107 claim; it has simply requested that we remand for consideration of that claim, not that we resolve the claim in the first instance.

C

In addition to leaving open whether Aviall may seek cost recovery under §107, Part III–B, *supra*, we decline to decide whether Aviall has an implied right to contribution under §107. Portions of the Fifth Circuit's opinion below might be taken to endorse the latter cause of action, 312

F. 3d, at 687; others appear to reserve the question whether such a cause of action exists, *id.*, at 685, n. 15. To the extent that Aviall chooses to frame its §107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery),[6] we note that this Court has visited the subject of implied rights of contribution before. See *Texas Industries*, 451 U. S., at 638–647; *Northwest Airlines*, 451 U. S., at 90–99. We also note that, in enacting §113(f)(1), Congress explicitly recognized a particular set (claims "during or following" the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979). Nonetheless, we need not and do not decide today whether any judicially implied right of contribution survived the passage of SARA.

* * *

We hold only that §113(f)(1) does not support Aviall's suit. We therefore reverse the judgment of the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

---

[6]As noted above, we do not address whether a §107 cost recovery action by Aviall (if not waived) may seek some form of liability other than joint and several.

# SUPREME COURT OF THE UNITED STATES

No. 02–1192

## COOPER INDUSTRIES, INC., PETITIONER *v.* AVIALL SERVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 13, 2004]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Aviall Services, Inc., purchased from Cooper Industries, Inc., property that was contaminated with hazardous substances. Shortly after the purchase, the Texas Natural Resource Conservation Commission notified Aviall that it would institute enforcement action if Aviall failed to remediate the property. Aviall promptly cleaned up the site and now seeks reimbursement from Cooper. In my view, the Court unnecessarily defers decision on Aviall's entitlement to recover cleanup costs from Cooper.

In *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 818 (1994), all Members of this Court agreed that §107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. §9607, "unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs." The Court rested that determination squarely and solely on §107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.[1]

---

[1] Key Tronic, a PRP, asserted a cost-recovery claim under §107(a) to recoup approximately $1.2 million in costs that it allegedly incurred

The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in §107(a)'s text, as the majority determined, or whether §107(a) expressly confers the right, as the dissenters urged. The majority stated: Section 107 "*implies*—but does not expressly *command*—that [a PRP] may have a claim for contribution against those treated as joint tortfeasors." 511 U. S., at 818, and n. 11 ((emphasis added)). The dissent maintained: "Section 107(a)(4)(B) states, as clearly as can be, that '[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person.' Surely to say that A shall be liable to B is the *express* creation of a right of action." *Id.*, at 822. But no Justice expressed the slightest doubt that §107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

In its original complaint, Aviall identified §107 as the federal-law basis for an independent cost-recovery claim against Cooper, and §113 as the basis for a contribution claim. App. 8A, 16A–17A. In amended pleadings, Aviall alleged both §§107 and 113 as the federal underpinning for its contribution claim. *Id.*, at 27A, 48A. Aviall's use of §§113 and 107 in tandem to assert a contribution claim conformed its pleading to then-governing Fifth Circuit precedent, which held that a CERCLA contribution action arises through the joint operation of §107(a) and §113(f)(1). See *Geraghty and Miller, Inc.* v. *Conoco, Inc.*, 234 F. 3d 917, 924 (2000) ("[W]hile section 113(f) is the

---

cleaning up its site "at its own initiative." *Key Tronic Corp.* v. *United States*, 984 F. 2d 1025, 1026 (CA9 1993). Although Key Tronic settled a portion of its liability with the Environmental Protection Agency (EPA), the claim advanced in Key Tronic's §107(a) suit rested on remedial action taken before the EPA's involvement, remediation that did not figure in the settlement. *Id.*, at 1026–1027, *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 811–812 (1994).

vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107." (footnote omitted)). A party obliged by circuit precedent to plead in a certain way can hardly be deemed to have waived a plea the party could have maintained had the law of the Circuit permitted him to do so. But cf. *ante*, at 9–10.

In the Fifth Circuit's view, §107 supplied the right of action for Aviall's claim, and §113(f)(1) prescribed the procedural framework. 312 F. 3d 677, 683, and n. 10 (2002) (stating that §107 "impliedly authorizes a cause of action for contribution" and §113(f) "govern[s] and regulate[s]" the action (citing *Geraghty and Miller*, 234 F. 3d, at 924) (internal quotation marks omitted)); see §113(f)(1) (calling for the governance of "Federal law" and the application of "the Federal Rules of Civil Procedure," and specifying that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). Notably, Aviall expressly urged in the Court of Appeals that, were the court to conclude that §113(f)(1)'s "during or following" language excluded application of that section to this case, Aviall's suit should be adjudicated independently under §107(a). See Response of Appellant Aviall Services, Inc., to the *Amicus Curiae* Brief of the United States in No. 00–10197 (CA5), p. 24 ("[P]arties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery [covering both full recovery and contribution] under section 107(a)."); cf. *Key Tronic*, 511 U. S., at 816 ("[T]he statute now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107.").

I see no cause for protracting this litigation by requiring

the Fifth Circuit to revisit a determination it has essentially made already: Federal courts, prior to the enactment of §113(f)(1), had correctly held that PRPs could "recover [under §107] a proportionate share of their costs in actions for contribution against other PRPs," 312 F. 3d, at 687;[2] nothing in §113 retracts that right, *ibid.* (noting that §113(f)'s saving clause preserves all preexisting state and federal rights of action for contribution, including the §107 implied right this Court recognized in *Key Tronic*, 511 U. S., at 816). Accordingly, I would not defer a definitive ruling by this Court on the question whether Aviall may pursue a §107 claim for relief against Cooper.

---

[2]The cases to which the Court refers, *ante*, at 12, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981), and *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77 (1981), do not address the implication of a right of action for contribution under CERCLA. *Texas Industries* concerned the Sherman and Clayton Acts, 451 U. S., at 639–646. *Northwest Airlines*, the Equal Pay Act and Title VII, 451 U. S., at 90–99. A determination suitable in one statutory context does not necessarily carry over to a different statutory setting.

21 P.3d 344

21 P.3d 344, 52 ERC 1488

**(Cite as: 21 P.3d 344)**



**H**

Supreme Court of Alaska.
FEDERAL DEPOSIT INSURANCE CORPORATION, as statutory successor to the Resolution
Trust Corporation, in its capacity as Receiver for Sun Savings and Loan
Association, Plaintiff,
v.
LAIDLAW TRANSIT, INC. d/b/a Laidlaw Transit (AK), Inc., Burton Carver & Co., K
Beach Parts & Equipment, Peninsula Sanitation Co., Inc., Defendants.
**No. S-8540.**

April 12, 2001.

