

**COMPELLED COSTS UNDER CERCLA: INCOMPATIBLE
REMEDIES, JOINT AND SEVERAL LIABILITY, AND TORT
LAW**

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INTRODUCTION

Applying the current Supreme Court test, if Company A is seeking to recover, under Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), costs associated with the cleanup of a property, it could find itself in one of two very uncomfortable situations. First, Company A may have been held liable for 100% of the costs and not be able to recover a fair share from some of the other parties involved.¹ Second, Company A could be in the even more troubling scenario in which it has no cause of action under the statute to recover part of its costs.²

The original version of CERCLA included a provision—section 107(a)—allowing for the recovery of certain cleanup costs.³ In 1986, Congress passed the Superfund Amendments and Reauthorization Act (“SARA”)⁴ to solve the multiple problems concerning the Act itself and its implementation by the Environmental Protection Agency (“EPA”).⁵ One of the main changes was the incorporation of section 113(f), which recognized the right to seek contribution from other potentially responsible parties under certain conditions.⁶ The existence of two different sections in the statute under which a party could recover its cleanup costs created diverging interpretations that were later addressed by the United States Supreme Court.⁷

However, several years after the Supreme Court adopted a comprehensive test to clarify the interplay between the two causes of action in *Atlantic Research*,⁸ situations where uncertainty still remains are still generating litigation, as recent cases such as *Hobart Corp. v. Waste*

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1. See *infra* Part IV.B.

2. *Id.*

3. 42 U.S.C. § 9607(a)(4)(A)–(D) (2012).

4. H.R. Rep. No. 99-253, pt. 3, at 16 (1985).

5. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

6. 42 U.S.C. § 9613(f)(1) (2012).

7. *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157 (2004); see also *United States v. Atl. Research Corp.*, 551 U.S. 128, 131–32 (2007) (providing a case in which the Supreme Court of the United States recognized that “Courts have frequently grappled with whether and how PRPs may recoup CERCLA-related costs from other PRPs”).

8. *Atlantic Research Corp.*, 551 U.S. at 134.

*Management of Ohio*⁹ and *LWD PRP Group v. Alcan Corp.* show.¹⁰ This article argues that the complications that federal courts are having to deal with when deciding these issues are a result of significant flaws in the test laid out by the Supreme Court in *Atlantic Research*,¹¹ and suggests an alternative test that would avoid these problems.¹² Part I explains how courts have defined the interplay of both causes of action since the enactment of the SARA amendments. Part II addresses the shortcomings of the framework adopted by the Supreme Court. Part III suggests an alternative approach to these issues. Part IV analyzes why the arguments advanced by the Supreme Court in *Atlantic Research* do not support the current test.

I. FROM THE ORIGINS OF CERCLA TO THE CURRENT FRAMEWORK
ADOPTED BY THE SUPREME COURT

A. *The Basic Principles of CERCLA*

CERCLA was enacted by Congress in 1980, shortly after President Carter's electoral defeat.¹³ The statute's legislative process has been characterized as "peculiar" due to, among other things, the lack of mark-up sessions or hearings.¹⁴ To reach a complicated compromise, most of the negotiations occurred behind closed doors and therefore never became part of the legislative history.¹⁵ As a result, the version of the statute that was

9. See *Hobart Corp. v. Waste Mgmt. Inc.*, 758 F.3d 757, 761, 763 (6th Cir. 2014) (illustrating the situation where a party could potentially sue under section 107 and section 113).

10. *LWD PRP Grp. v. Alcan Corp.*, 600 F.App'x. 357, 364–65 (6th Cir. 2015).

11. *Atlantic Research*, 551 U.S. at 139–42.

12. Once this article was in the publication process with the Vermont Journal of Environmental Law, another piece dealing with these issues was published. See Jeffrey Gaba, *The Private Causes of Action Under CERCLA: Navigating the Intersection of Section 107(a) and 113(f)*, 5 MICH. J. ENVTL. & ADMIN. L. 117 (2015). As will become apparent throughout this article, the author and Prof. Gaba suggest different approaches to address some of the problems with the Supreme Court test. While the author of this article proposes a modification of the current framework so that Potentially Responsible Parties ("PRPs") can only recover costs under section 113 of CERCLA, Prof. Gaba maintains that the loose ends in the current test should be addressed by relying, in part, on the principles that the Supreme Court itself provided. *Id.* at 148–49. This leads to situations where PRPs would be able to sue other PRPs under the more favorable section 107(a), *id.* at 152, 163, creating, in the opinion of this author, the array of structural problems pointed out by the United States in the *Atlantic Research* litigation, see *infra* Part II.A.

13. Alfred R. Light, *CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?*, 19 SE. ENVTL. L. J. 245, 251 (2008).

14. *Id.* at 252.

15. Alfred R. Light, *Clean Up of a Legislative Disaster: Avoiding the Constitution Under the Original CERCLA*, 37 ENVIRONS ENVTL. L. & POL'Y J. 197, 200–01 (2014).

finally enacted contained numerous ambiguities and inconsistencies.¹⁶ Some members of Congress later addressed this situation by attempting to incorporate a series of post hoc statements to the legislative history.¹⁷

CERCLA was enacted with the double purpose of ensuring the cleanup of hazardous waste sites while placing the economic cost of such cleanup on the so-called Potentially Responsible Parties (“PRPs”), pursuant to the polluter pays principle.¹⁸ Section 107(a) provides that the following persons may be held liable under the act:

(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.¹⁹

A mere reading of subsections (a)(1) and (a)(2) of the Act reveals that the current owner of a facility is a PRP even if he did not own the property at the time of the release of hazardous substances. On the other hand, a previous owner will only be deemed a PRP if she owned the property at that particular point in time. Some authors have criticized the harsh results this regime can lead to,²⁰ especially in light of the courts’ interpretation that the statute allowed the imposition of joint and several liability on PRPs.²¹

16. *Id.* at 202 (quoting a statement of Representative Harsha, who indicated that “we are establishing civil liability and criminal penalties in this legislation, and numerous questions have been raised as to what we are doing to common law with this new statute. These are not spurious issues. They are going to be litigated and the courts are going to have a field day in ridiculing the Congress on passing laws that are vague, internally inconsistent, and using tools such as superseding laws which are in conflict without any further guidance. This bill is not a superfund bill—it is a welfare and relief act for lawyers.” 126 Cong. Rec. 31,970 (1980)).

