

# THE SUPERFUND COST ALLOCATION LIABILITY CONFLICTS AMONG THE FEDERAL COURTS

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## INTRODUCTION

Seldom in judicial history does the Supreme Court decide a case where it can, let alone will, reverse the standing precedent articulated by essentially every federal judicial circuit court across the nation. Seldom is there such a profound difference of opinion. Step one: Eleven federal circuits, one after the other in a compressed period, barred the use of section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>1</sup> for cost recovery by most plaintiffs, including: the Seventh<sup>2</sup> (July 1994), the First<sup>3</sup> (August 1994), the Tenth<sup>4</sup> (March 1995), the Eleventh<sup>5</sup> (September 1996), the Third<sup>6</sup> (May 1997), the Ninth<sup>7</sup> (July 1997), the Fifth<sup>8</sup> (July 1997), the Fourth<sup>9</sup> (April 1998), the Sixth<sup>10</sup> (August 1998), the Second<sup>11</sup> (September 1998), and the Eighth (August 2003).<sup>12</sup> This judicial cascade occurred at a time when the Superfund hazardous substance cleanup effort was starved by budgetary deprivation. The Environmental Protection Agency (EPA) had to delay beginning remediation activities at thirty-four separate priority sites in fiscal year 2004 because of funding shortfalls.<sup>13</sup>

Step two: The practical result of the 2004 Supreme Court decision in *Cooper Industries v. Aviall Services, Inc.*,<sup>14</sup> coupled with the decisions of the eleven circuit courts regarding section 107 in step one,<sup>15</sup> coalesced to

1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).

2. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994).

3. *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994).

4. *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995).

5. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996).

6. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997).

7. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997).

8. *OHM Remediation Serv. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997).

9. *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998).

10. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998).

11. *Bedford Affiliates v. Sills*, 156 F. 3d 416, 432 (2d Cir. 1998).

12. *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 531 (8th Cir. 2003).

13. Linda Roeder, *Insufficient Funds for Cleanup Operations, Supreme Court Decision Lead EPA Concerns*, 36 ENV'T REP. (BNA) S-14, S-15 (2005).

14. *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157 (2004).

15. See *infra* Section II (discussing and analyzing the circuit court opinions).

greatly discourage voluntary remediation activities at many of the 450,000 contaminated sites in the United States.<sup>16</sup> The nation's hazardous liability scheme had descended into total chaos because of the federal circuit court decisions on section 107 cost recovery being unavailable and the 2004 Supreme Court *Aviall* decision walling off section 113 contribution to remediation.

Step three: In 2007, in *Atlantic Research Corp. v. United States*,<sup>17</sup> the Supreme Court reversed the prior wall of consistent precedent from these eleven unanimous federal circuit courts.<sup>18</sup> It declared every federal circuit court that had decided these cost recovery cases to be in total error in statutory interpretation. Even more remarkably, the often divided Supreme Court did so in a rare unanimous opinion in the Roberts Court.

Step four: The *Atlantic Research* decision nonetheless resulted in uncertainty in the lower courts. Several circuits have not embraced or implemented the Supreme Court decisions nor reversed their own contrary precedent. Now, more than two years since *Atlantic Research*, there are still critical gaps in the lower federal courts regarding CERCLA cost allocation liability and recovery.<sup>19</sup> These gaps are apparent and the implications are key, with an almost half of a million estimated contaminated sites in the United States that will cost hundreds of billions of dollars to remediate.<sup>20</sup>

This stepped evolution has been a long and often conflicted process. I published an article in 1994 that suggested that to resolve lower court judicial splits on use of section 113 and section 107, the correct interpretation of CERCLA by appellate courts was that section 107 was

16. U.S. GEN. ACCOUNTING OFFICE, "COMMUNITY DEVELOPMENT: LOCAL GROWTH ISSUES-FEDERAL OPPORTUNITIES AND CHALLENGES 118 (2000), available at <http://www.gao.gov/archive/2000/rc00178.pdf> ("[N]ationwide, 450,000 brownfields await cleanup.").

17. *Atl. Research Corp. v. United States*, 459 F.3d 827, 834-35 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007).

18. *See infra* Section II.

19. *See, e.g.*, *Consol. Edison Co. of N.Y. v. UGI Util. Inc.*, 423 F.3d 90, 95 (2d Cir. 2005) (finding that a contribution right only exists when liability for a CERCLA claim is resolved); *City of Waukesha v. Viacom, Int'l, Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wisc. 2005) (finding no contribution right exists when only state environmental claims are resolved); *Differential Dev.-1994 Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 729-30 (S.D. Tex. 2007) (discussing issues left unresolved by the U.S. Supreme Court decision).

20. *See* EPA About Brownfields (2008), [www.epa.gov/swerosps/bf/about.htm](http://www.epa.gov/swerosps/bf/about.htm) (estimating that more than 450,000 contaminated sites require cleanup); EPA, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS 1-4 (2004), available at [www.clu-in.org/download/market/2004market.pdf](http://www.clu-in.org/download/market/2004market.pdf) (estimating the cost to clean up the remaining sites at \$209 billion).

available to all private parties.<sup>21</sup> Thereafter, as these disputes progressed to appeal, the federal circuit courts commenced a 1994–2003 cascade of unvarying opinions all holding contrary to the position I articulated in the article, and often reversing their lower federal trial courts. This result discouraged private party voluntary remediation at multi-party contaminated sites precisely during the period when public Superfund resources were dramatically scaled back by Congress. Simultaneously, public resources were truncated by Congress and private incentives to undertake voluntary remediation were obliterated by the federal circuit court decisions.

In 2007, the Supreme Court was finally able to identify a conflict (set up by circuit court equivocation after its former 2004 CERCLA opinion in *Aviall*), grant certiorari, and, via a unanimous decision, reverse this decade of circuit court decisions blocking section 107. It is this past fifteen years of radical stepped evolution of Superfund hazardous substance cost responsibility allocation that is analyzed here. It is a retrospective look at the seeds of judicial conflict, as well as a look forward at how the courts are internalizing, or not reflecting, the recent Supreme Court determinations. This article analyzes each of the following steps.

Section I of this article analyzes step one, the action of all the federal circuits between 1994–2003 walling off private hazardous waste cost recovery actions pursuant to the long-standing and never amended section 107 of CERCLA, causing the entire national cost-recovery mechanism to descend into chaos.

Section II examines step two, the pivotal impact of the 2004 Supreme Court decision in *Aviall*, greatly limiting CERCLA section 113 contribution liability allocation and complicating the circuit court precedential chaos.

Section III examines step three, the 2007 unanimous Supreme Court opinion in *Atlantic Research* reopening section 107 based on “plain meaning” statutory interpretation that none of the circuit courts had gotten right.

Sections IV and V carefully chart how the lower courts have responded to these new commands: specifically, whether they have implemented the Supreme Court jurisprudence on CERCLA since 2004. The checkerboard of results is surprising.

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21. See Steven P. Ferrey, *Allocation & Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L. J. 36 (1994).

I. THE FIRST STEP: OCEAN'S ELEVEN—HOW ELEVEN FEDERAL CIRCUIT COURT UNIFORMLY MISREAD THE “PLAIN MEANING” OF CERCLA FOR A DECADE

A. *Wrong at Every Turn*

For a decade, from 1994 to 2004, there were uncontradicted, parallel decisions from every one of the eleven federal circuits considering section 107 Superfund private party liability allocation. One after the other, federal circuits, often overruling their lower courts, cascaded down the same chute—negating all rights of private potentially responsible parties (PRPs) to utilize section 107 of Superfund to recover or share their remediation response costs.

1. Roadblock: No Private PRP Circuit Court Access to Section 107

Since suggested by a federal district court in the *Kramer* opinion, the section 107 private cost recovery route has been the preferred path of private party plaintiffs for cost reallocation.<sup>22</sup> Prior to 1994, none of the circuit courts had directly addressed the issue of whether a PRP had standing under section 107 to recover cleanup costs, and the Supreme Court had only touched upon the question as a background issue in dicta.<sup>23</sup> District courts split on whether a PRP could elect between a section 107 and a section 113 claim, or was restricted to section 113.<sup>24</sup>

On its face, section 107(a)(4)(B) is available to “any . . . person” other than the sovereigns who are listed and otherwise enabled in section 107(a)(4)(A).<sup>25</sup> In 1994, there began a decade of cascading federal circuit opinions. Over the course of four years, ten circuits confronted the question

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22. *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991).

23. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (noting that the Court did not answer the question of whether only “innocent” parties had standing under section 107 cost-recovery claims; rather, the Court merely held that section 107 did not provide for the award of attorney’s fees).

24. For district courts that had allowed PRPs to raise section 107 claims, see, e.g., *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994), finding that PRPs were allowed to raise section 107 claims. *See also United States v. SCA Serv. of Ind., Inc.*, 849 F. Supp. 1264, 1282 (N.D. Ind. 1994) (permitting a PRP to pursue a section 107 claim); *Transp. Leasing Co. v. California (CalTrans)*, 861 F. Supp. 931, 938 (C.D. Cal. 1993) (finding that PRPs were allowed to bring claims under section 107). For district courts that have held that PRP may not use section 107 to recover response costs, see, e.g., *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1362–65 (D.N.J. 1996) (finding that CERCLA limits PRPs to contribution claims under section 113) and *Kaufman v. Unisys Corp.*, 868 F. Supp. 1212, 1215 (N.D. Cal. 1994) (finding that PRPs are confined to section 113).

25. 42 U.S.C. § 9607(a) (2006).

of whether section 107 of CERCLA can be utilized by PRPs to reallocate their cost of voluntary cleanup at a hazardous waste site. Each of the circuits, many reversing their district courts, blocked the path dictated by section 107's unambiguous language.

In a compressed period of four years, ten of the twelve circuits came to decide or opine on the availability of section 107 cost recovery in the following sequence: the Seventh<sup>26</sup> (July 1994), the First<sup>27</sup> (August 1994), the Tenth<sup>28</sup> (March 1995), the Eleventh<sup>29</sup> (September 1996), the Third<sup>30</sup> (May 1997), the Ninth<sup>31</sup> (July 1997), the Fifth<sup>32</sup> (July 1997), the Fourth<sup>33</sup> (April 1998), the Sixth<sup>34</sup> (August 1998), and the Second<sup>35</sup> (September 1998). The Eighth Circuit followed in 2003.<sup>36</sup> All of these circuits closed off section 107 to private party plaintiffs. While the D.C. Circuit court had never heard such a section 107 case, all of the remaining eleven federal circuits were unanimous in their holding on this essential interpretation.

Despite similar fact patterns, each circuit court took its own approach to disposing of the arguments put forward in favor of plaintiff PRP standing under section 107. Some courts attempted to interpret the language in section 107 and section 113 by looking at legislative and legal history and engaging in a textual analysis of the provisions. Other circuit courts simply ignored the express operative "any other person" language in section 107(a)(4)(B), and instead construed only section 113 as a backhanded way to limit section 107. Some circuit courts hold that only their often strained reading of CERCLA does not frustrate the goals of the statute.

Several circuits wrestled with the nature of section 113 contribution. In an attempt to decipher the parameters of the claims under section 107 and section 113, six<sup>37</sup> of the eleven circuit courts discuss the Superfund

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26. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994).

27. *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994).

28. *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995).

29. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996).

30. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997).

31. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997). The court in *Adhesives Research v. American Inks & Coatings*, 931 F. Supp. 1231, 1243-46 (M.D. Pa. 1996), adopts the *Pinal Creek* court's discussion of CERCLA policy in its entirety.

32. *OHM Remediation Serv. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997).

33. *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998).

34. *Centerior Serv. Company v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998).

35. *See Bedford Affiliates v. Sills*, 156 F.3d 416, 432 (2d Cir. 1998) (holding that Bedford could not pursue a section 107(a) claim).

36. *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003).

37. The six circuit courts are the following: First, Second, Third, Sixth, Ninth, and Tenth.

Amendments and Reauthorization Act (SARA)<sup>38</sup> and how this 1986 amendment codified the common law right to contribution. The Second, Third, and Tenth Circuits most exhaustively develop the arguments for why SARA, which did *not* alter the pre-existing section 107, by silent implication precludes a PRP from using section 107.<sup>39</sup> In distinguishing “cost recovery actions” under section 107 from “contribution actions” under section 113, five<sup>40</sup> of the eleven circuit courts determined that an action between PRPs for apportionment of cleanup costs is always an action for contribution, notwithstanding section 107’s contrary language. The Sixth, Seventh, and Tenth Circuits reached back to either Black’s Law Dictionary,<sup>41</sup> the Restatement (Second) of Torts<sup>42</sup> or American Jurisprudence<sup>43</sup> in defining the term “contribution” in the legal context.<sup>44</sup>

The First Circuit countered the clear inclusiveness of the express “any other person” language of section 107 by stating that courts must strive to give effect to each subsection in a statute, such as section 113, “indeed, to give effect to each word and phrase.”<sup>45</sup> To give effect and force to section 113, these courts then ignored the language of section 107. Many of these circuits strain to avoid confronting or construing the plain language of

38. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, §§ 101-405, 100 Stat. 1613 (1986).

39. The three courts reason that SARA, as well as the pre-SARA case law (recognizing an implicit right of contribution), establish the principle that PRPs should not be exposed to joint and several liability in actions by other PRPs seeking to recover cleanup costs. *See Bedford Affiliates*, 156 F.3d at 435 (holding that a PRP can never recover 100% of response costs since it is a joint tortfeasor); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122-24 (3d Cir. 1997) (holding that actions for contribution must be made under section 113); *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (citing legislative history stating that a principle goal in creating section 113 was to “clarif[y] and confirm the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances”) (citing S. Rep. No. 99-11, at 44 (1985)).

40. The five circuit courts are the following: First, Third, Sixth, Seventh, and Tenth.

41. Defining contribution as the “right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.” BLACK’S LAW DICTIONARY 328 (6th ed. 1990).

42. RESTATEMENT (SECOND) OF TORTS § 866(A) (1977).

43. 18 AM. JUR. 2D *Contribution* § 9 (2004).

44. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) (applying RESTATEMENT (SECOND) OF TORTS and BLACK’S LAW DICTIONARY); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (applying Restatement (Second) of Torts); *United States v. Colorado & E. R.R. Co.*, 50 F.3d at 153 (applying Am Jur.)