Current landowner brought action against former landowner and its tenants, seeking to recover hazardous waste cleanup costs. The United States District Court for the District of Alaska, James K. Singleton Jr., J., certified questions. The Supreme Court, Bryner, J., held that: (1) statute imposing strict liability on polluters for the release of hazardous substances provides a private cause of action for the owner of private property damaged by a release; (2) affirmative defenses, such as the statute of limitations, may be applied to such an action; (3) an action for contribution accrues after the direct action is concluded; and (4) current landowner's action could not be characterized as one for continuing nuisance or trespass.

Questions answered.

West Headnotes

**[1] Federal Courts ⇐392**
170Bk392 Most Cited Cases
Because the Supreme Court addresses questions of law and essentially stands in
the shoes of the certifying court, it must exercise its independent judgment when answering certified questions. Rules App.Proc., Rule 407.

**[2] Action ⇐3**
13k3 Most Cited Cases
Statute imposing strict liability on polluters for the release of hazardous substances provides a private cause of action for the owner of private property damaged by a release. AS 46.03.822(a).

**[3] Environmental Law ⇐444**
149Ek444 Most Cited Cases
Actions.
(Formerly 199k25.5(5.5) Health and Environment)
Statute imposing strict liability on polluters for the release of hazardous substances allows a potentially responsible party who denies responsibility to pursue a direct cause of action for joint and several strict liability against other potentially responsible parties. AS 46.03.822(a), (j).

**[4] Environmental Law ⇐461**
149Ek461 Most Cited Cases
(Formerly 199k25.15(5) Health and Environment)

**[4] Environmental Law ⇐669**
149Ek669 Most Cited Cases
(Formerly 199k25.15(5) Health and Environment)
Affirmative defenses, such as the statute of limitations, may be applied to a private cause of action to recover costs that is brought by an owner of private property damaged by a release of hazardous substances. AS 46.03.822(a).

**[5] Statutes ⇐190**
361k190 Most Cited Cases
The threshold question in ascertaining the correct interpretation of a statute is whether the language of the statute is clear or arguably ambiguous.

**[6] Statutes ⇐190**
361k190 Most Cited Cases
Even when the meaning of a statute's language seems plain on its face, ambiguity may arise if

applying that meaning would yield anomalous consequences.

**[7] Statutes ⇐188**
361k188 Most Cited Cases

**[7] Statutes ⇐205**
361k205 Most Cited Cases
In ascertaining the plain meaning of a statute, the court must look to the particular language at issue, as well as to the language and design of the statute as a whole.

**[8] Statutes ⇐223.1**
361k223.1 Most Cited Cases
When a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole.

**[9] Statutes ⇐206**
361k206 Most Cited Cases
In general, a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

**[10] Limitation of Actions ⇐49(6)**
241k49(6) Most Cited Cases
In actions to recover costs for cleanup of hazardous waste, a potentially responsible party's cause of action for contribution does not accrue until the direct cause of action concludes. AS 46.03.822(a), (j).

**[11] Contribution ⇐9(1)**
96k9(1) Most Cited Cases
In actions to recover costs for cleanup of hazardous waste, potentially responsible parties may assert contribution claims in actions prosecuted either in court or through administrative proceedings. AS 46.03.822(j).

**[12] Environmental Law ⇐670**
149Ek670 Most Cited Cases
(Formerly 199k25.15(5) Health and Environment)
Current landowner's action against former landowner and its tenants to recover hazardous waste cleanup costs could not be characterized as one for continuing nuisance or trespass, so as to avoid the statute of limitations applicable to suit to recover costs by the owner of private property damaged by the release of hazardous substances, where former owner and tenants did not exacerbate the contamination that they allegedly caused over a decade earlier. AS 46.03.822(a).
***345** Joseph R.D. Loescher and Carl J.D. Bauman, Hughes, Thorsness, Powell, Huddleston & Bauman LLC, Anchorage, for Plaintiff.

Ann W. Resch and Richard L. Waller, Brown, Waller & Gibbs, Anchorage, for Defendant Peninsula Sanitation Company, Inc.

Nelson G. Page, Burr, Pease & Kurtz, Anchorage, for Defendant Laidlaw Transit Alaska, Inc.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

BRYNER, Justice.

I. *INTRODUCTION*

The Federal Deposit Insurance Corporation (FDIC), as receiver of a failed bank's assets, acquired land that had been contaminated by hazardous waste many years previously. After undertaking voluntary cleanup at the request of the Alaska Department of Environmental Conservation, the FDIC filed suit in federal court against the former landowner and the owner's tenants, seeking to recoup its cleanup costs. FDIC claimed a right to compensation under AS 46.03.822, which imposes strict liability on a joint and several basis for release of hazardous substances and, in addition, allows responsible parties to sue for contribution.

Since this court had not yet determined whether section .822 creates a private cause of action other than for contribution or is governed by a statute of limitations, the federal district court certified these questions to us. We conclude that the statute allows private parties to sue directly for damages,

not just for contribution, and that suits under the statute--both direct and for contribution--are governed by a statute of limitations.

II. *FACTS AND PROCEEDINGS*

For purposes of this decision, we accept the facts alleged in FDIC's complaint. In May 1988 Sun Savings and Loan Association, F.A., foreclosed on land that was owned by Burton Carver & Co. and that had been occupied by Carver and three tenants, Laidlaw Transit, K Beach Parts and Equipment, and Peninsula Sanitation Co. Carver and these tenants allegedly had contaminated the land by releasing various hazardous substances, including fuel oil.

In December 1989, a year and a half after Sun Savings foreclosed on the land, the Alaska Department of Environmental Conservation asked it to enter into a Compliance Order by Consent for the purpose of investigating and remediating contamination on the property. Not long after this, Sun Savings failed, and the Resolution Trust Corporation took over its assets. In July 1990 Resolution Trust wrote two of Carver's tenants--Peninsula Sanitation and Laidlaw--to inform them of the Department's action.

Nearly seven years later, in February 1997, FDIC, which by then had become the Resolution Trust Corporation's statutory successor, filed suit in federal district court against Laidlaw, K Beach Parts, Peninsula Sanitation, and Carver. FDIC alleged that these defendants were both strictly liable under AS 46.03.822(a) and liable in contribution under AS 46.03.822(j) for cleanup costs and other damages resulting from contamination of its land by their release of hazardous substances. FDIC alternatively alleged liability for the same damages under other theories, including continuing nuisance and trespass.