17. *Id.* at 204.

18. Amy Luria, *CERCLA Contribution: An Inquiry into What Constitutes an Administrative Settlement*, 84 N.D. L. Rev. 333, 333–34 (2008).

19. 42 U.S.C. § 9607(a).

20. Aaron Gershonowitz, *United States v. Atlantic Research Corp.: Who Should Pay to Clean up Inactive Hazardous Waste Sites?*, 19 DUKE ENVTL. L. & POL’Y F. 119, 123 (2008).

21. *Id.* at 123 (citing Alan J. Topol & Rebecca Snow, *SUPERFUND LAW AND PROCEDURE* § 1:1 (2008–2009 ed.)). As some authors have noted, CERCLA allows for joint and several liability, but

Under the original version of the statute, this framework had the potential of leading to two troubling situations: (i) a party could find itself in the position of having to pay the costs for the remediation of an entire site, even if it only contributed a small part of the waste,²² and (ii) a landowner who purchased the site without knowing it was contaminated could be required to incur the full cost of the remediation.²³

B. The SARA Amendments

In 1986, CERCLA was amended to fill several gaps, the most relevant for the purposes of this paper being: (i) establishing a right to contribution and (ii) incorporating a statute of limitations.²⁴ The right to contribution is contemplated in section 113(f)(1), which provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [section 107(a) of the Act] of this title, during or following any civil action under section 9606 [section 106 of the Act]²⁵ of this title or under section 9607(a) of this title 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.²⁶

Related to this, subsection (f)(2) incorporates the so-called “settlement bar,” which makes parties who have reached an “administrative or judicially approved settlement” with the United States or a State immune from contribution claims concerning the matters dealt with in such agreement.²⁷ However, any person meeting the requirements in 113(f)

does not mandate it. Kevin A. Gaynor et al., *Unresolved CERCLA Issues After Atlantic Research and Burlington Northern*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11198, 11199 (2010).

22. Gershonowitz, *supra* note 20, at 123.

23. RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLICY 735 (3d ed. 2015); L. Jager Smith, Jr., *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155, 156 (1993).

24. Light, *supra* note 15, at 213–14.

25. See 42 U.S.C. § 9606(a). (authorizing governmental abatement actions). It provides that “In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat.” *Id.*

26. *Id.* § 9613(f)(1).

27. *Id.* § 9613(f)(2).

(regardless of whether she has settled her liability) may bring a contribution claim against a party who has not resolved its liability in an approved settlement.²⁸

The amendments also added a statute of limitations for both liability and contribution claims. Pursuant to section 113(g), an action under section 107 for the recovery of remedial costs must be commenced (with some exceptions) within six years after the physical remediation is initiated.²⁹ On the other hand, actions for contribution under section 113(f) may not be initiated three years after the date of the judgment, administrative order, or judicially approved settlement pertaining to the recovery of response costs or damages.³⁰

As for the two problematic situations described in the last paragraph of Part I.A *supra*, SARA tempered their harshness. With regard to the first scenario—where a party could be compelled to pay all the costs of the entire remediation, even though it only contributed to part of the contamination—the express recognition of the right to contribution made theretofore easier for PRPs in these situations to recover part of the costs from other PRPs.³¹ The consequences of the second troubling situation—in which a landowner could be required to pay remediation costs for a site that he bought without knowing it was contaminated—have also been minimized through the introduction of the innocent-land-owner defense.³² This defense³³ shields the landowner from liability if he exercised due care and took appropriate precautions and “[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.”³⁴

In short, these amendments substantially modified CERCLA’s initial framework, and minimized some of its malfunctions through the introduction of the innocent-land-owner defense and the right of

28. *Id.* § 9613(f)(3)(A)–(B).

29. *Id.* § 9613(g)(2)(B). *But see* § 9613(g)(2)(A) (creating a three-year statute of limitations for an action to recover costs from *removal*).

30. *Id.* § 9613(g)(3).

31. Light, *supra* note 15, at 208 (citing *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 227 (W.D. Mo. 1985)). (Before SARA, however, some courts recognized the right to contribution. In 1985, a U.S. District Court had concluded that the contribution rights were “particularly appropriate, given the nature of the CERCLA legislative scheme” because “[t]he broad character of the remedial scheme fashioned by Congress strongly evidence[d] an intent not to foreclose the right of contribution”).

32. 42 U.S.C. §§ 9601(35), 9607(b)(3).

33. It has been pointed out that referring to it as a “defense” is a misnomer because § 9601(35) did not create a new defense but merely specified the meaning that should be given to the term “contractual liability” in § 9607(b)(3). REVESZ, *supra* note 23, at 735.

34. *Id.* § 9601(35)(A)(i) (2012).

contribution. As noted earlier, some of the complications that have followed the addition of the right of contribution—a right that had been implied by some courts from section 107(a)³⁵—to the statute constitute the main focus of this paper. At this point, it is important to stress that this cause of action—contribution—was given certain features that made it different from the existing liability claim, i.e. a shorter statute of limitations and a restriction through the settlement bar of the potential defendants at which it could be directed. Two of the questions that the introduction of the right of contribution begged were: (i) whether there were any relevant limitations to the right of a PRP to bring a contribution claim under section 113(f); and (ii) whether PRPs could, after the incorporation of section 113(f) to the Act, still bring an action against another PRP under section 107(a).

C. The First Part of the Current Test: The Aviall Decision

The two questions noted above became critical issues in *Cooper Industries, Inc. v. Aviall Services*, a case decided by the United States Supreme Court in 2004.³⁶ Aviall Services acquired four aircraft maintenance sites in Texas from Cooper Industries.³⁷ When it discovered that the site was contaminated, Aviall cleaned it up and brought suit against Cooper Industries under sections 107(a) and 113(f) of CERCLA.³⁸

The main issue was whether Aviall was entitled to bring a claim for contribution against Cooper Industries under section 113(f)(1), given that it had not been sued under sections 106 or 107.³⁹ The District Court concluded that Aviall was barred from doing so in light of the language of section 113(f)(1) that provides “[a]ny 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.”⁴⁰ The Court of Appeals for the Fifth Circuit ultimately reversed the District Court’s decision, basing its conclusion on the last sentence of section 113(f)(1), which reads: “[n]othing 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.”⁴¹

35. See *Conservation Chem. Co.*, 619 F. Supp. at 227.

36. *Aviall*, 543 U.S. 157.