45. A broad reading of the statute is unacceptable because allowing PRPs to have standing under section 107 would eviscerate section 113(g)(3), and PRPs would readily abandon a section 113 claim for a section 107 claim due to the significant procedural advantages. Consequently, section 113(g)(3) would become a nullity and section 113 would eventually be swallowed by section 107. *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101 (1st Cir. 1994).

section 107's empowerment of "any other person" as a plaintiff entitled to cost recovery.

The Ninth<sup>46</sup> and Sixth Circuits<sup>47</sup> ignored the "any other person" language in section 107 as moot because they surmised that section 107 and section 113 work in conjunction in contribution claims. Thus, a contribution claim brought pursuant to section 107 and its "any other person" language is transformed and limited by the mechanisms of section 113. This leaves only several liability to be in play. The First and Sixth Circuits left open the question of which statute of limitations provision applies if a PRP initiates a cleanup with government prodding.<sup>48</sup> The statute of limitation periods under section 107 and section 113 are different by a factor of 100%.

All of these opinions would be shattered by the Supreme Court a decade later, although, as discussed below, not all of the circuits have taken obvious action to conform their precedents in the two years since.

## 2. Contradicting the Trial Courts

Of particular note is that many of these federal circuits had to overrule their trial courts to arrive at these opinions. A series of more than a dozen primarily trial court decisions found no legislative barrier to section 107 action by "any other person" private-plaintiff parties.<sup>49</sup> These decisions,

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46. *Pinal Creek Group v. Newmount Mining Group.*, 118 F.3d 1298, 1301-02 (9th Cir. 1997). The court also points to the legislative history behind section 113 to support the contention that the two provisions work together. *Id.* at 1301.

47. *See Centerior Serv. Co.*, 153 F.3d at 350 (The court agreed with the government's contention that "CERCLA does not provide two separate and distinct causes of action, but that the two sections, § 107(a) and §113(f) work in conjunction."). The Sixth Circuit added:

[P]arties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of the defendants . . . . While a party seeking contribution under § 113(f) may not recover under joint and several liability, it is clear that under a plain reading of the statute, the party is seeking to recover its "necessary costs of response" as referred to in § 107(a).

*Id.*

48. *Id.* at 355; *United Techs. Corp.*, 33 F.3d at 99 n.8.

49. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F. Supp. 545, 553 (N.D. Ind. 1992); *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991); *Barton Solvents, Inc. v. Sw. Petro-chem, Inc.*, No. 91-2382-GTV, 1993 WL 382047, at \*3 (D. Kan. Sept. 14, 1993); *Charter Twp. of Oshtemo v. Am. Cyanamid Co.*, No. 1:92:CV:843, 1993 WL 561814 (W.D. Mich. Aug. 19, 1993); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994); *Town of Walkill v. Tesa Tape, Inc.*, 891 F. Supp. 955, 958-59 (S.D. N.Y. 1995); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1119 (N.D. Ill. 1988); *United States v. Atlas Minerals & Chemicals, Inc.*, No.91-5118, 1995 U.S. Dist. LEXIS 13097, at \*216 (E.D. Pa. Aug. 22, 1995); *Bethlehem Iron Works, Inc. v. Lewis Indus. Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995); *Chesapeake & Potomac Tel. Co. of Virginia v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992); *United States v. SCA Serv. of Ind.*, 849 F. Supp. 1264, 1281 (N.D. Ind. 1994); *Gen. Elec. Co. v. Litton Indus. Automation Sys. Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990);

beginning with the *Sand Springs* decision in 1987,<sup>50</sup> were elevated to a detailed, eloquent analysis in the *Kramer* opinion in 1991<sup>51</sup> and proliferated through the mid-1990s. The wholesale contradiction of many of these trial courts is notable.

These district courts generally based their conclusions on a plain meaning review of CERCLA. One of these trial courts had the case that would eventually get to the Supreme Court in 2007. In *Adhesives Research v. American Inks & Coatings*, the court began its inquiry by dissecting the plain language of the statute,<sup>52</sup> which invests standing under section 107 to “any other person” who incurs response costs. The court found each of these terms to be unambiguous.<sup>53</sup> The court stated that if a statutory term was clear in meaning, a court should not alter the meaning of the term solely because its makes the statute broad in scope.<sup>54</sup> The term “any,” although broad in scope, is clear and unambiguous; applying the plain meaning standard of review ends judicial review of the statute.<sup>55</sup> The *Adhesives* Court held that the “any other person” language of section 107(a)(4)(B) confers standing on persons who incur response costs regardless of their own potential liability. Following this logic to its end, the court held that a plaintiff PRP has standing to bring a cost recovery action under CERCLA section 107.

A number of district courts also agreed. The district court in *Laidlaw Waste Systems v. Mallinckrodt*<sup>56</sup> spurned its own circuit precedent and likewise found that the plain language of section 107 and section 113 does not deny plaintiff PRPs bringing claims pursuant to section 107.<sup>57</sup> The district court in *Pinal Creek Group v. Newmont Mining Corp.*<sup>58</sup> explained that section 107 confers standing upon any party who has incurred response

*Transp. Leasing Co. v. California*, 861 F. Supp. 931, 937–38 (C.D. Cal. 1993); *Kelley v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990); *Barnet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159, 164 (W. D. Ky. 1995); *Sand Springs Home v. Interplastic Corp.*, 670 F. S. pp. 913, 916 (N.D. Okla. 1987).

50. See *Sand Springs Home*, 670 F. Supp. at 916 (imposing no bar to a section 107 cause of action for potentially responsible parties).

51. See *Kramer*, 757 F. Supp. at 416–17 (holding that any temporary windfall to the private plaintiff employing section 107 for cost recovery was justified by the incentives for voluntary private clean up to foster the purpose of the statute).

52. *Adhesives Research Inc. v. Am. Inks & Coatings Corp.*, 931 F. Supp. 1231, 1238 (M.D. Pa. 1996).

53. *Id.* at 1239.

54. *Id.*

55. *Id.* at 1238.

56. *Id.* at 1239; *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624 (E.D. Mo. 1996).

57. *Laidlaw Waste Sys., Inc.*, 925 F. Supp. at 630.

58. *Pinal Creek Group v. Newmont Min. Corp.*, 926 F. Supp. 1400 (D.Ariz. 1996).

costs,<sup>59</sup> as the plain meaning of the statute does not provide a modifier that should be applied to “any other person.”<sup>60</sup>

The Supreme Court in 2007 would unanimously confirm these district court opinions regarding section 107, even though every federal appellate court had reversed these district court opinions in the interim, creating chaos in hazardous substance cost recovery.

### 3. Equitable Factors Supersede Plain Meaning

The desire of the federal appellate courts to broadly apply equitable factors seems to have influenced these courts’ interpretation of section 107. Many of the circuits (with the exception of the First, Fifth, and Twelfth Circuits) held that there are no equitable defenses available against a section 107 claim. In *Veliscol Chemical Corp. v. Enenco, Inc.*, the court disagreed with the district court’s allowance of the doctrine of laches as a defense under section 107 because the only statutorily available defenses under section 107 are those enumerated thereunder.<sup>61</sup> In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, the appellants argued unsuccessfully that the court should allow a section 107 “unclean hands” defense.<sup>62</sup> The court in *State of California v. Neville Chemical Company*, held that the “three defenses to CERCLA liability expressly listed in § 107(b) are the only defenses available, and traditional equitable defenses are not.”<sup>63</sup> To have equitable discretion at its disposal, the appellate courts gravitated to section 113 claims and did not sanction section 107 claims. Some circuits required the PRPs to bring a claim for contribution under section 113, but then due to equitable considerations applicable under

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59. *Id.* at 1405.

60. *Id.*

61. *Veliscol Chem. Co. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993); *Town of Munster v. Sherwin-Williams Co.*, 27 F. 3d 1268, 1270 (7th Cir. 1994).

62. *Gen. Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1414, 1418 (8th Cir. 1990). The court held that “unclean hands” is not a defense to private party’s action to recover CERCLA response costs under section 107. Specifically, the court stated that “CERCLA is a strict liability statute, with only a limited number of statutorily-defined defenses available [under section 107(b)] . . . CERCLA does not provide for an ‘unclean hands’ defense; the liability imposed by § 107(a) is subject only to the defenses [in section 107(b)] . . . the purpose of allowing a private party to recover its response costs is to encourage timely clean-up of hazardous waste sites. This purpose would be frustrated if a plaintiff’s motives were subject to question.” *Id.*

63. *See California v. Neville Chem. Co.*, 358 F.3d 661, 672 (9th Cir. 2004) (holding that equitable considerations are not premised under section 107; however, they are considered under section 113); *see also Blasland, Bouck & Lee, Inc. v. N. Miami*, 283 F.3d 1286, 1304 (11th Cir. 2002) (holding that CERCLA bars equitable defenses); *Veliscol Chem. Co. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993) (discussing the reluctance of the court to permit non-enumerated equitable defenses); *Town of Munster*, 27 F.3d at 1270. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. *Id.*

section 113, allowed for 100% cost recovery rather than partial cost contribution.<sup>64</sup> This result is exactly what some courts feared would happen if section 107 were enforced and the entire PRP liability was shifted from plaintiff PRPs to defendant PRPs.

According to many of the federal circuit courts, the general rule under CERCLA was that PRPs may bring only a claim for contribution under section 113 and cannot recover under section 107 unless they are asserting one of section 107(b)'s defenses.<sup>65</sup> There is no statutory provision or supportive legislative history to this effect. To get there, the circuit courts ignored plain statutory language, their own decisions in analogous CERCLA cases, and several canons of statutory construction.

In *United Technologies Corporation v. Browning-Ferris Industries*, the First Circuit made mention in dicta of the possibility of allowing a PRP who does the cleanup without prodding by the government to recover under section 107. The court did not decide the issue in this case because the parties began cleanup after governmental prodding. The 2007 Supreme Court decision in *Atlantic Research* dismissed the interpretation of these circuit courts and found that this flexibility is indeed available.

### *B. How Ocean's Eleven Disrupted the Superfund*

Here is the cost allocation and recovery scheme that the decisions of the eleven federal circuits disturbed by disposing of section 107 into the ocean. The preferred EPA enforcement approach to hazardous substance releases under CERCLA is cleanup by private parties, either voluntarily or pursuant to enforcement orders issued by the EPA.<sup>66</sup> The EPA compiles lists of priority sites and related PRPs to promote and maximize the number of privately funded cleanups, marshalling the Superfund to finance those priority cleanups for which no or inadequate private response activity transpires.<sup>67</sup>

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64. *Dent v. Beazer Materials & Serv. v. Braswell Shipyards, Inc.*, 156 F.3d 523, 530–31 (4th Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998); *W. Prop. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 689–90 (9th Cir. 2004); *Morrison Enter v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002); *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (holding that a PRP can never recover 100% of costs under section 107(a)).  
65 42. U.S.C. § 9607(b) (2006).

66. *Broward Gardens Tenants Ass'n v. U.S. E.P.A.*, 311 F.3d 1066 (11th Cir. 2002).

67. *Cf. Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 271 F.3d 911, 924–25 (9th Cir. 2001) (noting that CERCLA requires the EPA to compile a national priorities list and that the EPA may use funds from the Superfund to finance the cleanup of priority sites).

The allocation of liability under CERCLA usually involves two stages.<sup>68</sup> The first stage is the macro-level shift of remediation expenses from the plaintiff(s) to the defendant(s). This stage involves determining whether liability should be imposed on the entire group of liable PRPs jointly and severally or should be divided severally or equitably. In the Superfund context, this dimension triggers issues of joint and several responsibility versus several contribution, allocation among categories of responsible parties, and plaintiff's choice of the cause of action and designation of named defendants.

The second stage entails a micro-level reallocation of response costs among the universe of liable defendant parties. This allocation may be accomplished as part of the original imposition of joint and several liability, or subsequently in reallocation of shares among PRPs.<sup>69</sup> This second dimension of allocation can divide those who choose to settle their liability with the government from nonsettlers, juxtaposing the interests of settling and nonsettling responsible parties.

Either to compel PRPs to clean up contamination or to recover its own response costs, the government could bring suit under section 107 to shift the liability for government-incurred cleanup costs on to the defendant PRPs. This shifting or imposition of liability constitutes the first macro-level stage of allocation. The defendant PRPs then must equitably allocate this liability among themselves in the second micro-level stage of allocation. PRPs who settle with the government should be able to recover from other co-responsible parties those expended response costs under section 107(a) or contribution to cleanup expenses under section 113(f) of CERCLA.<sup>70</sup> Under section 107(a), liability of PRPs in cost recovery actions against PRPs is strict.<sup>71</sup> Section 107 often shifts joint and several liability to the defendants, unless a defendant can affirmatively demonstrate that the harm is divisible.<sup>72</sup> Joint and several liability, however, generally

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68. However, some courts have merged these two stages together. *See infra*. Also, when harm is divisible, there is no need for apportionment of harm that occurs in the second stage. *See infra*.

69. *See* 42 U.S.C. § 9613(f)(1) (2006) ("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 9607(a) of this title.").

70. *See id.* § 9607(a) (establishing avenues for cost recovery); § 9613(f) (establishing contribution requirements).

71. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998).

72. *See, e.g., Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 75 (1st Cir. 1999) ("[W]e embrace the Restatement (Second) of Torts approach in construing [CERCLA], stating that a defendant may avoid joint and several liability if the defendant demonstrates that the harm is divisible."); *Centerior Serv. Co.*, 153 F.3d at 348 (noting that a plaintiff to a section 107 cost recovery action need only show that "each defendant is a 'liable' party" and that damages will only be "apportioned according to fault" if the defendant can "affirmatively demonstrate that the harm is divisible").

has been the norm because of the difficulty imposed on a PRP to affirmatively demonstrate the divisibility of the harm.<sup>73</sup>

There are situations where the government is willing to make advantageous settlements with some parties.<sup>74</sup> To the extent that unrecovered costs remain, early settlement leaves both the government and the settling parties free to initiate section 113 contribution or section 107 response costs actions against non-settling parties. There is a potential advantage to the government because it gets an immediate settlement, whether in the form of a cash settlement or a commitment to perform response actions, or both. Whatever discount the government affords settlers in litigation, thereby leaving it with unreimbursed response costs, can be recouped pursuant to section 107 jointly and severally from any single or multiple nonsettler(s). Where the government knows that not all the parties will settle and that viable non-settling parties will remain, this strategy may have advantages and few risks to the government.<sup>75</sup>

A settling PRP can also strategically choose which non-settling defendants to sue if it is allowed access to CERCLA section 107. It is much easier for a plaintiff to prove damages against a fewer number of defendants; if section 107 is employed, only a few defendants need to be named to shift liability to those defendants. This is much easier than bearing the burden of proof severally for the contribution share against every PRP.