***346** Peninsula moved for summary judgment, alleging that FDIC's claims are barred by AS 09.10.070(a), Alaska's statute of limitations for liability created by a statute. Finding that FDIC's complaint and Peninsula's summary judgment motion raised unresolved issues of Alaska law, the federal district court certified four questions for our review:

1. Is a statute of limitations defense available for a direct cause of action under AS 46.03.822(a)?
2. Does a private cause of action imposing joint and several liability exist under AS 46.03.822(a)?
3. When does a cause of action for contribution accrue under AS 46.03.822(j)?
4. Can continuing trespass and nuisance claims for environmental contamination be brought where the original act leading to the contamination occurred outside of the limitations period?

We accepted these questions under Alaska Appellate Rule 407 and answer them as follows.

III. *DISCUSSION*

A. *Standard of Review*

[1] Under Appellate Rule 407, a decision by this court upon certification from another court necessarily involves determinative questions of Alaska law as to which there is no controlling precedent. [FN1] Because we address questions of law and essentially stand in the shoes of the certifying court, we must exercise our independent judgment. [FN2]

> FN1. Appellate Rule 407(a) provides:
> The supreme court may answer questions of law certified to it by ... a United States district court ... when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.
>
> FN2. *See M.A. v. United States*, 951 P.2d 851, 853 (Alaska 1998).

B. *Alaska Statute 46.03.822(a) Provides Private Plaintiffs with a Cause of Action for Strict Joint and*

*Several Liability.*

[2] FDIC alleges that the defendants are subject to joint and several strict liability under AS 46.03.822(a), which provides that "the owner and the operator of a ... facility, from which there is a release ... of a hazardous substance" are among those "strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village...." The passive language of this provision does not specify whether a private party may sue for damages. But the legislative history of this provision and our case law dealing with the creation of statutory causes of action establish that it provides a private cause of action for the owner of private property damaged by a release.

1. *The legislative history behind subsection .822(a) supports a private cause of action.*

The original version of AS 46.03.822, enacted in 1972, created a cause of action imposing strict liability on polluters who damaged private property:

> To the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, *for the damages to persons or property,* public or *private,* caused by the entry.... [ [FN3]]
>
> FN3. Ch. 122, § 1, SLA 1972 (emphasis added).

The act defined "damages" to include "injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit." [FN4] A separate provision, AS 46.03.870, specified that causes of action under AS 46.03 "inure solely to and are for the benefit of the state" "[e]xcept as provided under AS 46.03.822--46.03.828," implying that those sections provide for private causes of action. [FN5]

FN4. *Id.*

FN5. Ch. 122, § 2, SLA 1972. Title 46, Chapter 3 includes AS 46.03.010-.900.

***347** In 1989 the legislature amended section .822 to "strengthen the State's ability to obtain cleanup of hazardous substance spill sites." [FN6] The amendments explicitly allowed the state and municipalities to recover damages, including cleanup and remediation costs, under the strict liability language of subsection .822(a):

> FN6 Position Paper, March 16, 1989, Dennis D. Kelso, Commissioner, Alaska Department of Environmental Conservation.

> Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section[,] ... *the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private,* including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance....
>
> ....
>
> (2) the owner and the operator of a vessel or facility from which there is a release ... of a hazardous substance[.] [ [FN7]]
>
> FN7. Ch. 39, § 2, SLA 1989 (emphasis added).

Legislative history indicates that this amendment was modeled after the Federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), [FN8] which Congress enacted in 1980. [FN9]

FN8 *See* 42 U.S.C. §§ 9601-9675 (1994).

FN9. The Department of Environmental Conservation stated in its position paper:
The bill [CSHB 68 (Resources) ] was introduced at the request of the Governor. The Department strongly supports the bill

> and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law [including the re-enacted section .822] incorporate provisions similar to [those in] the federal "Superfund" law into state law.
> *See* Position Paper, March 16, 1989, Dennis D. Kelso, Commissioner, Alaska Department of Environmental Conservation.
> In addition, Senate Judiciary Chairwoman Jan Faiks explained that the 1989 amendments to AS 46.03.822 were modeled after CERCLA. *See* Committee Minutes, Senate Judiciary Committee (May 2, 1989).

In 1991 the legislature passed a number of amendments to AS 46.03.822. First, it amended subsection .822(a) to add villages to the governmental entities that could recover cleanup and remediation costs. [FN10] In so doing, the legislature retained the "public or private" damages language quoted above. [FN11] Later in the same session, the legislature moved the damages language from subsection .822(a) to a new subsection, .822(k), but did not change its content. [FN12]

> FN10. *See* Ch. 83, § 9, SLA 1991.
>
> FN11. *Id.*
>
> FN12. *See* Ch. 92, §§ 1, 3, SLA 1991 (including "damage to persons or to public or private property [and] damage to natural resources of the state or a municipality" in subsection .822(k) among the harms that trigger strict liability, as section .822 has always done). The amendments contained in §§ 1 and 3 took effect July 3, 1991. In the same Act, these sections were to be repealed effective July 1, 1992, with the language in the new subsection (k) reverting to subsection (a). *See id.* at §§ 10, 12. However, this repeal and re-enactment was itself repealed in 1992. *See* Ch. 83, § 15, SLA 1992.

In each of the foregoing amendments, the legislature also retained AS 46.03.824, a provision defining damages to include injuries to persons or property, real or personal, and loss of income. [FN13] The legislature likewise retained the original version of AS 46.03.870, which, as mentioned above, specifically provides that causes of action under section .822 are not limited to the state. Moreover, every version of section .822 has subjected polluters ***348** of either private or public property to joint and several strict liability.

> FN13. While the definition of damages does not expressly include cleanup costs outside the context of those incurred by the state, a municipality, or a village, other courts have held that damages include cleanup costs. *See, e.g., One Wheeler Road Assocs. v. Foxboro Co.*, 843 F.Supp. 792, 796-97 (D.Mass.1994) (applying Massachusetts law); *Borough of Rockaway v. Klockner & Klockner*, 811 F.Supp. 1039, 1051 (D.N.J.1993) (applying New Jersey law). The inclusion of cleanup costs in damages also furthers the legislative purpose of protecting the environment from pollution. *See Stock v. State*, 526 P.2d 3, 12 (Alaska 1974).

In sum, this history strongly suggests that the legislature originally contemplated a private cause of action against parties who release hazardous substances and that it never repealed that cause of action. It would be incongruous for the legislature to create strict liability for damage to private land without providing a way for private parties to get compensation for that damage.