37. *Id.* at 164.

38. *Id.* at 165.

39. *Id.* at 160–61.

40. *Id.*

41. *Id.* at 166.

The Supreme Court, however, held that contribution under section 113(f) could only be sought “‘during or following’ a specified civil action”⁴² and provided several reasons in support of its conclusion. First, the Court noted that, if a party could bring a contribution claim regardless of the existence of a civil action, this condition included in the statute would be rendered superfluous.⁴³ Second, the majority interpreted the saving clause in the last sentence of section 113(f) as meaning that “[section] 113(f)(1) does nothing to ‘diminish’ any causes(s) of action for contribution that may exist independently of [section] 113(f)(1).”⁴⁴ Last, the Court pointed out that section 113(g)(3), which establishes the statute of limitations for contribution claims, only contemplates situations in which there is a judgment or a settlement.⁴⁵ The argument was that such a claim could not be brought under section 113(f) given the absence (in section 113(g)(3)) of a point in time from which the statute of limitations would start running in a scenario where, as the one in the case before it, there had been a voluntary cleanup.⁴⁶

The next logical question was whether Aviall could recover at all by bringing a 107(a) suit instead. The majority refused to address this issue, reasoning that the lower courts had not considered it.⁴⁷ The dissenting justices, on the other hand, explained that the court had already agreed, in *Key Tronic Corp. v. United States*, that section 107 enabled a PRP to bring a claim for reimbursement of cleanup costs against another PRP.⁴⁸

D. The Second Part of the Current Test: Atlantic Research

Atlantic Research Corp., a company that retrofitted rocket motors for the United States, caused soil and groundwater contamination of a site operated by the Department of Defense.⁴⁹ After cleaning up the site, Atlantic Research sued the United States to recover part of its costs under sections 107(a) and 113(f). In light of the decision in *Aviall*, Atlantic Research amended its original complaint to exclude section 113(f) as grounds for relief.⁵⁰ The District Court held that a PRP was not entitled to recover costs from another PRP under section 107(a) and dismissed the

42. *Id.* at 168.

43. *Id.* at 167.

44. *Id.* at 166.

45. *Id.* at 167.

46. *Id.*

47. *Id.* at 168.

48. *Id.* at 172.

49. *Atlantic Research*, 551 U.S. at 134.

50. *Id.*

plaintiff's complaint.⁵¹ The Court of Appeals for the Eight Circuit reversed the District Court's decision and held that, given that relief under 113(f) was not available to Atlantic Research, it could instead bring a 107(a) claim against the United States.⁵² The Supreme Court affirmed the Eight Circuit's judgment.⁵³

The dispute hinged upon the interpretation of section 107(a)(4), which provides in its relevant part that a PRP "shall be liable for . . . (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe . . . (B) any other necessary costs of response incurred by any other person."⁵⁴ In other words, the issue was whether the expression "any other person" in section 107(a)(4)(B) included other PRPs.⁵⁵ The Supreme Court concluded that "any other person" meant any person not mentioned in the previous subparagraph—which refers to the United States, a State, or an Indian tribe.⁵⁶ Therefore, a PRP or any other private party may bring cost-recovery actions under 107(a)(4)(B).⁵⁷ The Court also clarified the interplay between sections 107(a) and 113(f) and addressed the Government's arguments in detail.⁵⁸

1. The Current Test for Determining Which Remedy is Available

Citing *Aviall*, the Court noted that sections 107(a) and 113(f) provide distinct remedies, i.e., the "right to cost recovery in certain circumstances, [section]107(a), and separate rights to contribution in other circumstances, [sections] 113(f)(1), 113(f)(3)(B)."⁵⁹ Interestingly, the majority started its explanation of the right of contribution under section 113(f) by citing the definition in Black's Law Dictionary, which describes the traditional notion of contribution as: "a tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."⁶⁰ It then concluded that Congress could not have intended to use this term in a manner inconsistent with its traditional sense and noted that under section 113(f) the right to contribution is also premised on an inequitable

51. *Id.* at 135.

52. *Id.*

53. *Id.* at 142.

54. 42 U.S.C. § 9607(a)(4)(A)–(B).

55. *Atlantic Research*, 551 U.S. at 135–36.

56. *Id.* at 136.

57. *Id.* at 137.

58. *Id.* at 139–42.

59. *Id.* at 139 (emphasis omitted).

60. *Id.* (quoting *Contribution*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

distribution of liability.⁶¹ However, the Court did not provide a full explanation of why allowing a PRP to sue under section 113(f) in the absence of a suit or an approved settlement would be inherently inconsistent with Black's Dictionary's definition of "contribution."

According to the Court, in cases in which a PRP has not been held liable to a third party, it may seek recovery under section 107(a) as long as it has incurred cleanup costs.⁶² If this party makes a payment pursuant to a settlement agreement or to satisfy a court judgment, it is considered to be reimbursing other parties, and therefore section 107(a) is not available.⁶³ The Court indicated, as a distinctive feature of section 107(a), that it applies to a party who has *itself* incurred cleanup costs.⁶⁴ This interpretation is consistent with the wording of the statute, which reads: "shall be liable for . . . any other necessary costs of response incurred by any other person."⁶⁵ It is important to note that, while the Court claims that sections 107(a) and 113(a) provide different remedies, the majority added a caveat in footnote six, which reads:

We do not suggest that [sections] 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under [section] 106 or [section] 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under [section] 113(f), [section] 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of [section] 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under [section] 113(f). Thus, at a minimum, neither remedy swallows the other, contrary to the Government's argument.⁶⁶

Three main conclusions on use of the remedies in sections 107(a)(4)(B) and 113(f) may be drawn from the preceding passage and the other

61. *Id.* at 138–39.

62. *Id.* at 140.

63. *Id.*

64. *Id.*

65. 42 U.S.C. § 9607(a)(4) (B).