Recovery under section 113 is more complicated. Since liability under section 113(f) is not joint and several, but merely several, plaintiffs bear the burden of proving the proportionate share of liability for each and every

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73. *Centerior Serv. Co.*, 153 F.3d at 348.

74. EPA Region I and the Commonwealth of Massachusetts, in settling the *United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1041 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990) case, involving four sites, employed this strategy. Most of the major non-*de minimis* parties received an initial settlement at a discount of approximately 75% of their proportionate shares based on waste-in volume. *Id.* Subsequently, individual governments sued several dozen additional nonsettling parties, requiring them to make the governments whole. *Id.* at 1033. Small volume parties received *de minimis* settlements crafted in several stages. *Id.* Also note that non-settling PRPs may not bring contribution actions against settling *de minimis* parties. 42 U.S.C. § 9613(f)(2) (2006); *Id.* § 9622; *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp. 1132, 1139 (D.R.I. 1992).

75. Of course, after the initial settlement the government may seek either to litigate against nonsettlers or use the initial settlement as leverage to compel a subsequent settlement with the nonsettling parties. While reducing the number of parties by an initial settlement, the government may or may not have resolved all liability or maximized recovery. This partial settlement mode has the advantage for the government of prompting a quick settlement with some liable parties, while leaving additional nonsettling parties against whom unreimbursed present or future response costs can be incurred. In certain applications, this is an ideal solution in that it operates much like an insurance policy, while expediting some initial settlement.

defendant severally.<sup>76</sup> Section 113 allows an equitable reallocation of total costs incurred severally among PRPs. Pursuant to this avenue, the liability is divided among the PRPs according to their proven equitable proportionate shares.<sup>77</sup> This follows the general common law rule of contribution that all joint tortfeasors must contribute equally to satisfy a collective burden.<sup>78</sup> A primary difference between section 107 and section 113 is that district courts are afforded great discretion in allocating liability on an equitable basis under section 113(f)(1).<sup>79</sup> The difference between several liability and joint and several liability is profound.

Much of the circuit court imbroglio over section 107, and resulting chaos after the 2004 Supreme Court decision in *Aviall*, was justified by circuit courts that claimed that only by finding an implied congressional intent for use of “equitable factors” under section 113 did distinctions make sense. However, there is no express statutory prohibition against equitable considerations applied to claims adjudicated under section 107.<sup>80</sup>

Not only do these two routes of section 107 and section 113 yield potentially different reallocations, but they yield distinct outcomes depending on whether or not the plaintiff previously has settled its liability with the EPA. To encourage settlement and reduce litigation costs, Congress provided contribution protection to all settling PRPs pursuant to section 113(f) under section 107 or section 113.<sup>81</sup> A PRP which has settled with the government in a judicially or administratively approved settlement is protected from additional liability from both other private PRPs and the government for matters which are covered in the settlement.<sup>82</sup> Contribution

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76. See also § 9613(f) (dealing with contribution claims).

77. *Id.* (stating that courts should determine the equitable share on a case-by-case basis).

78. *McDonald v. Magruder*, 28 U.S. (1 Pet.) 470, 477 (1830); *Adamson v. McKeon*, 225 N.W. 414, 416 (1929); *Easterly v. Barber*, 66 N.Y. 433, 440 (1876), available at 1876 WL 12250. Contribution is inherently equitable, and courts are free to fashion equitable remedies. *Yates v. Donaldson*, 5 Md. 389, 394–95 (1854).

79. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571–73 (6th Cir. 1991). Note that this case is a subsequent opinion in *United States v. Northern Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987) (holding defendants jointly and severally liable under section 107(a)), *aff'd sub nom.*, *United States v. R.W. Meyer Inc.*, 889 F.2d 1497 (6th Cir. 1989).

80. See *United States v. Hardage*, 116 F.R.D. 460, 465 (W.D. Okla. 1987) (allowing equitable factors raised as a defense to bar government’s section 107 claims). However, this opinion is not followed by many other courts.

81. § 9613(f).

82. § 9613(f)(2). See generally STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS (4th ed. 2007) (Typically settlements of CERCLA liability by private parties involve both the EPA and state government. In the author’s experience, the interests of the state and federal government can be quite distinct. The federal government incurs 90% of government capital response costs, while the state government typically incurs the remaining 10% plus ongoing obligations for operations and maintenance. Therefore, a state government may be particularly attuned to long-term risks and costs associated with operating site O&M systems).

protection is effective as soon as a settlement is signed and it is not dependent on the fulfillment of any duties undertaken by the settler.<sup>83</sup> A settlement with the government should confer absolute protection against counterclaims by non-settling defendants.<sup>84</sup> In order to ensure this protection, however, the settling PRP must settle via a consent decree, as opposed to responding to a unilateral administrative order from the EPA issued pursuant to section 106.<sup>85</sup> This distinction is critical. Whether a state government settlement can trigger this federal contribution protection emerged as a critical issue after the Supreme Court's *Aviall* opinion, as discussed below.

A PRP or group of PRPs can settle for the entire response cost, their proportionate share, or even less than their proportionate share. If the federal appellate courts had correctly interpreted the statute as ultimately determined by the Supreme Court, the settling PRP can then pursue non-settling PRPs for the response costs incurred under the settlement via either of two alternative allocation avenues. First, pursuant to section 107, the settling party typically seeks restitution of response costs under a theory of joint and several liability.<sup>86</sup> In the alternative, pursuant to section 113, the settling party seeks contribution of liability under a several liability theory.<sup>87</sup> The ultimate final allocation among all liable parties is only clear after a subsequent cost recovery or contribution action lodged by the settling PRP against other non-settling PRPs.<sup>88</sup>

There are significant differences between section 107 and section 113. Key advantages of section 107 are the application of joint and several liability, a doubly long statute of limitations period in which to initiate suit,

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83. *See Dravo Corp. v. Zuber*, 13 F.3d 1222, 1225–26 (8th Cir. 1994) (holding that, pursuant to section 122(a), *de minimis* settlers receive automatic and instantaneous contribution protection subject to a condition subsequent to fulfill duties).

84. § 9613(f).

85. 42 U.S.C. § 9606 (2006). While there are many differences between the EPA's model consent decree and the EPA's model unilateral administrative order, a critical distinction is in the provision of contribution protection to settlers. The model consent decree utilized by the EPA contains an optional paragraph pertaining to the contribution protection contained in section 113(f)(2). *See Dravo Corp.*, 13 F.3d at 1227–28 (holding that contribution protection applies to administrative settlement as well as to consent decrees). The *Dravo* court held that it lacked jurisdiction to second-guess the EPA on administrative settlements. While nonparticipating settlers can object during the standard thirty-day public comment period, the court found that there was no other recourse for a third party to challenge a settlement, even where that party would be prevented from seeking contribution against the settling party. Effectively, this removes judicial review of administrative *de minimis* settlements. *Id.*

86. 42 U.S.C. § 9607(a)(4)(B) (2006). *See E.I. Dupont de Numours v. United States*, 460 F.3d 515, 522 (3d Cir. 2006) (Section "107 imposes strict, joint, and several liability on all PRPs.").

87. § 9613(f)(1).

88. § 9613(f).

the necessity only to name and prosecute a few and not all of the liable parties, and traditionally the unavailability of equitable defenses to defendants beyond the statutorily prescribed defenses. Section 107 is less likely to result in the plaintiff absorbing “orphan shares” of unfunded PRP liability.<sup>89</sup>

If the plaintiff chooses to use a section 113 claim as a “sword,” the settler can theoretically recover severally from nonsettlers for their equitable shares of the incurred remediation costs. However, the plaintiff’s burden to demonstrate *several* liability of each and every individual and potential defendant is formidable<sup>90</sup> and diminishes the probability of a full recovery. Comparatively, the settler can settle for any amount—more or less than the settler’s proportionate share—and then initiate litigation against some non-settling PRPs<sup>91</sup> under section 107 to shift the settler’s direct response costs under joint and several liability principles.

Under this relatively detailed statutory scheme, the eleven federal circuit courts walled off access to section 107 by PRPs acting as plaintiffs. This fundamentally killed a lone PRP’s incentive to voluntarily undertake remediation expenditures at multi-party sites, as it could get stuck with the responsibilities of non-responding PRPs. It would turn out that all of these circuit courts were wrong at every turn.

## II. THE SECOND STEP: THE 2004 *AVIALL* SUPREME COURT DECISION

In its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>92</sup> the Supreme Court went around the barrier created by the federal circuits between 1993 and 2004.<sup>93</sup> This chaos-causing decision allowed for billions of dollars more in hazardous waste liability allocations than previously allowed by most of the circuit courts. The Supreme Court opinion in *Aviall* prohibits a private party from initiating a claim under section 113(f)(1) against other PRPs for contribution to hazardous waste cleanup expenses, unless and until that plaintiff party itself has been sued first for response

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89. See FERREY, *supra* note 82, at 401–11 (providing a detailed example of orphan-share allocation under section 107 and section 113).

90. In a section 113 action, a plaintiff must shoulder the burden of proving the liability of every PRP defendant and successfully rebut all defenses raised by the defendants. Additionally, discovery must be conducted against each defendant. For each defendant who is not brought into the litigation or is not successfully prosecuted, a piece of the amount necessary for the plaintiff’s full recovery is lost. The parts may not equal the whole under section 113.

91. Compared to a section 113 action, only a few defendants need be named, and only one needs to be successfully prosecuted to shift liability jointly and severally.

92. *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157 (2004).

93. See *supra* Section II.

costs by (or settled with) the government under section 107(a) or section 106.

With the eleven circuits previously having blocked use of section 107, this decision of the Supreme Court blocked the other avenue of section 113 in many instances. The federal government only sues PRPs in those few situations resulting from very high-profile waste sites. The existing system relies substantially on voluntary private action to remediate hazardous waste contamination and thereafter private judicial proceedings to reallocate the cleanup cost from the volunteering party to others PRPs who are also liable for or contributed to the contamination.<sup>94</sup> With the cost-reallocation mechanism of both section 107 and section 113 judicially disabled, the incentives for voluntary clean up of hazardous waste sites disappear because cost recovery for the volunteering party becomes difficult or impossible.

The facts in *Aviall* are straightforward.<sup>95</sup> The federal district court found for Cooper, barring Aviall's section 113 claim on the basis that it had not been brought during or after a government action against Aviall nor subject to an approved settlement.<sup>96</sup> The Fifth Circuit initially upheld the district court's ruling,<sup>97</sup> but then reversed it in an en banc hearing.<sup>98</sup> The en banc decision relied on the purpose of CERCLA "to promote prompt and effective cleanup."<sup>99</sup> The Fifth Circuit en banc found that the statute's savings clause was not limited to state claims and that a private section 113 action by Aviall was not dependent upon a prior or pending action.

On certiorari, the odds on paper were stacked: twenty-three states joined Aviall as amici, as did numerous corporations and others, to argue in support of the final Fifth Circuit en banc decision allowing unfettered use of section 113. The United States Government filed the sole amici brief

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94. See FERREY, *supra* note 82, at 407–09 (discussing cost reallocation among private parties).

95. Aviall purchased four aircraft manufacturing and maintenance facilities from Cooper Industries. *Aviall*, 543 U.S. at 163–64. Hazardous substance contamination at the sites was created by both companies' operations before and after the sale. *Id.* Aviall, the then-current owner, remediated the site under direction of the Texas environmental agency at a cost of almost \$5 million, as a prerequisite to its sale of the property to a third party, whereupon it sought section 113 contribution and/or section 107 CERCLA response cost recovery from Cooper, the former owner. *Id.* at 164. These two claims were later amended to consolidate and launch just a single section 113 claim, as per the controlling precedent in the circuit. *Id.* Aviall performed the remediation voluntarily, having never been sued by any environmental enforcement agency, nor had Aviall ever entered a formal judicially or administratively approved settlement with any environmental agency. *Id.*

96. *Id.* at 164–65.

97. *Aviall Servs. Inc. v. Cooper Indus. Inc.*, 263 F.3d 134 (5th Cir. 2001).

98. *Aviall Servs. Inc. v. Cooper Indus. Inc.*, 312 F.3d 677 (5th Cir. 2002).

99. *Id.* at 681.

supporting Cooper Industries.<sup>100</sup> The numbers of parties here did not presage the outcome. The Supreme Court reversed the Circuit in a forceful opinion requiring as a prerequisite to any section 113(f) CERCLA contribution action that the private party plaintiff has either (1) suffered prosecution for liability from the federal government or, (2) entered a judicially or administratively approved settlement of such dispute with the government.<sup>101</sup> The Court maintained the distinction between section 107 “cost recovery” and section 113 “contribution actions”: “[a]fter 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).”<sup>102</sup>

It required no leaps of judicial logic for the Supreme Court to reach this outcome. It followed the plain meaning of the exact language of section 113 of the statute, finding that the authorization to initiate a contribution action after or during such other litigation or settlement is the only means, not an illustration of one of a host of means, to entitle one to bring contribution claims against other potentially liable parties under the statute. Otherwise, a more permissive interpretation of the section would “render . . . entirely superfluous” the conditional “during or following” language of the Act.<sup>103</sup> This interpretation, in the view of the Court majority, gave every word of the statute meaning—a plain meaning interpretation following the canons of statutory construction.

Of particular note, while the Supreme Court decision in *Aviall* was by a seven to two plurality, the two dissenters did not seem to contest this core holding. Rather they sought to go further to address in the opinion the even more pressing issue of whether there was a private right to cost recovery along the alternative road of section 107(a), notwithstanding the prior opinions of eleven circuit courts. However, because *Aviall* had been forced in the district court to drop its alternative section 107 claim after the initiation of the litigation, thereby consolidating all claims under the less conducive section 113 recognized by the Fifth Circuit, the issue was not addressed in the circuit court opinion on review, and therefore formally was

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100. Brief for United States as Amicus Curiae Supporting Petitioner, Cooper Indus. Inc., v. Aviall Servs. Inc., 543 U.S. 157 (2004) (No. 02-1192).

101. *Aviall*, 543 U.S. at 166.

102. *Id.* at 163.