*2. Alaska Statute 46.03.822(a) necessarily implies a private cause of action under the Hendsch Analysis.*

In *Alaska Marine Pilots v. Hendsch*, we identified six factors as relevant to determine whether a statute implies a private cause of action in tort: "the nature of the legislative provision, the adequacy of existing

remedies, the extent to which a tort action will interfere with existing remedies, the importance of the purpose of the provision, how drastically the new tort will change the law, and the burden the [cause of action] will place on the court system." [FN14] Here, these factors support a private cause of action.

> FN14. 950 P.2d 98, 104-05 (Alaska 1997) (citing Restatement (Second) of Torts § 874A cmt. h (1977)); *see also Walt v. State*, 751 P.2d 1345, 1351 n. 12 (Alaska 1988).

(1) *Nature of subsection .822(a):* Subsection .822(a) is easily amenable to individual enforcement. The prohibited conduct and the potential defendants are clearly identified by subsection .822(a), which attaches strict liability for the release of hazardous substances, and by subsection .822(k), which identifies damage to "persons or to public or private property" as a kind of damage covered by subsection .822(a). [FN15] An injured property owner who, like FDIC, identifies parties responsible for contaminating the property need only show that the parties owned or operated the facility causing the contamination. [FN16]

> FN15. *See* AS 46.03.822(k) (" '[D]amages' has the meaning given in AS 46.03.824 and includes damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and [certain damages caused by cleanup contractors]."). AS 46.03.824 reads: "Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit."

> FN16. *See* AS 46.03.822(a).

(2) *Adequacy of existing remedies:* When the legislature created a strict liability regime for hazardous substance contamination, it expressed its judgment that negligence remedies were not adequately controlling the hazardous substance contamination problem. Nevertheless, Peninsula and Laidlaw insist that the subsection .822(j) right of contribution is an adequate remedy. We disagree. Under subsection .822(j), a damaged party can seek contribution only "during or after" an action against the party under subsection .822(a). Since private parties who voluntarily undertake cleanup efforts cannot compel the state to commence an action against them, they would be forced to wait for government action and, if no action were brought, would lose funds spent cleaning up another's contamination. That is not an adequate remedy. A more convincing reading of subsections .822(a) and (j) gives private parties the means to recover private damages, while allowing defendants a way to spread the costs of that recovery among the responsible parties.

(3) *Interference with existing remedies, and* (4) *importance of purpose of the provision:* A private cause of action under subsection .822(a) would not interfere with existing remedies, such as contribution claims; and it would enhance the important purposes of Alaska's contamination responsibility regime. As discussed above, allowing private parties to initiate cleanup while they bring an action against others who may be responsible--without waiting for government action--promotes the goal of quick response to discovered contamination. At the same time, actions for contribution allow the parties to sort out ultimate responsibility for the contamination afterwards.

(5) *Scope of change in the law:* Allowing a private cause of action under subsection .822(a) is not a departure from the way the law already operates in Alaska. In *Chenega Corp. v. Exxon Corp.*, for example, the parties*349 litigated a complex private strict liability claim under subsection .822(a) stemming from the EXXON VALDEZ disaster. [FN17] No party questioned that subsection .822(a) allowed the action, and Exxon ultimately conceded strict liability, contesting only causation and damages. [FN18]

> FN17. 991 P.2d 769, 776 (Alaska 1999).

FN18. *See id.* Several Alaska superior courts have adopted similar approaches. *See University of Alaska v. Texaco,* No. 4FA-93- 2486 CI (Alaska Super., November 14, 1995) (memorandum decision); *Parks Hiway Enters., LLC v. CEM Leasing, Inc.,* No. 4FA-95-2117 CI (Alaska Super., December 22, 1997) (memorandum and order granting defendant's motion for summary judgment).

(o) *Burden on the courts of creating a private action:* While allowing private parties to bring causes of action may increase the number of claims under subsection .822(a), it will be consistent with what the legislature intended. We do not see that as an undue burden on the courts.

Because subsection .822(a) meets all of the criteria for an implied cause of action under our *Hendsch* analysis, and since the legislative history of the provision supports the conclusion that the legislature meant to permit private actions, we hold that subsection .822(a) creates a private cause of action for joint and several strict liability. In the following section, we briefly consider the scope of this private action.

3. *The private cause of action created in subsection .822(a) extends to potentially responsible parties.*

[3] In arguing that the only remedy available to FDIC is a subsection .822(j) action for contribution, the defendants place great weight on FDIC's status as a potentially responsible party. They contend that potentially responsible parties should not be allowed joint and several recovery, but should be limited to contribution from other potentially responsible parties.

Any entity that may be required to take financial responsibility for cleaning up a contaminated site is a potentially responsible party. Alaska Statute 46.03.822(a)(3) imposes strict liability on the owners of a facility that releases hazardous material. Insofar as FDIC stands in the shoes of the owner of the contaminated property at the time of the release--allegedly Sun Savings--FDIC is a potentially responsible party and, as such, is theoretically subject to the same liability as those who caused the contamination. [FN19]

FN19. We note in passing that FDIC's exact status is not clear. FDIC is the ultimate receiver of property owned by Carver that was pledged as security to Sun Savings. The defendants allege that FDIC is potentially responsible, but FDIC does not address the question. Under AS 46.03.826(8) "owner" and "operator" are defined to exclude a person who "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect that person's security interest in the vessel or facility." The federal district court's certified questions do not require us to interpret this provision or to determine whether FDIC is a potentially responsible party, and we decline to do so here. Nevertheless, we note that federal courts that have interpreted the CERCLA equivalent of this section are divided. *Compare United States v. Fleet Factors Corp.,* 901 F.2d 1550, 1557-58 (11th Cir.1990) (actual management unnecessary for secured creditor liability) *with In re Bergsoe Metal Corp.,* 910 F.2d 668, 672 (9th Cir.1990) ("[T]here must be some actual management of the facility before a secured creditor will [be liable under CERCLA]."). Moreover, AS 46.03.822(a) differs from its federal counterpart in the way it describes owner liability. *Compare* AS 46.03.822(a)(2) (imposing liability on "the owner ... of a ... facility, from which there *is* a release ... of a hazardous substance") *with* 42 U.S.C. § 9607(a)(1) (imposing liability on "the owner ... of a ... facility"). Alaska's law appears to focus on the owner at the time of the release, rather than on subsequent owners.