66. *Atlantic Research*, 551 U.S. at 140 n.6 (emphasis omitted) (internal citations omitted).

principles laid out in the opinion. First, the triggers for each section are the following: section 107(a) may be used when the plaintiff has incurred costs,⁶⁷ and a section 113(f) contribution claim is available during or following a suit⁶⁸ or after a PRP has entered into an administratively or judicially approved settlement with the United States or a State.⁶⁹ Second, there are certain situations in which—even if the triggers for both section 107(a) and section 113(f) have been met—the plaintiff may only bring suit under one particular section. Section 107(a) is the only avenue that can be used for recovery of costs voluntarily incurred,⁷⁰ and contribution under section 113(f) is the sole cause of action if the resulting amounts sought are for reimbursement to third parties.⁷¹ Third, the Court concedes that this differentiation may allow for certain situations—when the PRP incurs “compelled costs”—to fit into both categories.⁷² Therefore, regardless of how these scenarios are treated in the future, this framework is not comprehensive and leaves loose ends.

2. The Court’s Position on the Government’s Arguments

The United States argued that if Atlantic Research’s interpretation of 107(a)(4)(B) were adopted, a PRP could (i) avoid the shorter statute of limitations in 113(f), (ii) “eschew equitable apportionment under [section] 113(f) in favor of joint and several liability under [section] 107(a),” and (iii) circumvent the settlement bar in section 113(f)(2).⁷³ The majority addressed these three concerns⁷⁴ and responded by providing a series of arguments of questionable persuasiveness.

In response to the first argument, the Court pointed out that the structure explained in Part I.D.1 would prevent, “at least in the case of reimbursement,” a PRP who has a recognized right to contribution under section 113(f) from taking advantage of the longer statute of limitations provided for cost-recovery actions under section 107(a).⁷⁵ As for the second argument, the Court noted that, by the same token, a party may not avoid

67. *Id.* at 140.

68. Superfund Amendments and Reauthorization Act of 1986 § 113(f)(1).

69. *Id.* § 113(f)(3).

70. *But see* Gaba, *supra* note 12, at 146 (internal citations omitted) (noting that “the Supreme Court never relied on the voluntary/involuntary distinction as the basis of allocation”; however, the language in note six of *Atlantic Research* definitely takes this factor into account to determine if section 107(a) is the only available remedy).

71. *Id.* at 148.

72. *Atlantic Research*, 551 U.S. at 140 n.6 (internal citations omitted).

73. *Id.* at 138–39.

74. *Id.* at 139–41.

75. *Id.* at 139.

reimbursement costs under section 113(f) by imposing joint and several liability on a different party under section 107(a).⁷⁶ The Court insisted that “[a] choice of remedies simply does not exist.”⁷⁷ The majority conceded that there could be cases in which a PRP could in fact institute a section 107(a) claim against another PRP. Nonetheless, the Court concluded that any inequitable distribution of expenses that may result could be neutralized if defendant PRP filed a counterclaim under section 113(f).⁷⁸ This counterargument, however, is not completely satisfactory if there are orphan shares in play, i.e., those that correspond to “contributors to the contamination who are not before the court because they could not be located or they are out of business.”⁷⁹

Last, the Court addressed the Government’s argument that permitting PRPs to recover under section 107(a) would eviscerate the settlement bar in section 113(f)(2).⁸⁰ Section 113(f)(2) provides that those who have resolved their liability either to the United States or to a State are immune from contribution claims.⁸¹ Therefore, allowing a PRP to sue another PRP under section 107(a) would enable the plaintiff to seek cost recovery from a party against which it could not have brought a section 113(f) claim. In response to this argument, the Court first pointed out that a defendant PRP who has been sued in circumvention of the settlement bar could always seek equitable apportionment through a section 113(f) counterclaim.⁸² In that case, as explained in the preceding paragraph, the defendant PRP could have to pay a higher total sum than the one initially contemplated in the settlement agreement with the government if, for example, there were orphan shares.⁸³ The Court provided two other reasons in support of the conclusion that the settlement bar cannot be circumvented in a substantial way by permitting PRPs to sue other PRPs under section 107(a): (i) that the

76. *Id.* at 140.

77. *Id.*

78. *Id.*

79. Gershonowitz, *supra* note 20, at 147–50. If PRP A brings a section 107(a) successful suit against PRPs B and C, the defendants could have to bear the cost of the entire remediation, i.e., the costs attributable to the plaintiff, the defendants, and any orphan share. This results from the fact that a section 107(a) would allow PRP A to impose joint and several liability upon PRPs B and C. *Supra* note 21 and accompanying text. The subsequent contribution counterclaim under section 113(f), however, would only allow PRPs B and C to recover from PRP A the costs that the latter was responsible for—there is no joint and several liability in claims under section 113(f). Thus, if there were an orphan share, its associated cost would only be borne by PRPs B and C. Greshonowitz, *supra* note 20, at 147–50; see Gaba, *supra* note 12, at 145 (noting that in cases where PRP A is a settling party, the settlement bar would also prevent PRPs B and C from bringing a counterclaim against PRP A).

80. *Atlantic Research*, 551 U.S. at 140–41.

81. 42 U.S.C. § 9613(f)(2).

82. *Atlantic Research*, 551 U.S. at 140–41.

83. *Supra* note 79 and accompanying text.

settlement bar still provides significant protection in cases where section 113(f) is the only available remedy, and (ii) that it continues to have the advantage of resolving the liability with the United States or the State.⁸⁴

These counterarguments provided by the Court, however, merely explain why the settlement bar is not completely circumvented. They do not deny, however, that the problem will still exist in many instances. The Court's failure to address this problem ultimately reflects that these claims brought by a PRP under section 107(a) do not fit neatly in the structure of CERCLA as the Court conceives it.

II. THE CURRENT PROBLEMS WITH THE SUPREME COURT'S TEST

A. *Two-Remedy or No-Remedy Situations*

As explained earlier, the test that the Supreme Court adopted in *Aviall* and *Atlantic Research* left some important loose ends.⁸⁵ The main difficulty stems from the fact that applying the rules provided in these two decisions leads to unsatisfactory results. There are two problematic situations that can arise.

First, a party that has reimbursed costs to another party may have no available action under section 107(a) or section 113(f). For example, what CERCLA claim would PRP B bring if PRP A cleans a site voluntarily, then PRP A enters a private agreement with PRP B for the reimbursement of part of these costs and PRP B then intends to sue PRP C? Applying the test in *Atlantic Research*, PRP B would need to have incurred cleaning costs by itself to be able to file a claim under section 107(a), which is not the case. Further, PRP B may only bring a claim under section 113(f) if it has been sued under section 106 or section 107, or if it has entered into an administrative or judicially approved settlement.⁸⁶ This condition is not met either—this is a mere “private settlement.” Thus, PRP B would not be able to sue under either section 107(a) or section 113(f). Another variation of this problem would arise when governmental entity A reimburses the costs incurred by governmental entity B and then seeks to bring an action against a PRP.⁸⁷ Again, governmental entity A cannot bring a claim under section

84. *Atlantic Research*, 551 U.S. at 142.