103. *Id.* at 166. Justice Thomas, in his opinion for the majority, rejected the notion that “may” should be read permissively so the “during or following” statutory language was one of several mechanisms to utilize section 113. *Id.* Rather, the opinion held that only during or after one of the statutorily specified requisites could a party as plaintiff initiate a section 113 civil contribution action. *Id.* Therefore, the “may” language was read as exclusive rather than inclusive of the only statutorily authorized means to utilize the section 113 path for private cost contribution to waste remediation. *Id.*

not before the Court on certiorari.<sup>104</sup> The Supreme Court majority in *Aviall* would not adjudge the section 107 rights of private party litigants *sua sponte*.<sup>105</sup> In dissent, Justice Ginsburg, joined by Justice Stevens, would have ruled on the section 107 issue notwithstanding it not being briefed to the Court, potentially overturning the impenetrable section 107 roadblocks erected by the circuits.<sup>106</sup>

This 2004 Supreme Court decision cut off section 113 as an effective cost reallocation route. Four of the federal circuits which had previously blocked any use of the alternative section 107 cost recovery route by PRPs debated then whether section 107 had been revitalized in the shadows of the Supreme Court's *Aviall* decision, or whether the impenetrable wall of the eleven circuits remained un-breached.<sup>107</sup> Three of these four courts decided to reopen access to section 107, which they had previously blocked, with one stating that if the Supreme Court did not compel reopening section 107, its prior precedent stood un-impeached. This provided the Supreme Court a second chance to reach the decision it could not stretch to reach in 2004.

### III. THE THIRD STEP: THE 2007 *ATLANTIC RESEARCH* DETONATION

#### A. *U-Turns in the Second and Eighth Circuits*

Immediately after the 2004 Supreme Court opinion in *Aviall*, the Second Circuit did an immediate U-turn. Despite its 1998 *Bedford* decision denying *all* PRPs access to section 107 in order not to render section 113 "a nullity," the Second Circuit had second thoughts in *Consolidated Edison*

104. *Id.* at 170.

105. *Id.*

106. *Id.* at 174 (Ginsburg, J., dissenting). Justice Ginsburg's dissent notes that in *Key Tronic*, the Supreme Court in *dicta* stated that section 107 "unquestionably provides a cause of action for [PRPs]." *Id.* at 172. Justices Scalia and Thomas, dissenting in *Key Tronic*, but in the majority in *Aviall*, also favored a private right of action under section 107. Justice Ginsberg notes that in *KeyTronic* "no Justice expressed the slightest doubt that section 107 indeed enables a PRP to sue other covered persons for reimbursement . . . of cleanup costs." *Id.* at 172.

107. Three circuits reinvigorated section 107 after the *Aviall* decision. *See* *Consol. Edison Co. of New York v. UGI Util. Inc.*, 423 F.3d 90, 97 (2d Cir. 2005) (finding that the cost of recovery may be pursued under section 107(a) because costs to clean up sites are "costs of response" under the statute); *see also* *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 830-32 (7th Cir. 2007); *Atl. Research Corp. v. United States*, 459 F.3d 827, 834-35 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007). The Third Circuit held to its prior precedent. *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 531 (3d Cir. 2006).

*Co. v. UGI Utilities, Inc.*<sup>108</sup> There, the Second Circuit noticed the “plain language” of section 107 and, fearing that it would “impermissibly discourage voluntary clean-up”<sup>109</sup> and that all voluntary cleanups would grind to a halt, stated that “[t]his would undercut one of CERCLA’s main goals, ‘encouraging private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.’”<sup>110</sup>

To make this U-turn, the Second Circuit pivoted off the 1994 CERCLA decision of the U.S. Supreme Court in *Key Tronic Corp.*<sup>111</sup> Regarding its prior contrary precedent in *Bedford*, the circuit court stated that “[t]his holding impels us to conclude that [*Bedford*] no longer makes sense.”<sup>112</sup> However, rather than formally overrule *Bedford*, the Second Circuit tried to distinguish it by noting that Consolidated Edison had not been sued or found partially liable, unlike in *Bedford*. However, here the logic stops. Without settling one’s liability in an administratively or judicially approved settlement with the federal government there is no contribution protection under section 113(f)(2) and this minimizes incentives for voluntary remediation. Even with section 107 available, without contribution protection against cross-claims there is scant incentive for voluntary remediation when more litigation will result in claims against the settler.

The *Consolidated Edison* Court viewed section 107(a) and section 113(f) as operating in tandem because “[e]ach of those sections . . . embodies a mechanism for cost recovery available to persons in different procedural circumstances.”<sup>113</sup> The court’s holding implied that a section 113(f)(1) claim for contribution will be permitted for PRPs who are subject

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108. *Consol. Edison Co.* 423 F.3d at 96–97. The plaintiff entered into a Voluntary Cleanup Agreement with the state of New York. The plaintiff alleged that under that agreement it had resolved its liability to the state, but the court held that the resolution of liability must pertain to liability of claims under CERCLA. The court noted that while the plaintiff may have resolved its liability to the State of New York for claims arising under the state’s environmental laws, the agreement contained a “Reservation of Rights” whereby the state reserved its right to bring CERCLA claims against the plaintiff. Because the state reserved a right to bring future CERCLA claims against the plaintiff, the court held that the plaintiff had not resolved its CERCLA liability to the state and therefore it could not bring a contribution claim under section 113(f)(3). *Id.*

109. *Id.* at 100.

110. *Id.*

111. *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

112. *Consol. Edison Co.*, 423 F.3d at 99.

113. *Id.* The court found that “section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment.” *Id.* at 100. The court authorized PRPs to bring claims for contribution under section 107(a) or section 113(f), depending on their “procedural circumstances,” but precludes those PRPs who are subject to an administrative proceeding from bringing a claim for contribution under section 107(a). *Id.* at 99.

to an administrative proceeding, even if they were not subject to a judicial proceeding. The Supreme Court stated in *Aviall* “that [one] must, if possible, construe a statute to give every word some operative effect.”<sup>114</sup> Section 107(a) does not exclude liable parties from raising a section 107 claim, and thus section 107(a) is available to “any other person” who has incurred “any other necessary costs of response.”<sup>115</sup>

In a similar U-turn, the Eighth Circuit provided an interesting mechanism for the circuits to side-step their prior precedent blocking the use of section 107. After *Aviall*, it decided that a PRP plaintiff may avail itself of a section 107 cost recovery action.<sup>116</sup> To overcome its prior contrary decision in *Dico*, above, the Circuit did not attempt to reverse this precedent, but rather indicated that a different three-judge panel can depart from a prior panel’s decision where its rationale has been undermined.<sup>117</sup> The Circuit found that once free of this prior decision, the *Aviall* decision requires that section 107 and section 113 be regarded as separate and distinct avenues both accessible to PRP plaintiffs. In section 107, “any other person” includes any parties other than governments or Indian Tribes which are previously expressly included.<sup>118</sup>

The Eighth Circuit, in this 2006 reversal of past decisions, found no congressional intent to have silently repealed just the “any other person” provision of the preexisting section 107 when it enacted section 113(f) in 1986.<sup>119</sup> The court proceeded to limit the amount of response costs owed by a PRP who has neither been sued nor settled its liability to only its fair share costs under the “any other necessary costs of response” provision of section 107.<sup>120</sup> This proportionate concept removes one of the few logical criticisms of section 107’s shifting of private costs: that it could allow a temporary windfall.<sup>121</sup> The Circuit goes even further to read into section 107(c) an implied right to contribution so as not to penalize parties who

114. *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 167 (2004).

115. *Consol. Edison Co.*, 423 F.2d at 94. The Second Circuit in *Consolidated Edison* did not seem to recognize that a PRP counterclaim in response to a private plaintiff section 107 action could be barred by section 113 counterclaim protection if the plaintiff had previously entered an approval settlement with the EPA. *Id.* at 100 n.9. See discussion *infra* Section V.B.

116. *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006).

117. *Id.*

118. *Id.* at 835. See 42 U.S.C. § 9607(a)(4)(A)–(B) (2006) (PRPs shall be liable for “all costs . . . incurred by the United States Government or a State or an Indian tribe” and “any other necessary costs . . . incurred by any other person”).

119. *Atl. Research Corp.*, 459 F.3d at 836.

120. *Id.* at 835.

121. See *United States v. Kramer*, 757 F. Supp. 397, 416–17 (D.N.J. 1991) (acknowledging that allowing a section 107 can create a temporary windfall).

voluntarily remediate sites.<sup>122</sup> Therefore, this opens up to all PRPs—even those who have not settled with the government, and thus have no recourse to section 113 action after the Supreme Court's decision in *Aviall*—to utilize section 107 for cost recovery of their direct costs.

Notwithstanding these two quick U-turns in these even-numbered circuits, the reaction was not uniform. The Third Circuit remained fixed: if the Supreme Court in *Aviall* did not overrule the circuits, then the circuits should continue to deny PRP access to section 107.<sup>123</sup> Of course, while a minority of Justices in *Aviall* wished to address whether the circuit blockage of section 107 was incorrect, the Court could not consider this because the section 107 issue was neither before the Court nor briefed in *Aviall*.

On remand, the district court in the Fifth Circuit reexamining the controversy similarly refused to recognize the availability of the section 107 path.<sup>124</sup> Over the years, different panels of the Fifth Circuit had suggested, but never squarely held, that a private PRP could utilize section 107 for cost recovery.<sup>125</sup> Holding that the Fifth Circuit had not squarely addressed the issue, the district court took license to interpret “any other person” in section 107(a) to apply only to innocent parties and not PRPs. The district court's ultimate defense essentially was that the Supreme Court in its *Aviall* decision did not command that the circuit precedent on section 107 must yield.<sup>126</sup> Their seeming rationale was that allowing access to Section 107 would negate the contribution protection of section 113(f)(2).<sup>127</sup> The court concluded that section 107(a) also cannot be used for seeking contribution, so that parties prior to a judicially approved settlement with the federal government can not recover costs under any federal scheme, as both section 107 and section 113 are precluded.<sup>128</sup>

Some other courts followed both the Second and Eighth Circuit access to section 107,<sup>129</sup> while other courts followed the Third Circuit and Fifth

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122. *Atl. Research Corp.*, 459 F.3d at 836.

123. *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 544–45 (3d Cir. 2006).

124. *Aviall Servs., Inc. v. Cooper Industries, LLC*, No. 3:97–CV–1926–D, 2006 WL 2263305, at \*10 (N.D. Tex. Aug. 8, 2006). On remand, the Fifth Circuit, en banc, ordered the district court to permit *Aviall* to amend its complaint to reassert its original section 107 claim.

125. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (stating that a private party may recover only those response costs consistent with the national contingency plan); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988) (holding that government involvement is not a prerequisite for a PRP cost-recovery claim under section 107).

126. *See Tanglewood E. Homeowners*, 849 F.2d at 1568; *Dico, Inc. v. Amoco Oil Co.*, 340 F. 3d 525, 529 (8th Cir. 2003).

127. *See Tanglewood E. Homeowners*, 849 F.2d at 1568.

128. *See id.*

129. *See City of Bangor v. Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 222 (D. Me. 2006) (declining to interpret *Aviall* as stripping PRPs of their rights to section 107 claims); *see also Raytheon*

Circuit denials of access to section 107 cost recovery.<sup>130</sup> The result was total chaos.

## B. *The New Path of Atlantic Research*

### 1. A New Direction

The even-numbered circuits would eventually be affirmed by the Supreme Court in 2007. In *United States v. Atlantic Research Corp.*, decided in mid-2007, the Supreme Court affirmed a 2006 post-*Aviall* opinion of the Eighth Circuit<sup>131</sup> that opened up private PRP access to section 107 cost recovery. In *Atlantic Research*, the United States had

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*Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006) (holding that a PRP has an implied right to contribution under section 107); *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1133 (D. Or. 2006) (following Ninth Circuit precedent that section 107 “continues to exist as a viable cause of action” for PRPs); *Aggio v. Aggio*, No. C 04-4357 PJH, 2005 WL 2277037, at \*5, 6 (N.D. Cal. Sept. 19, 2005) (holding that in the Ninth Circuit PRPs continue to have rights to claims under section 107); *Ferguson v. Arcata Redwood Co.*, No. C 03-05632 SI, 2005 WL 1869445, at \*6 (N.D. Cal. Aug. 5, 2005) (recognizing that the Ninth Circuit allows PRPs to bring contribution claims under section 107); *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) (noting the change in the circuit courts and allowing PRPs to bring a section 107(a) action); *Kotrous v. Goss-Jewett Co.*, No. Civ. S02-1520 FCD JFM, 2005 WL 1417152, at \*3 (E.D. Cal. 2005) (acknowledging controlling Ninth Circuit precedent and allowing PRPs to file contribution claims under section 107(a)); *Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp.*, 365 F. Supp. 2d 913, 917-18 (N.D. Ill. 2005) (allowing PRPs to sue under section 107(a)); *Vine Street L.L.C. v. Keeling*, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005) (allowing Vine Street to state a claim for cost recovery under section 107(a)).

130. See *Spectrum Int’l Holding, Inc. v. Universal Coops., Inc.* No. 04-99, 2006 WL 2033377, at \*5 (D. Minn. July 17, 2006) (noting the Eighth Circuit precedent and holding that a PRP may not bring a section 107(a) claim); see also *Adobe Lumber, Inc. v. Hellman*, 415 F. Supp. 2d 1070, 1076 (E.D. Cal. 2006) (“[A] PRP does not have a *cost recovery action*, and instead has only a *contribution action . . .*”) (emphasis in original); *R.E. Goodson Constr. Co. v. Int’l Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927, at \*29 (D.S.C. Oct. 13, 2005) (dismissing plaintiff’s section 113 claim for lack of civil action under section 107(a) against the plaintiffs); *Montville Twp. v. Woodmont Builders*, No. Civ.A. 03-2680DRD, 2005 WL 2000204, at \*13 (D.N.J. Aug. 17, 2005) (precluding a PRP from obtaining recovery costs from another PRP under section 107(a)); *City of Rialto v. U.S. Dep’t of Def.*, No. EDCV 04-00079-VAP (SSx), 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 15, 2005) (finding that PRPs may only pursue contribution claims under the combined effect of section 107(a) and section 113(f)); *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005) (finding that the law in the circuit states that section 113 is the only avenue for contribution claims by PRPs); *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at \*6 (W.D. Mo. June 27, 2005) (noting that PRPs cannot seek contribution against other PRPs under section 107); *Atl. Research Corp. v. United States*, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484 (W.D. Ark. June 1, 2005) (barring section 107 cost recovery); *City of Waukesha v. Viacom Int’l Inc.*, 362 F. Supp. 2d 1025, 1027-28 (E.D. Wis. 2005) (stating that to allow a section 107 claim would be “futile”); *Mercury Mall Assocs. v. Nick’s Mkt., Inc.*, 368 F. Supp. 2d 513, 520 (E.D. Va. 2005) (denying a section 107 recovery claim).