The defendants maintain that allowing one potentially responsible party to claim direct

damages under subsection .822(a) from other potentially responsible parties would give the claimant an unfair advantage over the defending parties, because the claimant's joint and several recovery under subsection .822(a) might include compensation for damages caused by absentee or judgment-proof polluters; the claimant would then receive full compensation despite being a potentially responsible--and possibly culpable--party, whereas the defending parties might be left with a worthless claim for contribution under subsection .822(j). The defendants reason that, in these situations, cleanup costs should ***350** be borne by all potentially responsible parties equally.

This argument seems to assume that courts cannot distinguish among potentially responsible parties to avoid inequitable results. But federal case law shows that courts can. In *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, the Seventh Circuit Court of Appeals found that when a potentially responsible party sues for direct damages under the federal counterparts to subsections . 822(a) and (j), the federal statutes allow the claim, but leave room for equitable distinctions upon conclusion of the litigation. [FN20] Thus, the court approved a direct action for joint and several liability by Rumpke--a potentially responsible party that denied actual responsibility for the contamination:

> FN20. 107 F.3d 1235, 1240-42 (7th Cir.1997).

> [W]e see nothing in the language of § 107(a) [the subsection .822(a) analog] that would make it unavailable to a party suing to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs (*i.e.*, where it is seeking to recover on a direct liability theory, rather than trying to divide up its own liability for someone else's injuries among other potentially responsible parties).[ [FN21]]

> FN21. *Id.* at 1240.

But the court went on to observe: "If the facts show, contrary to Rumpke's protestations, that it was partially responsible for the mess ..., it can proceed only under § 113(f)(1) [the subsection .822(j) analog] in a suit for contribution." [FN22]

> FN22. *Id.* at 1242 (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir.1994)). More recently, other federal courts have similarly allowed CERCLA's direct cost-recovery action to be recast as an action for contribution when brought by a potentially responsible party who is ultimately determined not to be "innocent." *See, e.g., Pinal Creek Group v. Newmont Mining Corp.* ., 118 F.3d 1298 (9th Cir.1997). The *Pinal* court found that CERCLA's analog to subsection .822(a) placed cleanup responsibility on the plaintiff Pinal Group because it was a potentially responsible party. At the same time, Pinal Group was entitled to recover from other potentially responsible parties for their share of the cleanup costs under CERCLA's subsection .822(j) analog. The court found that "this duality is best implemented by permitting a [potentially responsible party] who has incurred cleanup costs to assert only a contribution claim against other [potentially responsible parties]." *Id.* at 1301.

We agree with *Rumpke* that the possibility of inequitable results need not bar a potentially responsible party who denies responsibility from pursuing a direct cause of action for joint and several strict liability against other potentially responsible parties. Insofar as a plaintiff is an "innocent" potentially responsible party, that is, one who ultimately would not be liable for contribution, that plaintiff should recover jointly and severally. On the other hand, if a plaintiff ends up being among those responsible for the damage, the court may recast the direct claim as a claim for contribution upon conclusion of the litigation.

C. *Alaska's Statute of Limitations Applies to Actions Under Subsection . 822(a).*

[4] The defendants contend that FDIC's action is

barred by the statute of limitations. FDIC responds that subsection .822(a) precludes a statute of limitations defense. [FN23] In advancing this argument, FDIC points to the opening language of AS 46.03.822(a):

> FN23. The defendants assert, without elaboration, that this case is governed by AS 09.10.070(a), which establishes a two-year limit for "an action ... upon a liability created by statute." But it seems that this case might alternatively be governed by AS 09.10.050, which specifies a six-year limit for "an action for waste or trespass upon real property." Yet the relevant portion of the federal court's certification order only asks us to address FDIC's claim that no statute of limitations defense is available for a direct cause of action under AS 46.03.822(a). The question of which statute applies has not been adequately briefed, and the facts recited in the federal court's certification order suggest that the point may be time-barred under any applicable limit. Given these circumstances, we decline to consider which statute of limitations provision would govern FDIC's direct cause of action.

> *Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section,* the exception set out in (i) of this section, the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages [and ***351** other costs associated with hazardous substance spills].[ [FN24]]
>
> FN24. AS 46.03.822(a) (emphasis added).

Asserting that this provision's "notwithstanding" phrase plainly excludes all "defenses" to a subsection .822(a) action except those listed in subsection .822(b), FDIC argues that the provision's plain meaning precludes a statute of limitations defense.

We reject FDIC's plain meaning argument, for, as we explain below, FDIC's literal reading of the "notwithstanding" phrase strains common sense, is contextually implausible, and is at odds with legislative history.

[5][6] "[T]he threshold question in ascertaining the correct interpretation of a statute is whether the language of the statute is clear or arguably ambiguous." [FN25] Here, subsection .822(a)'s "notwithstanding" phrase's meaning may indeed seem clear and unambiguous. But " 'words are necessarily inexact and ambiguity is a relative concept.' " [FN26] Hence, even when a statute's language meaning seems plain on its face, ambiguity may arise if applying that meaning would yield anomalous consequences. [FN27]

> FN25. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n. 4, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988).
>
> FN26. *State v. Alex et al.*, 646 P.2d 203, 208-09 n. 4 (Alaska 1982) (quoting *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.1973) and adopting a sliding scale approach to statutory interpretation).
>
> FN27. Thus, courts adhering to the "plain meaning" rule of statutory interpretation commonly define the rule to apply only "where language of a statute is clear and construction according to its terms does not lead to absurd consequences." *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 540 n. 7 (Alaska 1978).

FDIC's proposal to enforce subsection .822(a)'s literal meaning by categorically barring all "defenses" except those listed in subsection .822(b) would have the nonsensical effect of eliminating a host of generally available "defenses" serving vital purposes wholly unrelated to the elements or underlying purposes of a direct action arising under subsection .822(a). If enforced literally, for instance, the "notwithstanding" phrase would bar a defendant who had previously settled and paid a

claim from defending on the basis of accord and satisfaction. A defendant who had already prevailed in an identical action by the same plaintiff could not raise the defense of res judicata. A defendant sued by a plaintiff who lacked an interest would be forbidden to claim lack of standing; one sued by a minor could not assert the plaintiff's lack of capacity; and one subjected to a claim without service of process could not raise lack of personal jurisdiction as a defense. The anomalies--all unavoidable consequences of adopting FDIC's proposed "plain meaning"--cast ambiguity on the seemingly clear language of subsection .822(a)' s "notwithstanding" provision. [FN28]

FN28. At least one federal court interpreting CERCLA has recently suggested that the "notwithstanding" language in the federal statute should not be interpreted to bar defendants from asserting res judicata, collateral estoppel, accord and satisfaction, or statutes of limitations, because such an interpretation would yield "absurd results that Congress could not have intended." *See Town of Munster, Indiana v. Sherwin-Williams Co., Inc.*, 27 F.3d 1268, 1271-72 (7th Cir.1994) ; *cf. Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 771-74 (9th Cir.1994) (affirming dismissal of section .822 claim on the ground of res judicata without expressly considering the "notwithstanding" language).