85. *Supra* Part I.D.1.

86. *See Gaba*, *supra* note 12, at 166. (explaining that one court has considered that the potential plaintiff should be able to bring an action under section 107(a), adopting a non-obvious interpretation of the word “incurred.” For the reasons noted below, however, channeling these lawsuits through section 113 would be more appropriate.)

87. *Gershonowitz*, *supra* note 20, at 148–49.

107(a)—because it has not incurred costs—or section 113(f)—because there has not been a previous suit or approved settlement.⁸⁸

Second, a PRP that incurs costs after a section 106 or section 107 suit, or an administrative or judicially approved settlement, has two potential causes of action. The PRP may bring a claim under section 107(a) because it “incurred” costs. The PRP may also bring a claim under 113(f) due to the suit or approved settlement.⁸⁹ This scenario involving the so-called “compelled costs” was briefly mentioned in a footnote in *Atlantic Research*, but the Court did not clarify what the appropriate remedy or remedies in that case would be.⁹⁰ As explained above, the Court responded to the main arguments raised by the government by insisting that there was generally no overlapping between section 107(a) and section 113(f). The Court nonetheless conceded that the compelled-costs scenario would create this duplicity of remedies. The next subsection analyzes this particular situation, which has arisen in various cases, most recently in *Hobart v. Waste Management of Ohio*⁹¹ and *LWD PRP Group v. Alcan Corp.*⁹²

B. A Closer Look at the Two-Remedy Problem: Compelled Costs

Several courts have been faced with the challenge of dealing with situations where the plaintiff has incurred costs after either being sued or after entering an administrative or judicially approved settlement,⁹³ which applying the general *Atlantic Research* test, would allow the plaintiff to bring an action under both sections 107(a) and 113(f). However, the majority of circuits concluded that section 113(f) provides the only available remedy.⁹⁴ The Court of Appeals for the Sixth Circuit has recently

88. *Id.* at 153; *see also* *Town of Windsor v. Tesa Tuck, Inc.*, 935 F. Supp. 317 (S.D.N.Y. 1996) (deeming that the governmental entity in question had incurred response costs by reimbursing the other governmental entity). As an author points out, given the test set out in *Atlantic Research*, the case would now be decided differently. Gaba, *supra* note 12.

89. *Atlantic Research*, 551 U.S. at 140 n.6.

90. *Id.*

91. *See* *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014) (illustrating the situation where a party could potentially sue under section 107 and section 113), *cert. denied*, 135 S. Ct. 1161 (2015).

92. *LWD PRP Gp. v. Alcan Corp.*, 600 F. App'x. 357 (6th Cir. 2015).

93. *See, e.g.*, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 227–29 (3d Cir. 2010); *AVX Corp. v. United States*, 518 F. App'x 130, 135 & n.3 (4th Cir. 2013); *see Hobart Corp.*, 758 F.3d at 767 (providing an example of a case in which the plaintiff incurred costs after entering an administrative settlement); *Bernstein v. Bankert*, 733 F.3d 190, 204–05 (7th Cir. 2012); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603–04 (8th Cir. 2011); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 427 (2012).

94. Christopher D. Thomas, *Tomorrow's News Today: The Future of Superfund Litigation*, 46 ARIZ. ST. L.J. 537, 548 (2014).

examined two cases on compelled costs, which shows that this issue is still unresolved and is still giving rise to litigation.

In *Hobart*, Hobart Corp. and others (“Appellants”) were PRPs with respect to the South Dayton Dump and Landfill Site.⁹⁵ Although they were never sued by EPA, they entered into an administrative settlement contemplated in section 113(f)(2).⁹⁶ Having incurred response costs that they claimed exceeded their equitable share, Appellants filed a suit against other PRPs under both CERCLA sections 107 and 113(f)(3)(B).⁹⁷ The defendants filed a motion to dismiss arguing that the three-year statute of limitations applicable to section 113(f)(3)(B) had passed, and that section 107(a) was not available to Appellants because sections 113(f) and 107(a) provide mutually exclusive recovery avenues.⁹⁸ The District Court agreed and granted the motion to dismiss.⁹⁹

The Court of Appeals for the Sixth Circuit recognized that, under the existing precedent, Appellants would be able to file their claim under both section 107(a) and section 113(f).¹⁰⁰ The majority reasoned that Appellants had incurred costs, which permitted them to sue under section 107(a) and had entered into an administrative settlement, thus enabling them to bring a contribution claim under section 113(f)(3).¹⁰¹ Nevertheless, the court ultimately held that “[i]f section 113(f)’s enabling language is to have bite, though, it must also mean that a PRP, eligible to bring a contribution action, can bring only a contribution action.”¹⁰² This conclusion was based on the premise that sections 107(a) and 113(f) provide mutually exclusive causes of action.¹⁰³

In January of 2015, in *LWD PRP Group*, the Sixth Circuit was asked to reconsider *Hobart*’s holding on the compelled-costs issue.¹⁰⁴ In the context of a dispute over when the three-year statute of limitations started running—at the time of the settlement or of the completion of a removal action—the court noted that footnote six in *Atlantic Research* “merely reserves the question of whether the remedies overlap or not.”¹⁰⁵ Moreover, the court pointed out that the conclusion reached in *Hobart* was still valid and that a PRP can only recover costs incurred as a result of an

95. *Hobart*, 758 F.3d at 764.

96. *Id.*

97. *Id.* at 765.

98. *Id.* at 766.

99. *Id.*

100. *Id.* at 768.

101. *Id.*

102. *Id.*

103. *Id.* at 769.

104. *LWD PRP Grp.*, 600 F. App’x. at 364–65.