131. *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *aff’d*, 551 U.S. 128 (2007).

argued that “any other person” in section 107(b) referred to parties other than the four groups of liable PRPs identified in section 107(a)(1)–(4).<sup>132</sup> The Court dismissed this argument as making “little textual sense.”<sup>133</sup> The Court relied on a plain language interpretation in holding against the government’s strained interpretation of section 107 of Superfund. The Court acknowledged that persons in different procedural positions have access to either section 107 or the recently limited section 113,<sup>134</sup> as the situation merits. In its articulation of “plain meaning,” the Court noted that “[t]he provisions are adjacent and have remarkably similar structures. Each concerns certain costs that have been incurred by certain entities and that bear a specified relationship to the national contingency plan.”<sup>135</sup>

The Supreme Court opined on issues that every circuit decision between 1993 and 2003 obscured or missed: section 113 is available for equitable apportionment of costs (including those not directly incurred) among jointly liable parties. Section 107, by contrast and pursuant to plain meaning, is freely available for *any* person or party to utilize to recover its own actually expended costs of response to hazardous substance remediation. Sections 107 and 113 are complementary avenues, not the excluded avenues determined by eleven circuits.

Despite the section 113(f)(2) contribution protection afforded settling parties, the Court assumed, without directly ruling, that plaintiffs utilizing section 107 would not be immune from counterclaims pursuant to section 113, which would cause a court to equitably apportion *de novo* the total cost burden among co-liable litigants. In *Atlantic Research*, the Supreme Court observed that an equitable allocation of response costs could be achieved by bringing “a Section 113(f) counterclaim.”<sup>136</sup> The Court noted that the section 113(f)(2) “settlement bar does not by its terms protect against cost-recovery liability under Section 107(a).”<sup>137</sup> The Supreme Court notes that “a defendant PRP in such a Section 107(a) suit could blunt any inequitable distribution of costs by filing a Section 113(f) counterclaim.”<sup>138</sup> There was less protection against the very section 107 cost-recovery claims that the Court had liberated from the blockage of eleven circuit courts. The Court did not seem to bar any section 113(f) counterclaims by defendants, and noted that they would be protected from reimbursement claims by their

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132. *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 (2007).

133. *Id.* at 136.

134. *See Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157 (2004) (limiting access to section 113 where suit and settlement had not preceded action).

135. *Atl. Research Corp.*, 551 U.S. at 135.

136. *Id.* at 140.

137. *Id.*

138. *Id.* at 140.

own prior settlement with the government, if not from section 107 cost recovery.<sup>139</sup> Settling parties are now opened up to section 107 claims, which are distinguished from contribution claims and not limited by any contribution protection under section 113(f)(2).

This dicta by the Supreme Court resolves the intriguing question originally posed in *Kramer*, which is whether a section 107 plaintiff could recover a windfall from shifting an inordinate share of its own equitable share of costs to defendants. In the view of the Supreme Court, a plaintiff could not recover a windfall. Section 107 could only be used by a party who actually incurred response costs itself, rather than by a party who reimbursed the costs incurred by another. “The remedies available in Sections 107(a) and 113(f) complement each other by providing causes of action ‘to persons in different procedural circumstances.’”<sup>140</sup>

“The choice of remedies simply does not exist” for a party.<sup>141</sup> The Court noted that voluntarily incurred costs can only be allocated by recourse to section 107.<sup>142</sup> However, the line between what is and is not voluntary is not precisely defined. Administrative orders from, and consent decrees with, the EPA, which are a common means of resolving alleged responsibility at Superfund sites, are not specified as to which such group they fall into but are left to the lower courts to determine. Prior to 2000, those federal district courts disagreed with each other, and even with their circuit courts, on section 107 and will do so again. The Supreme Court clarified that “a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a).”<sup>143</sup>

Moreover, the contribution protection of section 113(f) was held to only protect against contribution actions under section 113, not section 107(a) cost recovery actions.<sup>144</sup>

## 2. A New Canon Is Fired

Building on the rationale of the 2007 global warming decision of the Supreme Court,<sup>145</sup> the *Atlantic Research* decision establishes the interpretive rule of “plain meaning” construction of federal statutes enacted

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139. *See id.* at 139–40 (discussing various section 113(f) counterclaims).

140. *Id.* at 139.

141. *Id.* at 140.

142. *Id.* at 140 n.6.

143. *Id.* at 139.

144. *Id.* at 140.

145. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

by the legislature.<sup>146</sup> This canon asserts that the actual words of the statute are “the most important evidence of its meaning,”<sup>147</sup> “the final expression of the meaning intended,”<sup>148</sup> and “the most authoritative interpretive criterion.”<sup>149</sup> Under the plain meaning rule, the language used in the statute can be objectively determined without recourse to, for example, legislative history.<sup>150</sup> This canon restricts statutory interpretation to those circumstances unambiguously addressed in the legislative process, as evidenced by the specific terms of the law.<sup>151</sup>

This articulation was building in recent Supreme Court decisions. In 2005, the Supreme Court announced that it should interpret statutes by a reading “that makes sense of each phrase” and “the one favored by our canons of interpretation.”<sup>152</sup> The Supreme Court also has held that it is the duty of the courts to regard separate statutes—or in this case, by analogy, separate provisions of the same CERCLA statute—as each fully effective: “Judges ‘are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.’”<sup>153</sup>

In 2007, in rendering its *Massachusetts v. EPA* decision on carbon dioxide regulation, the Supreme Court again resorted to plain meaning interpretation of the Clean Air Act.<sup>154</sup>

The eleven federal circuits, in blocking access of PRPs to section 107 between 1994 and 2003, did not apply the canons of statutory construction as did the Supreme Court in *Atlantic Research*. Some of the circuit courts, which held that section 107 was not available to private parties, inferred a congressional purpose in the 1986 section 113(f) SARA amendments to have impliedly corrected and preempted the use of the previously enacted

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146. *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007).

147. See Richard A. Posner, *Statutory Interpretation— in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (refuting conception that most judges actually begin statutory interpretation by looking at the language of the act).

148. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 212–13 (1996) (quoting *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929)).

149. *Id.* at 243 (quoting William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990)).

150. *Id.* at 219–20. Adherents to the Plain Meaning Rule are also known as textualists, and the most well-known modern textualist is the U.S. Supreme Court Justice Antonin Scalia. See *id.*

151. *Id.*

152. *Bates v. Dow Agrosociences LLC*, 544 U.S. 431, 449 (2005).

153. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 265–66 (1992) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

154. *Massachusetts v. EPA*, 549 U.S. 497, 528–29, 532 (2007).

section 107. However, there was nothing to “correct.” The first court decision granting broad section 107 rights to private PRPs did not even occur until 1987, *after* the Congress added section 113 with the SARA amendments in 1986. Section 113(f) was added before any critical section 107 jurisprudence was decided.

Therefore, the rationale adopted by some circuits, that section 113 was added to correct and limit the rampant application of section 107 by private party plaintiffs to recover costs, does not comport with a true time line. The SARA amendments’ legislative history is clear that SARA’s creation of the new section 113 was only meant to accomplish the codification of the implied right to contribution found in court decisions, not to impliedly preempt any other avenues for cost recovery contained elsewhere in CERCLA.<sup>155</sup>

In *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, the First Circuit looked to the traditional section 113 meaning of the term “contribution” but never interpreted section 107. The Second Circuit first looked at this issue in *Bedford Affiliates v. Sills*, and similarly held that section 107 was not available for a potentially responsible party because it would render section 113 a nullity.<sup>156</sup> Similarly, the Third Circuit also held that a PRP may not bring a claim for recovery of costs against another PRP,<sup>157</sup> assiduously avoiding construing the meaning of section 107’s language.<sup>158</sup> The Fourth Circuit Court of Appeals used similar reasoning to hold that a PRP must sue another PRP under section 113.<sup>159</sup>

In confronting the issue of standing to sue under section 107, the Sixth Circuit<sup>160</sup> construed only section 113’s language, not the plain language of section 107.<sup>161</sup> The Seventh Circuit,<sup>162</sup> while leaving section 107 available

155. H.R. REP. NO. 99-253(I), at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (House Energy and Commerce Committee); S. REP. NO. 99-11, at 44 (1985).

156. *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998).

157. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 (3d Cir. 1997).

158. *See id.* at 1123 (allowing a PRP to recover cleanup costs against another PRP under section 107 would strip section 113 of “any meaningful application”). The Third Circuit Court of Appeals cited the arguments of other circuits in holding that PRPs may not bring section 107 cost recovery actions. *Id.* at 1122-23 (citing First, Seventh, and Tenth Circuit Court opinions).

159. *See Pneumo Abex Corp. v. High Point, Thomasville, & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (explaining that a PRP must bring a claim against another PRP under § 9613); *see also Axel Johnson, Inc. v. Carroll-Carolina Oil Co., Inc.*, 191 F.3d 409, 415 (4th Cir. 1999) (citations omitted). By the time of the *Axel Johnson* decision, the Sixth and Ninth Circuits had also ruled on this issue.

160. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-50 (6th Cir. 1998).

161. *See id.* (noting that actions by PRPs are governed by section 113(f), not by section 107(a)). In interpreting the “any other person” language of section 107, the court held that “any person may seek

for “innocent” parties, made no straightforward interpretation of section 107’s language.<sup>163</sup> The Ninth Circuit Court of Appeals, in ruling that a PRP may not jointly and severally recover its cleanup costs from another liable party,<sup>164</sup> again focused only on the ordinary meaning of the term “contribution” in section 113.<sup>165</sup> The Tenth Circuit<sup>166</sup> proceeded without fully explaining its logic that “§ 113(f) would be rendered meaningless” if section 107 was available to PRPs.<sup>167</sup> The Eleventh Circuit simply held that PRPs may not assert claims for recovery of costs under section 107.<sup>168</sup>

#### IV. HOW HAVE VARIOUS COURTS RESPONDED TO THE SUPREME COURT?

Each Supreme Court decision on cost allocation in 2004 and 2007 reversed the holdings of every circuit court that had rendered a decision, save one circuit, the D.C. Court of Appeals, which had not been asked to render a decision. Have the lower courts negated their prior precedent and conformed their rulings? Now more than two years past the last of these two Supreme Court decisions, the checkerboard is very uneven. In this section, I examine how the lower courts have or have not responded to these Supreme Court rulings.

Below, I first examine the scurry to circumvent the 2004 decision in *Aviall*. I examine whether this flurry of activity has or has not been successful in refracting section 113 liability for contribution. In Section V, I then examine the response of the district and circuit courts to the 2007 wholesale reversal of all federal circuit court CERCLA section 107

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to recover costs under § 107(a), but . . . it is the nature of the action which determines whether the action will be governed exclusively by § 107(a) or by § 113(f) as well.” *Id.* at 353.

162. *Azko Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764–65 (7th Cir. 1997).

163. *Id.* at 764–65. This was one of the first of many times where a circuit court of appeals has called these types of claims “a quintessential claim for contribution.” *Id.* at 764. However, the court suggested that a landowner required to clean up a release of hazardous substances deposited on its land by entirely unrelated third parties might be able to pursue a section 107 cost recovery action. *See id.* Subsequent Seventh Circuit decisions reiterated this “innocent landowner” exception. *See, e.g., AM Int’l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1346–47 (7th Cir. 1997); *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1239 (7th Cir. 1997) (discussing innocent landowner exception); *NutraSweet Co. v. X-L Eng’g Co.*, 227 F.3d 776, 784 (7th Cir. 2000) (describing the requirements for the innocent landowner exception).

164. *Pinal Creek Group v. Newmont Mining Group*, 118 F.3d 1298, 1299–1300 (9th Cir. 1997).

165. *Id.* at 1301.

166. *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995).

167. *Id.* at 1536.

168. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512–13 (11th Cir. 1995).

precedent in the *Atlantic Research* opinion. Here again, the response has been less than uniform. In both of these implementing responses by the courts, is writ part of the future of hazardous substance liability.

#### A. *Responding to the Aviall Section 113 Settlement Blockade*

In the words of *Aviall's* counsel more than a year after the 2004 decision, “the controversy continues, sites remain un-remediated, parties who act responsibly remain uncompensated, and flagrant polluters still scoff at potential liabilities.”<sup>169</sup> Post-*Aviall*, there were two types of newly-minted initiatives by private party plaintiffs to try to end-run the roadblocks for cost contribution and recovery created by the combination of this decisive Supreme Court decision limiting access to section 113 along with the prior uniform circuit court opinions cutting off access to section 107. These initiatives dealt with the *past* and with the *future*.

First, the past: there remained a limbo of twenty-five years of prior *past* settlements. To get around the newly articulated *Aviall* Supreme Court requirement of a prior settlement to utilize section 113, previous settling parties claimed that even though not recited in past responses to orders or threats from state environmental agencies, the real hidden intent of the parties was to resolve federal CERCLA liability to qualify to utilize section 113. Some states also supported this revisionist initiative to empower such settlers to avail themselves of section 113 federal contribution rights. The cases<sup>170</sup> made it not a straightforward proposition.

Second, the future: in new CERCLA settlements, parties were insisting that state agencies now include language that the agency otherwise would not include—to recite that its purpose was to resolve federal CERCLA liability as well as state liability. Some parties were proactively working with state environmental authorities to have the state file a friendly suit, immediately resolved by a consensual settlement, which was then judicially

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169. Richard O. Faulk et al., *Cost Recovery Under CERCLA Section 107 After Cooper v. Aviall*, 37 ENV'T REP. (BNA) 640, 641 (2006).

170. See *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754, 761 (E.D. Tex. 2005) (“[A] claim for contribution under § 113(f)(1) can only be brought by a potentially responsible party ‘during or following any civil action’ under § 106 or § 107(a) of CERCLA.”); see also *City of Waukesha v. Viacom Int’l Inc.*, 362 F. Supp. 2d 1025, 1027 (E.D. Wis. 2005); *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, No. 98-VC-838S(F), 2005 WL 1076117, at \*7 (W.D. N.Y. May 3, 2005); *Esso Standard Oil Co. v. Rodriguez Perez*, No. Civ. 01-2012(SEC)(JA), 2005 WL 643484 (D.P.R. Mar. 21, 2005); *Pharmacia Corp. & Solutia Inc. v. Clayton Chem. Acquisition LLC.*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005); *Johnson v. City of San Diego*, 2005 Cal. App. Unpub. LEXIS 1979, \*26-27 (Cal. Ct. App. Mar. 4, 2005); *Elementis Chem., Inc. v. T.H. Agric. & Nutrition, L.L.C.*, 373 F. Supp. 2d 257, 266 (S.D. N.Y. 2005); *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, 11 (E.D. N.Y. 2004).

approved under stipulation of the parties in order to allow access to section 113.