[7][8] Moreover, because "plain meaning" cannot exist in a vacuum, ambiguity is necessarily a creature of context. "As the Supreme Court has stated, 'in ascertaining the plain meaning of [a] statute, the court must look to the particular language at issue, as well as the language and design of the statute as a whole.' " [FN29] And "[w]hen a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole." [FN30]

FN29. *Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1048 (Alaska 1992) (Compton, J., dissenting) (quoting *K Mart Corp.*, 486 U.S. at 291, 108 S.Ct. 1811); *see also Nash v. State, Commercial Fisheries Entry Comm'n*, 679 P.2d 477, 478 (Alaska 1984).

FN30. *Millman v. State*, 841 P.2d 190, 194 (Alaska App.1992).

***352** Considered in context with other relevant provisions, subsection . 822(a)'s meaning is hardly plain. The "notwithstanding" phrase must initially be read together with other parts of section .822 to which subsection .822(a) specifically refers: subsection .822(b)'s list of "defenses" and the "exception" created in subsection .822(i). [FN31] The relevant language is as follows:

FN31. Subsection .822(a)'s "notwithstanding" phrase currently refers to two other provisions: "the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825." *See* AS 46.03.822(a). But neither of these references appeared in the originally enacted version of subsection .822(a). *See* Ch. 39, § 2, SLA 1989. Since both references were added after the original enactment of subsection . 822(a), they are not relevant to establish the intent of the legislature that originally enacted the statute.

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves
(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of
(A) an act of war;
(B) except as provided under AS 46.03.823(c) and 46.03.825(d), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person
(i) exercised due care with respect to the hazardous substance; and
(ii) took reasonable precautions against the act or

omission of the third party and against the consequences of the act or omission; or
(C) an act of God; and
(2) in relation to (1)(B) or (C) of this subsection, that the person [discovered the release and began containment and clean up within a reasonable period of time].
....
(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that
(1) the harm caused by the release or threatened release is divisible; and
(2) there is a reasonable basis for apportionment of costs and damages to that person.[ [FN32]]

FN32. AS 46.03.822(b) & (i).

As can be seen, subsection .822(b) creates three defenses to subsection . 822(a)'s strict liability scheme: an act of God, an act of war, or an unavoidable act of a third party. Each of these listed "defenses" centers on causation; each is triggered by the intervention of an outside actor, to which the law attributes the hazardous release, away from the original defendant. Hence, this specific category of defenses ameliorates the otherwise harsh effects of strict liability. So too, subsection (i) creates a specific exception that, when triggered by particular circumstances justifying the apportionment of partial responsibility to an outside actor or third party, ameliorates the harsh effects of joint and several liability.

The narrow focus of these defenses has significance in its own right, because "[w]here ... specific words follow[ ] general ones, [the statutory interpretation doctrine of *ejusdem generis*] restricts application of the general term to things that are similar to those enumerated." [FN33] As applied to the statutory phrase at issue, then--"notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exception set out in (i) of this section"--this interpretive canon strongly suggests that the terms "defenses" and "exception" refer not to the entire universe of potential general defenses, but to provisions and rules outside the original legislation that specifically mitigate the effects of joint and several liability.

FN33. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.17 (6th ed.2000); *see State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 412-13 (Alaska 1982) (applying this doctrine).

A companion provision of Alaska's 1989 hazardous substances legislation lends further ***353** credence to this reading. The statute immediately following subsection .822--AS 46.03.823--expressly creates a partial exception to strict liability for "hazardous substance response action contractors" (cleanup contractors), making them liable for hazardous releases only on the basis of negligence. [FN34] This provision certainly qualifies as a "defense" to subsection .822(a)'s strict liability provision-at least in the broad sense of "defense" that FDIC urges us to adopt insofar as it relates to the statute of limitations. Yet because this defense is not mentioned in subsection .822(a), it necessarily conflicts with FDIC's proposed "plain meaning" of subsection . 822(a)'s "notwithstanding" phrase: according to FDIC, the phrase's categorical preclusion of all conceivable defenses except those set out in section .822-- subsections .822(b) and (i).

FN34. As originally enacted by chapter 39, § 3, SLA 1989, section . 823 provided, in relevant part: (a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under

> the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.
> (b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly liable under this section.

[9] To apply FDIC's plain meaning of subsection .822(a), then, would nullify the section .823 defense, rendering the provision entirely superfluous. This, in turn would clash with the rule of construction holding that, as a general rule, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." [FN35]

> FN35. *Alascom, Inc. v. North Slope Borough Bd. of Equalization,* 659 P.2d 1175, 1178 n. 5 (Alaska 1983) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 46.06 (4th ed.1973)).

Legislation outside AS 46.03 reinforces the uncertainty generated by section .823. Just as subsection .822(a)'s "notwithstanding" phrase must be considered in context with the hazardous substances act as a whole, so too-other relevant laws must be considered, for "a seemingly unambiguous statute [may be] restricted by another act or where it must be considered in pari materia with another act." [FN36] In this regard, the comprehensive regime of statutes of limitations listed in AS 09.10 is particularly relevant, [FN37] because, as Laidlaw correctly observes, "if, as FDIC suggests, § . 822(a) has no statute of limitations whatsoever, it appears to be the only cause of action in Alaska with this distinction." [FN38]

> FN36. *Hafling v. Inlandboatmen's Union of Pacific,* 585 P.2d 870, 872 (Alaska 1978); *see also Anderson v. Anderson,* 736 P.2d 320, 321 (Alaska 1987) (seemingly unambiguous provision of Exemptions Act affected by Alaska Limited Entry Act).
>
> FN37. AS 09.10.010 provides: "A person may not commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute." AS 09.10.100 provides: "An action for a cause not otherwise provided for may be commenced within ten years after the cause of action has accrued."
>
> FN38. *See generally* AS 09.10.010--AS 09.10.100.