105. *Id.* at 365.

administrative settlement by way of section 113(f).¹⁰⁶ The Supreme Court in *Atlantic Research*, however, made it clear that this was the kind of situation where an overlap would be possible and laid out a test that strongly suggests that both causes of action would be available to a plaintiff.¹⁰⁷

The main complications associated with this second situation—availability of two similar but distinct remedies—were pointed out by the United States in *Atlantic Research*. The issue in these cases is not the choice itself, but the consequences that derive from allowing a PRP to sue another PRP under section 107(a). The PRP with the two possible causes of action would choose the most favorable, i.e., section 107(a), because it would allow it to benefit from the longer statute of limitations; to circumvent, if necessary, the settlement bar in section 113(g); and to potentially impose joint and several liability upon another PRP. The problem with allowing a PRP to impose joint and several liability on another PRP, as explained in more detail in Part IV.B, is that it may lead to an inequitable allocation of costs. As the preceding cases show, while some courts have ruled on how to address these choice-of-remedy situations, this issue is still spurring litigation eight years after *Atlantic Research*, and some circuits have not yet tackled it, which strongly suggests that the uncertainty will persist, especially in light of the Supreme Court's reluctance to accept for review cases like *Hobart*.

III. THE PROPOSAL: CONTRIBUTION ACTION UNDER SECTION 113(F) FOR ALL PRPs

Many of the problems that have arisen with the *Aviall/Atlantic Research* test result from the possibility that a PRP institute a section 107(a) suit against another PRP. The framework that allows this situation to occur also creates the potential for scenarios, fraught with uncertainty, in which PRPs would be entitled to file a suit under both sections 107(a) and 113(f) or under neither of these sections. This article proposes adopting the rule that PRPs may only bring suits under CERCLA through the contribution cause of action in section 113(f).¹⁰⁸ Permitting those parties to do so in the absence of a civil action or approved settlement would prevent many of the problems identified above. It is worth pointing out that, given the Supreme

106. *Id.*

107. *Atlantic Research*, 551 U.S. at 140; Gershonowitz, *supra* note 20, at 143 n.6.

108. It is worth noting, however, that allowing non-liable PRPs—e.g., innocent landowners—to sue liable PRPs under section 107(a) may not be excessively problematic because it does not create some of the problems explained *infra* in Part. IV.A, B.

Court's position on the issue and the extreme unlikelihood that the Court will overrule the *Aviall* and *Atlantic Research* decisions, the suggested modification would have to be adopted through a legislative amendment. Meanwhile, or in absence of such statutory amendment, courts have the option of construing the Supreme Court's framework in a way that avoids the negative consequences of giving the plaintiff a choice of remedy in the compelled-costs scenario.¹⁰⁹

A. *The Legislative Amendment Alternative*

While the proposed framework is arguably supported by the current version of statute, its full implementation would require a legislative amendment in light of the Supreme Court's interpretation of section 113(f).¹¹⁰ As explained earlier, one of the central issues in *Aviall* related to the proper construction of the saving clause in the last sentence of section 113(f)(1),¹¹¹ which provides that nothing in that subsection "shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section[s]9606 . . . [and] 9607."¹¹² Although the Supreme Court finally interpreted this provision as referring to "any cause[s] of action for contribution that may exist independently of section 113(f)(1)," this clause would certainly support, read literally, that PRPs may sue for contribution absent a previous suit or approved settlement, as the Court of Appeals held in this same litigation.¹¹³ Amending the first sentence of section 113(f)(1) to remove the reference to civil actions under sections 106 and 107(a) would resolve any potential ambiguity in this regard.

One of the other issues that must be addressed is that section 113(g)(3) does not currently prescribe when the three-year statute of limitation would start running in cases in which two PRPs enter into a private agreement or where the cleaning is voluntary. Using this section for all PRPs, therefore, would require extending the scope of section 113(g)(3) to include these situations. If the PRPs have signed a private agreement, the date of signature could be used as the beginning of the three-year period. If the cleanup has been voluntary, the provisions in 113(g)(2)—which regulate

109. *Infra* Part III.B.
110. *Supra* Part I.C, D.
111. *Aviall*, 543 U.S. at 166.
112. 42 U.S.C. § 9613(f)(1).
113. *Aviall*, 543 U.S. at 166, 167.

the timeframe for the initiation of recovery costs under section 107(a)¹¹⁴—could be either formally adopted or applied analogically.

These modifications, coupled with an amendment of section 107(a)(4)(B) to prevent PRPs from suing for cost recovery under section 107, would eliminate the situations in which a PRP has two potential causes of action—i.e., compelled costs—or no cause of action at all. In the case in which a PRP incurs costs after a settlement agreement following a section 106 or section 107 claim, the double remedy would be eliminated, leaving the PRP with only a section 113 cause of action. Thus, fact patterns such as the one in *Hobart*, in which a PRP seeks reimbursement after a consent decree,¹¹⁵ would allow the PRP to file a section 113(f) claim without a potential overlapping section 107(a) cause of action. Courts could achieve a similar result, i.e., where only one cause of action would exist, by channeling these claims through section 107(a).¹¹⁶ However, PRPs would still be able to circumvent the settlement bar or impose joint and several liability upon other PRPs. Further, by adopting the section 113(f) avenue for all PRPs, in scenarios when the PRP is reimbursing costs to another party pursuant to a private agreement—a potentially no-remedy situation under the Supreme Court test—the plaintiff would be able to seek recovery under section 113(f). More generally, this approach would also avoid the advantage that some PRPs have in factual patterns such as that in *Aviall*, where, despite not having a choice of causes of action, they can nonetheless sue another PRP under section 107, potentially imposing joint and several liability on the defendant and circumventing the settlement bar.

B. Alternative Option for Federal Courts: Limiting PRPs' Suits Under Section 107(a) Through Judicial Interpretation

Although the full implementation of the proposal described above would eliminate both the no-remedy and the two-remedy situations, courts

114. See Superfund Amendments and Reauthorization Act of 1986 § 113(g)(2) (“[A]n initial action for recover of the costs referred to in section 9607 of this title must be commenced—(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under Section 9604(c)(1)(C) of this title for continued response action; and (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under the subparagraph.”).

115. *Hobart*, 758 F.3d at 764.

116. Gershonowitz, *supra* note 20, at 143 (opining that the costs incurred by the plaintiff after a settlement should be recoverable under section 107).

can still—as some have been doing¹¹⁷—interpret the Supreme Court’s test in a way that adequately deals with the complications derived from the compelled-cost scenario. To such end, courts should only allow PRPs to sue under section 113 in cases in which the Supreme Court’s test suggests that there may be a possible choice of remedy.