A few states tried to chart an alternative path under state statute.<sup>171</sup> A number of courts post-*Aviall* moved immediately to dismiss contribution suits under section 113 by plaintiffs who had not reached a judicially or administratively approved settlement with, nor been sued by, the government.<sup>172</sup> Trial courts in the Fifth Circuit<sup>173</sup> and the Ninth Circuit<sup>174</sup> took a pragmatic response and allowed section 107 claims to be amended to comport with allowable pending litigation post-*Aviall*.

### 1. Reconfiguring Past pre-*Aviall* Settlements Retroactively

Some states were willing to collude with PRPs post hoc in an effort to create retrospective federal rights for some PRPs who previously settled only with the state. This involved state agencies going back months or

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171. See, e.g., *R.R. St. & Co., Inc. v. Pilgrim Enter., Inc.*, 166 S.W.3d 232, 238, 240 (Tex. 2005) (noting that private cost-recovery actions under Texas's state counterpart to CERCLA requires different elements to maintain a cause of action).

172. *W.R. Grace & Co.-Conn.*, 2005 WL 1076117, at \*2; see also *Vine Street*, 362 F. Supp. 2d at 761 (dismissing *Vine Street*'s contribution claim under section 113(f)(1) because "113(f)(1) only allows claims 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make'"); *Mercury Mall Assocs. v. Nick's Mkt., Inc.*, 368 F. Supp. 513, 518 (E.D. Va. 2005); *Waukesha*, 362 F. Supp. 2d at 1026-27 (dismissing a section 113 claim in light of the Supreme Court's holding in *Aviall*); *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927, at \*21 (D.S.C. Oct. 13, 2005) (dismissing plaintiff's section 113(f) claims for lack of a civil suit being brought prior to the section 113 claims); *Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp.*, 365 F. Supp. 2d 913, 917-18 (N.D. Ill. 2005) (ruling that parties who voluntarily undertake cleanup efforts may not sue for contribution); *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 543-544 (3d Cir. 2006) (noting that the Supreme Court's decision in *Aviall* precluded a PRP that voluntarily cleaned up a site from recovery under section 113).

173. See *Vine St.*, 362 F. Supp. 2d at 763 (permitting access to section 107 as a default alternative where section 113 is not available after *Aviall*). Note that *Cooper v. Aviall* came before the Supreme Court from the Fifth Circuit returned there on remand. *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 165, 171 (2004). On remand to the Fifth Circuit, the en banc remanded the case to the district court and ordered the district court to permit *Aviall* to amend its complaint to reassert its original section 107 claim for cost recovery. *Aviall Serv. Inc. v. Cooper Indus.*, 572 F. Supp. 2d 676, 683-84 (N.D. Tex. 2008). However, on remand the district court ultimately refused to recognize the availability of the section 107 path. *Aviall Servs. Inc. v. Cooper Indus., LLC*, No. 3:97-CV-1926-D, 2006 U.S. Dist. LEXIS 55040, at \*10 (N.D. Tex. Aug. 8, 2006). The district court concluded that *Aviall* could not use section 107(a) for either a cost recovery action or a contribution claim. *Id.* Thus, parties prior to a judicially approved settlement with the federal government can not recover costs under any federal scheme, as both section 107 and section 113 are walled off. Over the years, different panels of the Fifth Circuit had suggested, but never squarely held, that a private PRP could utilize section 107 for cost recovery.

174. See *Kotrous v. Goss-Jewett Co. of N. Cal.*, No. Civ. S021520 FCD JFM, 2005 WL 1417152, at \*3 (E.D. Cal. June 16, 2005) (rationalizing that section 107 is the original source of contribution).

years after a settlement was final and unappealable to rewrite settlement documents to fit the newly articulated contours of *Aviall*. These settlements were reworked cooperatively by the state and the PRP to recite post hoc purported federal elements of settlement that were not initially included when the settlement was actually entered. What is the dispositive value of a settlement that is cooperatively redrafted after the fact by the supposedly legally adverse state enforcement agency and target PRPs?

The desire to paper-over prior state settlements that did not even purport by their original written terms to address, let alone resolve, federal CERCLA liability was vigorous post-*Aviall*. In essence, states were asked to mask the true and originally cited facts for the settlement so as to provide additional protection for certain parties. Clearly, such post-hoc modifications are not part of the original bargain, not supported by either the original and certainly not new consideration, and could misstate the original purpose and authority of the state in making the settlement.

Case law began to emerge post-*Aviall* on what type of prior state settlements qualify as an administratively approved settlement for purposes of the finality of CERCLA section 113(f). In Wisconsin, whether a plaintiff could retroactively rewrite its settlement deficiencies post-*Aviall* was tested where a city sued the successor to a corporation that had disposed of hazardous substances at a city landfill.<sup>175</sup> Even though the city had not been sued by either the EPA or the state environmental authority, before the *Aviall* decision, the court interpreted section 113(f)(1) to permit the city to bring a section 113(f)(3) action for contribution.<sup>176</sup> After the *Aviall* decision, the defendants filed a motion to dismiss the prior ruling in conformance with *Aviall*.<sup>177</sup> Having initially allowed the section 113 contribution claim, the court after *Aviall* dismissed the action.<sup>178</sup> It appears that the city's effort to disguise this deficiency by trying to create the "settlement" after the fact, rather than resolving the issue, demonstrated that

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175. *Waukesha*, 362 F. Supp. 2d at 1027–28.

176. *Id.* at 1026.

177. *Id.* at 1027. The city attempted to disguise the fact that it had no settlement with any environmental enforcement agency. The city tried to amend its complaint by adding a section 113(f)(3)(B) claim. *Id.* at 1027. The city claimed that its clean-up cost-sharing pilot contract with the state was the legal equivalent of a settlement, and for good measure submitted to the state environmental agency a settlement agreement purporting to settle all possible CERCLA claims and state liability. *Id.* The court stated that a PRP must resolve its liability to the state before bringing a section 113(f)(3) contribution action and "[i]f the unsigned administrative settlement agreement demonstrates anything, it demonstrates that the City has not yet resolved its CERCLA liability to the State." *Id.*

178. *Id.* at 1026–27.

the city knew that its original arrangement did not legally resolve its liability to the state.<sup>179</sup>

In an Illinois matter, *Pharmacia Corp. v. Clayton Chemical Acquisition, L.L.C.*, nineteen PRPs entered into an administrative order on consent (AOC) with the EPA pursuant to section 106 of CERCLA to perform the remedial investigation and feasibility study (RI/FS) at a Superfund site.<sup>180</sup> The plaintiff PRP brought suit for contribution against a group of unsettled PRPs who were not party to any of the EPA orders.<sup>181</sup> The court held that the AOC was not an “administrative settlement” contemplated by section 113 of CERCLA for purposes of a subsequent contribution action.<sup>182</sup> The court focused on the fact that the AOC entered by the parties did not qualify as a civil action<sup>183</sup> and contained standard language stating that the parties did not admit to liability, which belied any argument that it was a settlement.<sup>184</sup> Therefore, the responding PRPs could not initiate a

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179. *Id.* at 1027. The court held that the cost-sharing agreement between the city and the state was not the requisite settlement that resolved the plaintiff’s liability, since the statute authorizing the agreement expressly provided that it did not affect any statutory or common law liability and because the city submitted a separate administrative settlement that attempted explicitly to resolve the city’s liability to the state. *Id.*

180. *Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C.*, 382 F. Supp. 2d 1079, 1081, 1085 (N.D. Ill. 2005). The EPA also issued an administrative order unilaterally after the administrative order on consent. *Id.* at 1081.

181. *Id.*

182. *Id.* at 1085. The plaintiffs asserted their contribution claim under section 113(f)(1) on the basis that its facts were distinguishable since, unlike *Aviall*, plaintiffs incurred clean-up costs by responding to two separate orders issued by the EPA: in an Administrative Order on Consent and a Unilateral Administrative Order pursuant to section 106. *Id.* at 1085–86. The court noted that CERCLA section 122 authorized the EPA to enter into administrative settlements, but the administrative order on consent was issued pursuant to section 106 rather than section 122(d)(3). *Id.* It was consistently captioned as an “order” rather than a “settlement.” *Id.* The plaintiff was attempting to recoup through a contribution action some of the \$3 million that it had expended after entering the administrative order on consent. The court noted that the caption of the AOC provided that it was issued pursuant to section 106, but that the provisions of section 106 did not provide for settlements, and the term “settlement” does not appear in section 106. Moreover, the court found that the penalties for violating the AOC were those imposed pursuant to section 106 and that if the AOC was intended as a settlement, then the penalties provided in the document would have been consistent with the penalties provided by section 122(1). *Id.*

183. The court looked to the Federal Rules of Civil Procedure and found that under Rule 2(a) “‘civil action’ refers to the ‘entire civil proceeding, including all component ‘claims’ and ‘cases’ within that proceeding.’” *Id.* at 1087. Under Rule 3, “[a] civil action is commenced by filing a complaint with the court.” Nowhere within the Rules is an administrative order even discussed. *Id.*

184. *Id.* The court looked at the term “civil action” in Black’s Law Dictionary to find the term defined as a “non-criminal litigation,” whereas “administrative order” is defined as “[a]n order issued by a government agency after an adjudicatory hearing” as well as “[a]n agency regulation that interprets or applies a statutory provision.” *Id.*

contribution action after they began cleanup in compliance with an administrative order on consent.<sup>185</sup>

The plaintiffs in *Boarhead Farm Agreement Group v. Advanced Environmental Technology Corp.*<sup>186</sup> also sought to distinguish their situation from *Aviall*. In *Boarhead*, the plaintiffs had entered into a private cooperative agreement to share in the costs of cleaning up two areas of the Boarhead Farm Superfund Site.<sup>187</sup> The court stated that to “stretch the holding of *Cooper Industries* in such a way . . . would torture the plain meaning of the statute and discourage PRPs not sued from cooperating and settling with PRPs who were sued . . . .”<sup>188</sup> There was no civil action in *Boarhead*.<sup>189</sup>

A court in New York limited the ability of a settlement with the state to be stretched after the fact to resolve CERCLA liability so as to enable a private party section 113 contribution action.<sup>190</sup> Where a party enters an AOC with the state that does not contain any reference to CERCLA and does not purport to release federal CERCLA liability of the settler, that settlement relieves only the settler’s state liability and does not enable a federal contribution action under CERCLA’s section 113.<sup>191</sup> In this case, the settling party amended its complaint after the decision in *Aviall* to add a section 113(f)(3) contribution claim.<sup>192</sup> The plaintiff argued that it had entered into “two administratively approved settlements” with the state Department of Environmental Conservation that by their terms resolved its liability to the state, and therefore it could bring a claim for contribution under section 113(f)(3).<sup>193</sup>

185. *Id.* The court applied the *Aviall* reasoning, finding that if Congress intended to allow a contribution action at any time it would not have created two separate avenues for a PRP to seek contribution nor would it have specified separately the conditions of a civil action in section 113(f)(1) as well as an administrative or judicially approved settlement in section 113(f)(3). *Id.* at 1087–88.

186. *Boarhead Farm Agreement v. Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 436 (E.D. Pa. 2005).

187. *Id.* at 429–30. All but one of the members in the group had entered into one or more settlement agreements with the EPA, which were thereafter entered in the district court as consent decrees. *Id.* at 436.

188. *Id.* at 436.

189. *Id.* Even though the EPA settlement in *Boarhead* was entered in the district court as consent decrees, the actions in *Boarhead* were not section 106 or section 107 civil actions, but rather were governed by section 122 of CERCLA and therefore do not fall within the scope of section 113(f)(1).

190. *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, No. 98-CV-838S(f), 2005 WL 1076117, at \*7 (W.D. N.Y. May 3, 2005). The AOCs were entered with the state environmental agency during the 1980s. The AOC resolved only state liability, but it did not release CERCLA liability, and it did not indicate any EPA concurrence with the settlement. *Id.*

191. *Id.*

192. *Id.* at \*3.

193. *Id.*

The court disagreed and held that for a settlement to be valid under CERCLA section 122 it “must be *judicially* approved, *i.e.*, entered as a consent decree in the appropriate United States district court.”<sup>194</sup> Section 122 of CERCLA grants to the EPA the authority to enter into settlement agreements with a PRP and states that the settlement “must be ‘entered in the appropriate United States district court as a consent decree.’”<sup>195</sup> Section 104 of CERCLA provides that the EPA may “‘enter into a contract or cooperative agreement with the State’” whereby a state may exercise CERCLA authority, including the EPA’s authority to enter into settlement agreements.<sup>196</sup>

A Texas court held that state consent agreements do not constitute settlements resolving CERCLA liability.<sup>197</sup> It is questionable whether a state settlement that is finalized without some form of public comment and agency response, as is required by CERCLA regulations,<sup>198</sup> could qualify under section 113 of CERCLA as an administratively or judicially approved settlement. In *Ferguson v. Arcata Redwood Co.*, the court held that the letters exchanged between the plaintiff and state and federal authorities did not qualify as a settlement agreement under section 113(f)(3) because the words “settlement” and “CERCLA” were nowhere contained in the letters.<sup>199</sup> Additionally, the court noted that the agency documents failed to show that the state was acting pursuant to authority granted by the EPA.<sup>200</sup>

State-law bases for settlement do not satisfy the requisite for section 107 cost recovery. In *Asarco v. Union Pacific Railroad Co.*, the court found that a memorandum agreement settling a dispute that had not evolved to litigation did not constitute a settlement satisfying the post-*Aviall* section 113 requirement.<sup>201</sup> And in *Cadlerock Prov. Joint Venture v. Schilberg*, the

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194. *Id.* at \*6.

195. *Id.* at \*4 (citing 42 U.S.C. § 9622(d)(1)(A) (2000)).

196. *Id.* (citing 42 U.S.C. § 9604(d)(1)(A) (2000)). In looking at the terms of the 1988 Consent Order issued by the state, the court found that it “does not state that the DEC was exercising any authority under CERCLA, does not indicate that the EPA concurred with the remedy selected and does not provide a release as to any CERCLA claims.” Moreover, nowhere within the order was the term “CERCLA” used. Thus, the 1988 Consent Order only resolved Grace’s liability to the State of New York, and it could not bring a claim for contribution under section 113(f)(3). *Id.* at \*7.