The final factor to consider in determining subsection .822(a)'s meaning is its legislative history. In our view, this factor further indicates that the legislature did not intend to exclude the statute of limitations as an available "defense" to a private cost recovery action. In 1989 the legislature amended section .822, using the federal CERCLA statute as a pattern. [FN39] Congress originally passed CERCLA in 1980, including the defense-limiting "notwithstanding" language that appears in subsection . 822(a). [FN40] When first enacted, CERCLA incorporated a three-year ***354** statute for damages actions. [FN41] But two federal trial courts ruled that this statute of limitations did not apply to cost recovery actions under 42 U.S.C. § 9607--the CERCLA analog to subsection .822(a). [FN42]

> FN39. *See supra* note 8 and accompanying text.
>
> FN40. *See* Comprehensive Environmental Response, Compensation & Liability Act of 1980, Pub.L. No. 96-510, Title I, § 107. 94 Stat. 2767, 2781 (1980).
>
> FN41. *See* 42 U.S.C. § 9612(d) (1994).
>
> FN42. *See United States v. Dickerson,* 640 F.Supp. 448, 450-51 (D.Md.1986); *United States v. Mottolo,* 605 F.Supp. 898, 901-10 (D.N.H.1985).

In 1986, evidently responding to these rulings, Congress added statutes of limitations specifically covering CERCLA's counterparts to subsections .822(a) and (j). [FN43] Congress codified these new statutes as separate provisions within CERCLA, and did not amend CERCLA's "notwithstanding" language to mention them as "defenses" to a cost recovery action under CERCLA. [FN44] Obviously, then, Congress did not consider these statutes of limitations to be included among the kinds of "defenses" that were limited by CERCLA's "notwithstanding" provision--a provision directly corresponding to subsection .822(a).

FN43. *See* Pub.L. No. 99-499, § 113(b), 100 Stat. 1613, 1647 (1986).

FN44. *See* 42 U.S.C. § 9613(g) (1994). CERCLA's analog to AS 46.03.822(a) appears at 42 U.S.C. § 9607(a).

When the 1989 Alaska legislature revised section .822 by incorporating many features of CERCLA, [FN45] it omitted CERCLA's internal statutes of limitations. FDIC argues that this omission evinces the legislature's intent to withdraw any statute of limitations defense. But the defendants respond that the Alaska legislature's omission merely reflects its awareness that, unlike federal law, Alaska law already incorporated general statutes of limitations outside its hazardous substances act that would govern a direct action brought under subsection .822(a)

FN45. *See supra* note 8 and accompanying text.

The defendants' view is more plausible than FDIC's. As pointed out above, it is apparent that Congress considered CERCLA's internal statute of limitations to lie outside the sphere of "defenses" described by CERCLA's "notwithstanding" provision. If we accepted FDIC's proposed view of legislative intent, then, we would have to conclude that the Alaska legislature meant to give the "notwithstanding" language imported from CERCLA more significance in subsection .822(a) than Congress gave it in the federal context. Since no legislative history supports this interpretation, there is no reason to suppose that the Alaska legislature intended subsection .822(a) to abrogate Alaska's general statutes of limitations.

In sum, we conclude that the limiting language of subsection .822(a) does not preclude affirmative defenses, like the defense of statute of limitations, that have no inherent relation to subsection .822(a)'s imposition of joint and several strict liability for release of hazardous substances.

D. *An Action for Contribution Under Subsection .822(j) May Be Filed When a Subsection .822(a) Action Is Brought but "Accrues" for Purposes of the Statute of Limitations When Judgment Is Entered or Settlement Is Reached.*

[10] One of the certified questions before us is when a cause of action for contribution "accrues" under subsection .822(j). In 1989, when the legislature amended subsection .822(a) to mirror CERCLA, it also enacted a new subsection, AS 46.03.822(j), that gave defendants an action for contribution:

> *A person may seek contribution from any other person who is liable under (a) of this section during or after a civil action under (a) of this section.* ... In resolving claims for contribution under this section, the court may allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section.[ [FN46]]

FN46. Ch. 39, § 2, SLA 1989.

The statutory language is clear that any party named in a direct subsection .822(a) action may commence an action for contribution at any time "during or after" the direct ***355** action. [FN47] We nevertheless conclude that even though subsection .822(j) allows a contribution action to be brought while a subsection .822(a) action is still in progress, the contribution action does not "accrue" for purposes of the statute of limitations until the

subsection .822(a) action concludes.

> FN47. Conversely, subsection .822(j)'s "during or after" language strongly suggests that a party has no right to seek contribution *before* an action has been commenced under subsection .822(a). Yet subsection . 822(j) also provides that "this subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section." In light of our decision that subsection . 822(a) creates a private cause of action, these provisions are not contradictory. In the absence of a third-party claim under subsection . 822(a), a potentially responsible party is free to bring a private action under subsection .822(a) against other potentially responsible parties and, in so doing, may seek or ultimately be limited to apportioned damages under subsection .822(j). *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir.1997). While this kind of anticipatory action might plausibly be characterized as a claim for contribution under subsection .822(j), because it derives from subsection . 822(a)'s creation of a private right of action, the anticipatory contribution action must accrue with the related subsection .822(a) action and be governed by its statute of limitations.

[11] Under CERCLA, an action for contribution accrues according to a contribution-specific statute of limitations, 42 U.S.C. § 9613(g)(3). Alaska has no analog to this provision on its books. Because the legislature unreservedly specified that contribution actions may be brought after a subsection .822(a) action concludes, and since an action under the subsection . 822(a) could conceivably remain pending for many years after its inception, the statute of limitations on such actions cannot realistically begin to run upon commencement of the action under subsection .822(a). [FN48]

> FN48. In this regard, we believe that subsection .822(j)'s language allowing potentially responsible parties to assert contribution claims "during" a subsection .822(a) action must be read to extend to actions prosecuted either in court or through administrative proceedings. If subsection .822(j) did not apply to parties who became subject to DEC administrative compliance actions, the benefit of a contribution action would accrue only to those who, through their recalcitrance, forced DEC to court. We do not believe that the legislature intended to force such cases into court. We note, however, that before the state's administrative process could qualify as an action, it would have to have the formal attributes of an administrative proceeding, including "a complaint-like pleading, which in turn set[s] in motion a formal process of dispute resolution." *Koss v. Koss*, 981 P.2d 106, 108 (Alaska 1999); *see also Agen v. State, CSED*, 945 P.2d 1215, 1219 (Alaska 1997) ; *cf. Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994) (listing a formal charging document that triggers a formal mechanism for dispute resolution as indicia of an agency "proceeding").

Moreover, interpreting subsection .822(j) to authorize a contribution action accruing upon or after judgment comports with general contribution case law elsewhere, [FN49] as well as with our own case law governing contribution in other contexts. For example, in *Providence Washington Insurance Co. of Alaska v. McGee* we recognized "that a claim for contribution is substantively separate from the underlying tort and does not arise until the contribution claimant has paid more than his or her proportionate share of the total claim." [FN50]

> FN49. *See* Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, 912-13 (1974).