As explained in footnote six of the *Atlantic Research* decision, the Supreme Court left unanswered the question of whether a PRP may sue under section 107, 113, or both, in a compelled-cost situation.¹¹⁸ Therefore, the Court left the door open for courts to choose any of these three options. Given the latitude that courts have in this area, channeling all actions between PRPs through section 113(f), as this article suggests, is not only permitted by the Supreme Court’s current framework, but also conforms to the general principles of tort law. Additionally, this framework would prevent the circumvention of the settlement bar by PRPs, and avoid the imposition, by a PRP, of joint and several liability on another PRP.

The traditional notion of contribution is characterized by the relationship between the parties—two or more tortfeasors that seek to recover any costs exceeding their share of fault.¹¹⁹ Therefore, as will be explained in Part IV, forcing PRPs to use section 113(f) instead of section 107(a) to recover costs from other PRPs would mimic the way contribution operates in tort law. As for the settlement bar, while some commentators have pointed out that the idea of plaintiff’s having the choice between the two possible remedies in the context of “compelled costs” has its supporters,¹²⁰ establishing an exclusive cause of action in these cases under 113(f) would prevent plaintiffs from dodging the settlement bar.¹²¹ As noted earlier, the avoidance of the settlement bar may occur in the cases where PRPs are able to sue other PRPs under section 107(a). If PRPs brought these suits under section 113(f), the settlement bar provision would apply and, therefore, this protection for settling parties would not be circumvented. Last, having the contribution action in section 113(f) as the only avenue for recovery in compelled cost situations prevents PRPs from

117. See, e.g., *Hobart*, 758 F.3d 757; *Niagara Mohawk Power Corp.*, 596 F.3d at 128; *Agere Sys.*, 602 F.3d at 227–29; *AVX Corp.*, 518 F. App’x at 135, n.3; *Bernstein*, 733 F.3d at 204–05; *Morrison Enters.*, 638 F.3d at 603–04; *Solutia, Inc.*, 672 F.3d 1230.

118. *Atlantic Research*, 551 U.S. at 140 n.6.

119. *Contribution*, BLACK’S LAW DICTIONARY (8th ed. 2004).

120. The argument is based on the fact that there is no language in the statute providing that both remedies are mutually exclusive. See Thomas, *supra* note 94, at 551.

121. See, e.g., *Solutia Inc.*, 672 F.3d at 1230 (example of courts interpreting the Supreme Court’s test).

imposing joint and several liability on other PRPs to escape part—or all—of their liability.¹²²

IV. ADDITIONAL ADVANTAGES OF THE PROPOSED TEST IN LIGHT OF THE ARGUMENTS ADVANCED BY THE SUPREME COURT

The issue of the potential overlapping of remedies (or the inverse situation in which no cause of action is available) is a consequence of the *Aviall* and *Atlantic Research* decisions, in which the Court concluded that a PRP that has incurred costs, but has not been sued and has not entered into a settlement with the government, may sue under section 107(a), but not under section 113(f). Because that enabled some PRPs to potentially use both sections, the Court had to create a test that would limit the ability of PRPs to bring a suit under section 107(a). Otherwise PRPs would systematically choose section 107(a) over the less favorable section 113(f), rendering the latter useless and potentially creating situations of inequitable allocation of cleanup costs.¹²³ In order to explain why that would not be a real issue, the majority in *Atlantic Research* advanced a series of arguments that further uncover the weaknesses of the test that the Court finally adopted. Moreover, it is also worth noticing that the legislative history also allows an interpretation of sections 107 and 113 that is different from that endorsed by the Supreme Court and consistent with the proposal suggested in this article.

A. Contribution Under Section 113(f) and the Principles of Tort Law

As noted earlier, the Supreme Court pointed out in *Atlantic Research* that “[n]othing in [section] 113(f) suggests that Congress used the term ‘contribution’ in anything other” than its traditional sense.¹²⁴ The principles of contribution in tort law, however, do not necessarily support this conclusion.

The Court cited Black’s Dictionary to support its view that PRPs who have not been sued under sections 106 or 107, or have not entered into a settlement contemplated in section 113(f)(3), are not eligible to bring a contribution claim under section 113. However, under the Court’s interpretation, PRPs may—if they have incurred costs—sue another PRP

122. See *infra* Part IV.B.

123. As explained in Part I.B., the statute of limitations for section 113(f) claims is shorter than that generally applicable to section 107(a) causes of action.

124. *Atlantic Research*, 551 U.S. at 139. For a discussion of this argument by the Supreme Court, see Gaba *supra* note 12, at 139–40.

for cost recovery under section 107(a). Black's Dictionary defines "contribution" as: "a tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."¹²⁵ The argument follows from this definition that the claim by which a PRP seeks to recover costs from another PRP after the first one has paid an amount in excess of its fair share would have to be brought under section 113(f), i.e., CERCLA's contribution remedy. Some commentators have explained that the fundamental trait of this right at common law is that "contribution is a cause of action based on the relationships existing between tortfeasors; it has nothing to do intrinsically with the plaintiff."¹²⁶ By the same token, it is reasonable, in the context of CERCLA, to base the choice of who can bring a section 113(f) contribution claim on the status of a party as a PRP, instead of making it hinge upon whether that PRP has been previously sued by a plaintiff or entered into a particular kind of agreement with the government. One of the requirements of the modern system of contribution is common liability, which means that "a tortfeasor seeking contribution must prove both his own liability and that of the other alleged tortfeasor where those liabilities have not been established by a judgment."¹²⁷ Therefore, the emphasis is again placed on the status of a party as a tortfeasor.

An interpretation of CERCLA consistent with this principle of tort law supports allowing PRPs to bring section 113(f) claims against other PRPs, regardless of whether there has been a previous suit or an approved settlement. The Supreme Court read the statute as requiring that PRPs suing other PRPs for contribution under section 113(f) have been previously sued or have entered into a particular type of settlement with the State or the United States.¹²⁸ Leaving private settlements—and also other settlements that do not meet the requisites of section 113(f)(3)(B)¹²⁹—outside the scope of section 113(f) is also inconsistent with the principles of tort law. As Prosser, Wade, and Schwartz note, the general rule is that a tortfeasor who has settled with an injured party may sue for contribution, with the most relevant limitation simply being that the settlement be reasonable.¹³⁰

125. *Id.* at 139 (quoting *Contribution*, BLACK'S LAW DICTIONARY).