197. *See Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754, 761 (Mar. 24, 2005). In this case a settlement with Texas’s environmental agency did not constitute an administratively approved settlement for purposes of absolving CERCLA liability. *Id.*

198. 42 U.S.C. § 9622(d)(2)(B) (2006).

199. *Ferguson v. Arcata Redwood Co.*, No. C 03–05632 SI, 2005 WL 1869445, at \*5 (N.D. Cal. Aug. 5, 2005).

200. *Id.*

201. *Asarco, Inc. v. Union Pac. R.R. Co.*, No. CV 04–2144–PHX–SRB, 2006 WL 173662, at \*16 (D. Ariz. Jan. 24, 2006) (finding that the agreement satisfied neither section 113 nor section 122 of CERCLA, and rejected the argument that where states were delegated to oversee clean-up, the states

court held that a state civil order to remediate a site was not a federal order under section 106 of CERCLA and could not qualify to enable a section 113 contribution cost-recovery path.<sup>202</sup>

It can be difficult to convince a court of the true legal tenor of the past once one rewrites long-ago legal agreements post hoc.

## 2. Controlling the Future of Settlements

Crafting future settlements that qualify for section 113 cost contribution can be challenging. First, the EPA exercises unilateral discretion as to whom it names as defendants in any section 106 administrative enforcement action under CERCLA and with whom it will enter into an administratively approved settlement. No party is deemed indispensable to an EPA enforcement action and the EPA does not allow interlocutory challenge to a section 106 order until after compliance or remediation.<sup>203</sup> Therefore, under the Court's new *Aviall* interpretive strictures, a PRP may not bring a section 113 action without an approved settlement or by establishing defendant liability through litigation by the EPA under CERCLA.

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could fashion CERCLA clean-up outside the normal contours of section 111); *see generally* *Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C.*, 382 F. Supp. 2d 1079, 1085 (N.D. Ill. 2005); *W.R. Grace & Co.-Conn.*, 2005 WL 1076117.

202. *Cadlerock Properties Joint Venture v. Schilberg*, No. 3:01CV895, 2005 WL 1683494, at \*6 (D. Conn. July 19, 2005).

203. Section 113(h) deprives the federal courts of jurisdiction over any action seeking to challenge a removal or remedial action decision made under section 104 (response authorities), or embodied in a section 106(a) order (abatement actions). Exceptions to this rule include: (1) in the context of a cost recovery, natural resource damages, or contribution actions that have been instituted pursuant to section 107(a) (liability provisions); (2) a section 106-based action to enforce an order or collect a penalty for violation of an order; (3) a section 106(b)(2) action against the government for reimbursement of voluntary clean-up expenditures; (4) a citizen suit brought under section 310 of CERCLA; or (5) a section 106 citizen action to compel remedial action. 42 U.S.C. § 9613(h) (2000). *See United States v. Princeton Gamma-Tech., Inc.*, 31 F.3d 138, 151–153 (3d Cir. 1994) (Nygaard, J., concurring) (arguing that, under the doctrine of sovereign immunity, Congress can limit suits against the EPA as it wishes). Such a position is consistent with those taken by the Seventh, Eighth, and Eleventh Circuits. *Id.* at 151. CERCLA section 106 provides authority for the EPA to act by administrative order instead of seeking judicial relief. Such orders appear to be sufficiently “final” actions to support an action brought by the recipient seeking judicial review. However, courts such as the one in *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986), have ruled that such orders are *not* reviewable except in defense of the EPA's enforcement suits.

### a. Federal Settlements

In August 2005, in response to the *Aviall* decision, the EPA revised its model administrative order on consent.<sup>204</sup> The new language stated that the AOC is designed to resolve liability to the federal government and protect the settlers' right to file contribution claims against other parties. The semantics are also altered: the title of future orders is changed from AOC to "administrative settlement and order on consent," and the word "settlement" is substituted for the term "order" in the text of the document.<sup>205</sup> These changes were enacted solely to gain traction under the new interpretations of CERCLA liability for cost allocation.

However, regardless of terminology, courts are still confronted with the fact that these orders/settlements are implemented pursuant to the EPA's authority under section 106 of CERCLA, which authorizes unilateral EPA orders and not settlements. Section 122 of CERCLA authorizes settlements.<sup>206</sup> It remains to be seen how courts will respond after twenty-five years of the EPA calling its unilaterally-issued administrative orders pursuant to section 106 "orders." The EPA is now relabeling these same documents "settlements," without invoking the separate settlement authority under CERCLA.

Responding to an agency Administrative Order on Consent (AOC) or a section 106 CERCLA unilateral order from the EPA may also not qualify to trigger section 113 contribution rights. There are critical legal distinctions between settlements and the unilateral EPA orders that are issued by the agency. If a private party is forced to take action to clean up a site pursuant to an EPA administrative order, section 113 is not invoked to empower subsequent cost contribution from other parties.

The Eastern District of Missouri reconsidered whether a consent decree can satisfy a settlement claim for contribution under section 113(f)(2).<sup>207</sup> Plaintiff Mallinckrodt filed a counterclaim against several companies alleging their liability for the contamination at an industrial park.<sup>208</sup> Mallinckrodt later engaged in a settlement with the other companies purporting to drop the suit if they helped pay a portion of the cleanup

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204. U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF JUSTICE, MEMORANDUM: INTERIM REVISIONS TO CERCLA REMOVAL, RI/FS AND RD AOC MODELS TO CLARIFY CONTRIBUTION RIGHTS AND PROTECTION UNDER SECTION 113(F) (2005), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

205. *Id.*

206. 42 U.S.C. § 9622 (2000).

207. *United States v. Mallinckrodt, Inc.*, No. 4:02CV01488, 2006 WL 3331220 (E.D. Mo. Nov. 15, 2006).

208. *Id.* at 2.

costs.<sup>209</sup> The court granted contribution protection for private party settlement agreements, holding that the statutory protection in section 113(f)(2) covers settlements between private parties.<sup>210</sup> The court thought that to disallow private party settlements would be against the public policy justifications of CERCLA, which encourage settlements.<sup>211</sup> However, this still is not a settlement with the EPA.<sup>212</sup>

Case law continues to emerge as to what prior state settlements qualify as an administratively approved settlement for purposes of section 113(f).<sup>213</sup> A remedial design/remedial action consent decree with the United States, or an AOC with the EPA for a remedial investigation/feasibility study, removal action, or reimbursement of response costs could give rise to a right of contribution pursuant to section 113(f)(3)(B).<sup>214</sup> Plaintiffs attempted to recover contribution for costs under section 113 by construing administrative orders as settlements.

District courts have differed as to whether an AOC under section 122 between the plaintiffs and the EPA constitutes a settlement for purposes of section 113(f)(3)(B). The two sections of the statute are distinct. In *Responsible Environmental Solutions Alliance v. Waste Management, Inc.*, the plaintiffs entered into an AOC, which did not use the word “settlement.”<sup>215</sup> Using the Oxford English Dictionary’s definition of “settle,”<sup>216</sup> the court concluded that the AOC was in fact a settlement agreement since it referenced the parties agreeing and the document referred to the AOC as an “agreement.”<sup>217</sup> Additionally, through the

209. *Id.* at 1.

210. *Id.*

211. *Id.* at 2.

212. *Id.*

213. The Supreme Court left open the possibility that administrative orders would qualify as “civil actions” for CERCLA contribution purposes. *See Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 168 n.5. (2004) (“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.”).

214. In order to clarify this issue, the EPA and the U.S. Department of Justice signed a settlement agreement. U.S. ENVTL. PROT. AGENCY & U.S. DEP’T OF JUSTICE, *supra* note 204, at 3, 5, 8. “The parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work.” *Id.*

215. *Responsible Env’tl. Solutions Alliance v. Waste Mgmt., Inc.*, 493 F. Supp. 2d 1017, 1023 (S.D. Ohio 2007).

216. The Oxford English Dictionary defines “settle” as to fix by “mutual agreement.” *Responsible Env’tl. Solutions Alliance*, 493 F. Supp. 2d at 1023 (citing OXFORD ENGLISH DICTIONARY 86 (2d ed. 1989)).

217. *Contra Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C.*, 382 F. Supp. 2d 1079, 1085 (S.D. Ill. 2005) The *Pharmacia* court held that the administrative order on consent was not an “administrative settlement” contemplated by section 113 of CERCLA for purposes of a subsequent contribution action. *Id.* The decision in *Pharmacia* significantly narrowed the ability of a PRP to bring

execution of the AOC, the plaintiffs had demonstrated that they had settled their liability with the EPA.<sup>218</sup>

Comparatively, the majority approach is articulated in *Emhart Industries, Inc. v. New England Container Co.*, where the court held that the “balance of decisional authority suggests that the type of administrative order to which *Emhart* is subject is not a ‘civil action’ within the meaning of § 113(f)(1).” Thus, *Emhart* was precluded from bringing a claim for contribution under section 113(f)(1).<sup>219</sup> In *ITT Industries, Inc. v. BorgWarner, Inc. (ITT Industries (I))*, the district court denied that the AOC at issue constituted a settlement because it was an interim agreement with the EPA that did not resolve the plaintiff’s liability and therefore did not fall within the description of the agreements in section 113(g)(3)(b).<sup>220</sup> On appeal, the Sixth Circuit found that the plaintiff’s administrative agreement with the EPA did not resolve the plaintiff’s CERCLA liability and thus did not confer contribution rights under section 113(f)(3)(B).<sup>221</sup>

The 2004 Supreme Court decision in *Aviall* did not address the issue of whether private parties cleaning contaminated sites pursuant to a Unilateral Administrative Order (UAO) have a right of contribution under section 113(f)(1). Case law has shown that a UAO can qualify as a civil action for purposes of a PRP’s contribution claim under CERCLA section 113(f)(1).<sup>222</sup> Using the reasoning of the Sixth Circuit’s former precedent in *Centerior*

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a contribution action pursuant to section 113(f)(1) by barring a PRP who has incurred clean-up costs pursuant to a section 106 administrative order from bringing a claim for contribution. *Id.*

218. *Responsible Envtl. Solutions Alliance*, 493 F. Supp. 2d at 1024. *Cf. Asarco, Inc. v. Union Pac. R.R. Co.*, No. CV 04–2144–SRB, 2006 WL 173662, at \*16 (D. Ariz. Jan. 24, 2006). In *Asarco*, the Nebraska Department of Environmental Quality expended nearly \$30 million to decontaminate the site, and sought contribution from defendant for its share of the cleanup costs, pursuant to section 113(f)(3)(B). *Id.* The court reasoned that the agreement did not constitute such a settlement, because it failed to resolve the plaintiff’s liability under either state law or CERCLA and therefore did not give rise to a right of contribution under section 113(f)(3)(B). *Id.*

219. *Emhart Indus., Inc. v. New England Container Co., Inc.*, 478 F. Supp. 2d 199, 203 (D.R.I. 2007). “[B]ecause there is no evidence to support the contention that the plain meaning of ‘civil action’ includes EPA-issued administrative orders, this court will follow the majority of courts in concluding that 113(f)(1) is unavailable for parties who are merely subject to administrative orders, as opposed to final consent decrees, judgments, or apportionments of liability. Count II will accordingly be dismissed.” *Id.*

220. *ITT Indus., Inc. v. BorgWarner, Inc.*, No. 1:05-CV-674, 2006 WL 2460793, at\*13 (W.D. Mich. Aug. 23, 2006) (stating that an AOC is not an administrative settlement for purposes of section 113(f)(3)(B)).

221. *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 460 (6th Cir. 2007); *see Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1142–43 (D. Kan. 2006) (holding that a section 106 administrative order does not qualify as a “civil action” and therefore does not authorize suit under section 113(f)(1)).

222. *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 840 (W.D. Tenn. 2006). A current owner of a facility from which there was a release of a hazardous substance brought action against former facility owner and current operator to recover past and future response costs, damages, and other relief. *Id.*

*Service Co. v. ACME Scrap Iron & Metal Corp.*, a Tennessee district court found that the UAO the plaintiff was issued under CERCLA's section 106 qualified as a "civil action" because it satisfied the requirement in section 113(f)(1).<sup>223</sup> The common law of contribution, which required only "that plaintiff act under some compulsion or legal obligation to an injured party," was codified in the savings clause in CERCLA section 113(f)(1). Thus, contribution under section 113(f)(1) was held to apply in claims where a potentially responsible party has been compelled to pay for response costs for which others are also liable, and who seeks reimbursement for such costs.

#### b. State Settlements

Shifting from federal to state enforcement, settlements with a state agency will not necessarily trigger access to CERCLA section 113 to allow a private contribution action by the settling private party against other recalcitrant and non-cooperating liable parties. In fact, the great bulk of hazardous substance site remediation is driven by the enforcement efforts of state environmental agencies rather than the federal EPA. The states conduct ninety percent of all enforcement actions and ninety-seven percent of the inspections at regulated facilities, while the remainder are performed by the federal EPA.<sup>224</sup> The states operate under their own state statutory authority.

CERCLA section 113(f) does not define or limit what is an administratively approved settlement. Moreover, the Court's language contemplates recourse to a section 113 contribution action "after an administratively or judicially approved settlement that resolves liability to the United States or a State."<sup>225</sup> In contrast, it might appear that an approved settlement with a state environmental agency is an equally valid portal to enable a subsequent section 113 federal CERCLA contribution action by a private party to recover costs of cleanup.

However, it is not so straightforward. First, many state environmental agencies do not have memoranda of understanding with the federal EPA to allow the state to make settlements discharging or resolving any federal claims.<sup>226</sup> Second, the state only has rights under CERCLA or state law to

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223. *See* *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 351–52 (6th Cir. 1998) (stating that an administrative order under section 106 satisfies the requirement that a plaintiff be under a legal obligation to pay costs before bringing an action under section 107(a)).

224. Dean Scott, *State Officials Urge Funding Shift to Restore Fiscal Year 2007 Grants*, 37 ENV'T. REP. (BNA) 400, 401 (2006).

225. 42 U.S.C. § 9613 (2006).

226. *Id.* § 9622.

recover its own specifically incurred site response and cleanup costs, which by definition do not include any federal incurred response costs or rights. Therefore, the state settlement can not qualify as a settlement under CERCLA.