FN50. 764 P.2d 712, 715 (Alaska 1988); *see also Alaska General Alarm, Inc. v. Grinnell*, 1 P.3d 98, 106-07 (Alaska 2000).

In the absence of statutory guidance other than the language of subsection . 822(j), and because subsection .822(j) specifically authorizes an action for contribution to be brought "during or after" a direct action under subsection . 822(a), we conclude that a contribution action under subsection .822(j) should not accrue for statute of limitations purposes until the direct cost recovery ends, either by judgment, settlement, or the conclusion of an administrative action. [FN51]

FN51. In our view, the rule we adopted in *Providence Washington Insurance Co. of Alaska v. McGee* should generally govern the date of accrual when a party who has paid damages assessed jointly and severally under subsection .822(a) files a contribution action to recoup the disproportionate payment. In at least one situation, however, reliance on the *Providence Washington* rule may not be warranted. When a party who has not been forced to pay an award or make cleanup efforts under subsection . 822(a) files a contribution action to apportion liability for the damages, the contribution action should be treated as accruing at the time of judgment on the subsection .822(a) action. Applying the *Providence Washington* rule to such cases would encourage subsection .822(a) judgment debtors to delay payment or cost recovery efforts, since any delay would be essentially cost-free and they could always trigger a new period for filing a contribution action by making a small payment on the judgment. In these situations and in other exceptional cases, subsection .822(j)'s express grant of discretion to consider "equitable factors determined to be appropriate by the court" will, we believe, empower trial courts to treat the contribution action as accruing upon entry of the subsection .822(a) judgment.

***356** E. *Nuisance and Trespass Actions Are Subject to Statutes of Limitations and the Discovery Rule.*

[12] Finally, we consider whether hazardous substance contamination can escape the statute of limitations by being characterized as a continuing nuisance or trespass. FDIC maintains that because the contamination of the Soldotna property "continued over time, and continue[s] up to the present time," no statute of limitations bars its claims for nuisance and trespass. To support this argument, it relies on our ruling in *Wood v. Alm.* [FN52]

FN52. 516 P.2d 137, 142 (Alaska 1973).

We are not persuaded that *Wood* is controlling. In *Wood*, we let stand the superior court's ruling that the defendant's failure to prevent the flooding of the Woods' property was a continuing nuisance that should be abated. [FN53] FDIC reads that case as describing a situation analogous to this case. But in *Wood*, the continuing nuisance was caused by a faulty dike for which the defendants were responsible. [FN54] While damage did occur soon after the dike began to leak, we recognized that compensation for that damage was time barred. [FN55] Nevertheless, the defendants were under a continuing obligation to prevent the inundation of the Woods' land, which they continuously failed to do; their leaky dike allowed water to seep onto the Woods' property up to the day the suit was filed. [FN56]

FN53. *See id.* at 141-42.

FN54. *See id.*

FN55. *See id.*

FN56. *See id.* (indicating that the superior court judge viewed the unrepaired conditions around the Woods' property).

In contrast, the defendants here are not

exacerbating the contamination that they allegedly caused during the late 1980s. And since they have lost their connection to the land, they cannot be characterized as maintaining an ongoing nuisance. Thus, we do not see how the contamination in this case differs from the harm ordinarily at issue in cases involving torts of a non-continuing nature, where discrete wrongful acts often have lasting consequences.

Insofar as there is a difference that relates to statutes of limitations, it is that injuries from seeping pollutants may be difficult to discover. That characteristic, however, does not militate in favor of describing the defendants' alleged actions as a continuing nuisance or trespass. Rather, the discovery rule adequately addresses this problem by delaying a cause of action's accrual until the plaintiff is aware, or reasonably should be aware, of its existence. [FN57]

> FN57. *See Cameron v. State*, 822 P.2d 1362, 1365-68 (Alaska 1991) (laying out the discovery rule and its purpose).

Here, given the parties' briefing, the undisputed facts discussed in the federal court's certification request, and the available record, we conclude that FDIC's allegations do not lend themselves to being framed as a continuing trespass or nuisance. [FN58]

> FN58. For the reasons that we advanced in discussing the availability of a statute of limitations defense to direct actions under subsection . 822(a), *see supra* Part III.C, we need not consider what statute of limitations applies to FDIC's trespass claim.

IV. *CONCLUSION*

In sum, we answer the certified questions as follows:

1. A statute of limitations defense is available for a direct cause of action under AS 46.03.822(a).

2. Alaska Statute 46.03.822(a) creates a private cause of action imposing joint and several strict liability.

***357** 3. A cause of action for contribution under AS 46.03.822(j) may be brought during the pendency of a direct action under subsection .822(a) but does not accrue for purposes of the statute of limitations until the direct action concludes.

4. Continuing trespass and nuisance claims for environmental contamination cannot be brought outside the limitations period under the undisputed circumstances presented here.

21 P.3d 344, 52 ERC 1488

END OF DOCUMENT

# HOUSE COMMITTEE REPO[illegible]

(9)
**Date Referred to Committee: April 14, 2005** **FURTHER REFERRALS: Judiciary**

**Date of Committee Action:** 4/25/05

**The RESOURCES Committee considered:** **HB 269**

**HOUSE BILL NO. 269** **HAZARDOUS SUBSTANCE RELEASE LIABILITY**

**"An Act relating to contribution actions relating to the release of a hazardous substance; and providing for an effective date."**

**Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____( _____)**
***For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____*** **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

*List of Abbrev for Depts.:*
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

| ***NEW*** **FISCAL NOTES** *Assigned by Chief Clerk's Office | | | | |
|---|---|---|---|---|
| List by Dept(s): | *FN# | Fiscal | Indet. | Zero |
| LAW | | | | ✓ |
| DEC | | | | ✓ |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

| ***PREVIOUS*** **FISCAL NOTES** | | | | |
|---|---|---|---|---|
| List by Dept(s): | FN# | Fiscal | Indet. | Zero |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

| **Signing with recommendations** | Printed Last Name | DP | DNP | NR | AM |
|---|---|---|---|---|---|
| | OLSON | ✓ | | | |
| | Gatto | | | ✓ | |
| | LeDoux | ✓ | | | |
| | CRAWFORD | | | ✓ | |
| | ELKINS | ✓ | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| **Chair:** | RAMRAS | X | | | |
| **Chair:** | | | | | |