126. William L. Crowe, Sr., *The Anatomy of a Tort: Part V Apportionment, Contribution, and Indemnity Among Multiple Parties in the Area of Damages – A Second Reader*, 44 LOY. L. REV. 671, 685 (1999).

127. DAN B. DOBBS, *THE LAW OF TORTS* 77–78 (2d ed. 2011).

128. *Aviall*, 543 U.S. 157, 166–68.

129. Luria, *supra* note 18, at 333.

130. VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 401 (12th ed. 2010).

The Court assumed that the legislature intended courts to interpret the statute in accordance with general tort law.¹³¹ Nevertheless, for the reasons stated above, the doctrine adopted by the Supreme Court in *Aviall* and *Atlantic Research*—which does not permit PRPs that have not been sued or that have not entered into a particular type of settlement to bring a contribution action—is not consistent with the principles of tort law.

B. The Problems Derived from PRPs Imposing Joint and Several Liability on Other PRPs

The proposal advanced in this article would also prevent PRPs from imposing joint and several liability upon other PRPs. This could happen both in the *Aviall/Atlantic Research* scenario, in which PRPs can only sue under section 107(a), or in compelled-cost situations, where a PRP, despite being able to bring a suit under section 113(f), may nevertheless choose to do so under section 107(a). If the harm is indivisible, PRP A, who has incurred cleanup costs, could sue PRP B and impose joint and several liability upon it. This could allow PRP A to obtain a judgment that entitles it to 100% of the cleanup costs, even though PRP A has caused part of the harm. The Supreme Court noted that PRP B could solve this problem by simply filing a counterclaim under section 113(f), and obtaining contribution from PRP A. However, there are at least two potential complications that the Court did not explicitly address. First, if there is a third PRP, which is insolvent, PRP B may have to pay the costs associated with this orphan share.¹³² Since PRP B is jointly and severally liable it may not be able to obtain reimbursement, through its contribution counterclaim against PRP A, for the costs associated with the orphan share.¹³³ Second, as the Third Circuit explained, there is an even more problematic situation.¹³⁴ If PRP A enters into a judicially approved settlement with EPA, cleans up the site, and then brings a 107 suit against PRP B, the settlement bar provision in section 113(f)(2) would prevent PRP B from bringing a

131. *Atlantic Research*, 551 U.S. at 139.

132. Gershonowitz, *supra* note 20, at 148–49.

133. While the argument can be made that a court may take this into account in the contribution action and spread the costs of the orphan share between the two other PRPs, the factors that courts generally rely on to allocate costs between PRPs do not contemplate such possibility. *See* Halliburton Energy Servs., Inc. v. NL Indus., 648 F. Supp. 2d 840, 862 (S.D. Tex. 2009) (enumerating the so-called “Gore factors,” while also noting that this is not necessarily an exhaustive list, especially after *Atlantic Research*). In any event, as some authors have explained, this issue was not directly addressed in *Atlantic Research* and therefore remains an open question. Gershonowitz, *supra* note 20, at 148–49.

134. *Agere Sys.*, 602 F.3d at 229.

counterclaim at all.¹³⁵ In a case like this, PRP B would not be able to recover any costs from PRP A.

C. The Legislative History of the SARA and the Settlement Bar

The legislative history of the SARA points in two different directions. While the analysis of section 113(f)(1) seems to support the interpretation of the statute adopted by the Supreme Court, some of the more general language included in the House Report No. 99-253(I) (“House Report”), as well as the comments relating to the settlement bar, permit a different reading of the amendments.¹³⁶

While it is true that the Committee on Energy and Commerce focused, when analyzing section 113(f), on situations where the plaintiff is “alleged or held to be liable under section[s] 106 or 107 of CERCLA,”¹³⁷ this same committee also defined “contribution” generally as a cause of action between PRPs. It explained the following: “CONTRIBUTION ACTIONS: The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site.”¹³⁸ The Judiciary Committee also understood the contribution action as the avenue conceived for PRPs, stating that the amendment to the new section 113(g) of CERCLA confirms, as did the Energy and Commerce Committee version, “that potentially responsible parties have a right of contribution under CERCLA.”¹³⁹ Moreover, the Committee on Energy and Commerce stressed the importance of the settlement bar to contribution actions in section 113(f)(3) noting that “[i]n addition to encouraging settlement, the section will help bring an increased measure of finality to settlements.”¹⁴⁰ This finality, however, is undermined when PRPs bring a claim against other PRPs under section 107(a).

CONCLUSION

The 1986 amendments to CERCLA created a complex framework that left uncertain whether PRPs could continue using section 107(a) to bring a claim against other PRPs—as some courts had permitted—or if section 113(f) had become their only available remedy. The answer provided by the Supreme Court in *Aviall* and *Atlantic Research* created various problems,

135. *Id.* at 228.

136. H.R. Rep. No. 99-253, pt. 3, at 18 (1985).

137. H.R. Rep. No. 99-253, pt. 1, at 79.

138. *Id.* at 59.

139. H.R. Rep. No. 99-253, pt. 3, at 19.

140. H.R. Rep. No. 99-253, pt. 1, at 80.

namely overlapping of causes of action with different statute of limitations, existence of situations when no remedy is available, the possibility that PRPs impose joint and several liability on other PRPs under section 107(a), and the potential circumvention of the statutory protection for settling parties. The issue of compelled costs, in particular, is still generating abundant litigation, as the decisions in *Hobart* and *LWD PRP Group* show.

To address these problems, this article proposes an alternative approach under which PRPs would only be able to bring a contribution claim against other PRPs under section 113(f). In light of the latest Supreme Court decisions on this issue, this framework would have to be implemented either by legislative amendment or, in a more limited form, through judicial interpretation. With the first option, the issues that the current model creates would be eliminated: PRPs would have one cause of action—not two or none—sounding in contribution, and consequently, PRPs would not be able to circumvent the settlement bar or impose joint and several liability on other PRPs. The second option achieves a similar goal but involves courts using the leeway provided by the Supreme Court's decision in *Atlantic Research* to prevent—as some U.S. Courts of Appeals have already done—PRPs from suing other PRPs under section 107 in the compelled-costs scenario.