For example, the state of New York proactively pronounced that all of its past hazardous substance settlements satisfied the requirements of section 113(f)(3) of CERCLA.<sup>227</sup> A federal judge subsequently thought to the contrary, ruling that settlements by consent with the New York state environmental agency only resolved liability as against the state and not potential federal CERCLA claims, and therefore that a settling party was not entitled to utilize federal section 113 contribution actions under the *Aviall* precedent.<sup>228</sup> The court held that a right of contribution under state law cannot flow from the federal CERCLA statute.<sup>229</sup> Regardless of the defendant's liability, the court found that plaintiff was precluded from shifting liability to that defendant under section 113.

Section 113(f)(3)(B) permits a contribution action to be brought by a party 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."<sup>230</sup> Courts have consistently stated that a PRP must resolve its liability to the state before bringing a section 113(f)(3) contribution action. In *BASF Catalysts L.L.C. v. United States*, the Massachusetts district court continued to interpret section 113 strictly.<sup>231</sup> The court held that a consent order entered by a contractor with the EPA did not resolve its liability for purposes of CERCLA's contribution provision, especially since the consent order stated that the parties agreed to resolve liability to the state for purposes of

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227. Memorandum of Law of the State of New York As Amicus Curiae in Opposition to Defendants' Motion to Dismiss, *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 427 F.2d 279 (W.D. N.Y. 2006). The New York Attorney General filed an amicus brief representing the New York State Department of Environmental Conservation opposing defendant's motion to dismiss, arguing that CERCLA constitutes the very basis of New York's settlement authority, and all settlements are meant to satisfy section 113(f) requirements. *Id.* The Attorney General cited the opinion in *Pfohl Bros. Landfill Site v. Allied Waste Sys.*, 255 F. Supp. 2d 134 (W.D. N.Y. 2003), which, before the *Aviall* decision, held that orders of consent in New York qualified as approved settlements under section 113(f)(3) of CERCLA. *Id.* The Attorney General argued that the court should distinguish the *Pharmacia* decision because that involved a section 106 EPA order rather than a settlement with a state environmental agency. *Id.*

228. *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 WL 1076117, at \*12 (W.D. N.Y. May 3, 2005).

229. *Id.*

230. § 9613(f)(3)(B).

231. *BASF Catalysts L.L.C. v. United States*, 479 F. Supp. 2d 214, 220 (D. Mass. 2007); see *City of Waukesha v. Viacom Int'l*, 362 F. Supp. 2d 1025, 1027 (E.D. Wis. 2005) (holding that the PRP must resolve its liabilities before it may bring a section 113(f)(3) contribution action).

CERCLA. A contractor with unresolved liability is not allowed contribution.<sup>232</sup>

The Second Circuit found that state consent orders, including those of state agencies, qualify as contribution-conferring agreements for purposes of CERCLA section 113(f)(3)(B).<sup>233</sup> A consent order between an owner of a landfill site and the New York State Department of Environmental Conservation (DEC) amounted to an “administrative settlement,” and, thus the owner could seek to recover from the PRP some of the costs that it incurred in cleaning up contamination at the site. This is possible because section 113(f)(3) allows a party to resolve its liability for part or all of a response action or costs thereof through an administrative settlement. The consent orders expressly stated that the parties agreed that the plaintiff had resolved its liability to the state for purposes of CERCLA.<sup>234</sup>

Other district courts have found that a settlement with a state agency that did not resolve CERCLA liability is not a basis for a CERCLA contribution claim.<sup>235</sup> Plaintiffs have to also absolve liability with the EPA.<sup>236</sup> A settlement with the state that contains unfulfilled conditions is insufficient to trigger section 113(f)(3)(b).<sup>237</sup>

232. *See, e.g., Waukesha*, 362 F. Supp. 2d at 1027 (“If the unsigned administrative settlement agreement demonstrates anything, it demonstrates that the City has not yet resolved its CERCLA liability to the State.”); *see also Vine St., L.L.C. v. Keeling*, 362 F. Supp. 2d 754, 761 (E.D. Tex. 2005) (holding that a settlement with the Texas environmental agency did not constitute an administratively approved settlement for purposes of also having CERCLA liability).

233. *Seneca Meadows, Inc., v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279 (W.D. N.Y. 2006); *see City Of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70 (1st Cir. 2008) (approving a consent decree that allocated certain responsibilities among the City of Bangor, Maine and Citizens Communications Company, and holding that non-settling defendants have standing to object to a partial settlement that purports to strip it of a legal claim or cause of action); *see also Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1042, 1043 n.8 (E.D. Wis. 2008) (noting that the clean-up costs incurred pursuant to a consent decree were not incurred voluntarily, as payments made under government duress are definitely not voluntary).

234. *Seneca*, 427 F. Supp. 2d at 286. The *Seneca* court referred to one commentator’s statement that “until Congress directly addresses this issue [of when a private party can assert a contribution claim under CERCLA in a purely private party cost recovery action] through an amendment to CERCLA, or the Supreme Court resolves the issues that it left open in *Cooper Industries* . . . practitioners prosecuting private party cost recovery actions would be wise to enhance the viability of contribution claims by making sure that settlements with the EPA or a state clearly reference that CERCLA liability is being resolved.” *Id.* at 290 n.9 (quoting Robert C. Goodman, *CERCLA Contribution Actions After Cooper/Aviall*, 19 CAL. ENVTL. INSIDER 3, 4 (2005)).

235. *See, e.g., Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 402 (N.D. N.Y. 2006) (“However, resolution of liability for state law claims does not meet the statutory prerequisite. Rather, to bring a § 9613(f)(3)(B) claim, CERCLA liability must have been resolved.”) (citation omitted); *Asarco, Inc. v. Union Pac. R.R. Co.*, No. 04-2144-PHX-SRB, 2006 WL 173662, at \*7 (D.Ariz. Jan. 24, 2006) (“Just as to receive CERCLA contribution protection, one must comply with CERCLA settlement procedures and resolve CERCLA liability, to initiate a CERCLA contribution action, one must do the same.”).

236. *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 90–91 (2d Cir. 2009) (holding that the plaintiff could not seek contribution under section 113(f)(3)(B) because, although it had

After *Aviall*, plaintiffs in the Fifth Circuit claimed that by participating in a Voluntary Cleanup Agreement (VCP) they had resolved *some* or *all* of their liability to the State of Texas and the United States and had a claim for contribution under section 113(f)(3)(B). The plaintiffs also asserted that since the EPA could not enforce CERCLA claims against a party while that party is participating in a voluntary state cleanup agreement, the VCP resolved at least part of plaintiff's liability to the federal government.<sup>238</sup> The court held that a VCP was not a settlement and should not create a contribution right under section 113.<sup>239</sup> Quoting *Consolidated Edison*, the court held that "the only liability that might some day be resolved under the Voluntary Cleanup Agreement is liability for state law—not CERCLA-claims."<sup>240</sup> The VCP was an agreement for eventual resolution, but at the time it did not resolve any claims.

Plaintiffs have successfully circumvented *Aviall* restrictions on the use of section 113 by plaintiffs by asserting that state consent decrees entitle them to section 113 contribution. In *Booth Oil Site Administrative Group v. Safety-Kleen Corp.*, the plaintiff sought contribution from other PRPs for costs incurred pursuant to a consent order with the New York environmental protection agency, since the plaintiff had resolved its proportionate share of liability.<sup>241</sup> Applying the analysis of *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*,<sup>242</sup> the court concluded that consent decrees issued

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resolved all liability with the state, it had not resolved all liability with the EPA); see *Niagara Mohawk*, 436 F. Supp. 2d at 402 ("A state has no CERCLA authority absent specific agreement with the federal Environmental Protection Agency."); see also *Asarco, Inc.*, 2006 WL 173662, at \*7 ("The question is whether a settlement lacking EPA authorization can serve as a basis for a CERCLA contribution claim under section 113(f)(3)(b). The court believes that it cannot.") (emphasis in original).

237. The district court for the district of New Jersey held that outstanding conditions in the AOC prevented Ford from recovering contribution. The AOC stated that its terms were subject to any required public process. Despite language in the AOC that was intended to fully absolve Ford of liability, the defendant presented evidence that the defendant opposed the consent order during the public comment period and therefore the order lacked finality. See *Asarco, Inc.*, 2006 WL 173662, at \*16 (holding that an agreement with a state that fails to resolve a plaintiff's liabilities to that state does not allow that plaintiff to maintain a section 113(f)(3)(B) action).

238. *Differential Development-1994, Ltd. v. Harkrider Distributing Co.*, 470 F. Supp. 2d 727, 741 (S.D. Tex. 2007).

239. *Id.* at 743.

240. *Id.* at 740 (quoting *Consol. Edison Co. of New York v. UGI Util. Inc.*, 423 F.3d 90, 96 (2d Cir. 2005)). The plaintiff entered VCP with the state agency and sought contribution under section 113(f)(3)(B), asserting that its voluntary cleanup agreement with the state environmental agency was an "administrative settlement" of CERCLA liability. *Id.* The court dismissed on the ground that the agreement with the state agency only resolved state-law claims and did not resolve federal or state CERCLA claims. *Id.*

241. *Booth Oil Site Admin. Group v. Safety-Kleen Corp.*, 532 F. Supp. 2d 477, 502 (W.D. N.Y. 2007).

242. See *Seneca Meadows, Inc. v. EIC Liquidating, Inc.*, 427 F. Supp. 2d 279 (W.D. N.Y. 2006) (concerning a consent order between an owner of landfill site and the New York State Department of

pursuant to a New York state statute allowed the plaintiff to pursue a contribution claim since the order purported to resolve the plaintiff's CERCLA liability to the EPA.<sup>243</sup>

Sometimes, there is even less of a settlement: state agencies can typically issue letters informing private PRPs that they are taking no further action at a remediation site rather than enter a formal settlement when they are not further pursuing an enforcement action against a responsible party at a site. Such a letter does not rise to the level of an administratively or judicially approved settlement post-*Aviall*.<sup>244</sup> Such a letter of no further action does not invoke the contribution protection for settling parties under section 113(f), nor does it trigger the ability to utilize section 113 for a private-party federal contribution action after *Aviall*. Some courts also found that a failure to reference CERCLA prevents such a state settlement from qualifying as the type of settlement that allows a federal section 113 contribution action post-*Aviall*.<sup>245</sup>

### B. Summary

The jurisprudence is very mixed on the details of what does and does not work legally after the Supreme Court set the record straight on section 113. Some courts have been concerned that the plaintiffs would not be able to recover under any other theory, so in the interest of justice, they have expressly stated they will reconsider section 113 cases, while others have not countenanced voluntary cleanup agreements. Because the *Aviall* decision did not define the specifications of eligible settlements, the jurisprudence is split on whether AOCs constitute an eligible settlement for purposes of allowing use of section 113 contribution actions. However, the majority holding is that an AOC does not qualify, as it is not the result of a

Environmental Conservation that expressly stated that the parties agreed that plaintiff had resolved its liability to the state for purposes of CERCLA).

243. *Booth Oil*, 532 F. Supp. 2d at 502 (“The Order on Consent states that it is issued pursuant to the NYSDEC’s ‘authority under [New York’s Environmental Conservation Law], Article 27, Title 13 and ECL 3–0301 . . . or pursuant to CERCLA, 42 U.S.C. § 9604.’”).

244. Some of the precedent interpreting what is an administratively approved settlement looks to the requirements of section 122 of CERCLA, 42 U.S.C. § 9622 (2006), which sanctions settlements of the agencies. *See United States v. Cannons Eng’g Corp.*, 899 F.2d 79 (1st Cir. 1990) (discussing agency discretion in settlements); *United States v. Serafina*, 781 F. Supp. 336, 338–39 (M.D. Pa. 1991) (discussing the right to settle); *Gen. Time Corp. v. Bulk Materials, Inc.*, 826 F. Supp. 471, 474–78 (M.D. Ga. 1993) (reviewing the requirements for a judicially approved settlement).

245. *See City of Waukesha v. Viacom Int’l Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2005) (“[R]esolving liability with respect to non-CERCLA claims . . . does not create a CERCLA contribution right under section 113(f)(3)(B).”); *see also W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, No. 98-CV-838S(F), 2005 WL 1076117, at \*7 (W.D. N.Y. May 3, 2005) (stating that where a state may settle with a PRP on its own authority, such a settlement may open the PRP to additional EPA liability).

“civil action.” Some courts have also required that liability is resolved with a state before commencing a contribution action, although the precedents are also split here on what qualifies and whether a state settlement can substitute for resolving liability with federal agencies.

## V. RESPONDING TO THE 2007 UNANIMOUS *ATLANTIC RESEARCH* REVERSAL OF SECTION 107 PRECEDENT

When the Supreme Court reverses the dominant legal interpretations, especially when those reversed decisions are embodied in the case precedent of virtually every federal circuit in the country, one expects a significant conforming reaction immediately thereafter across the courts. In 2004, the Court had also decided the *Aviall* decision, so there would soon become two iterations of CERCLA liability reversals by the Supreme Court. The section above analyzed what the agencies, parties, and courts did in response to the 2004 Supreme Court decision in *Aviall* regarding section 113 being closed off. Next, the U.S. Supreme Court opened a new door of section 107 cost recovery in 2007 in its *Atlantic Research* decision.

I examine here the subsequent lower federal court decisions that chart the new CERCLA liability landscape in this brave new world of hazardous substance. As of late 2009, for such a hotly contested matter involving thousands of sites nationwide, there is less movement than one might expect more than two years after the Supreme Court told all of the Circuits that their opinions were misinterpreting the plain meaning of one of the major financial allocation statutes in the country. I examine each circuit’s conformance, starting with the First Circuit.

### A. First Circuit

The First Circuit is a jurisdiction where no movement is yet obvious. The First Circuit’s 1994 precedent on section 107 liability and relief has not been overruled. In *United Technologies Corp. v. Browning Ferris Industries, Inc.*, a PRP entered into a consent decree under which it agreed to clean up a contaminated site in accordance with the remedial action requested by the EPA.<sup>246</sup> After spending thirteen million dollars to clean up a toxic spill, the plaintiff sought recovery of monies from the defendants to pay back the state and the EPA.<sup>247</sup> The court determined that the UTC action was for contribution under section 113, and that it should therefore

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246. *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994).

247. *Id.* at 97.

constrain the claim to section 113's three-year contribution statute of limitations and not the six-year statute of limitation pursuant to section 107.<sup>248</sup>

Some lower federal courts in the First Circuit have shown movement. In light of the 2007 *Atlantic Research* decision, the federal district court of Rhode Island found an implied right to contribution under section 107 even though contribution technically is contained only in section 113.<sup>249</sup> Emhart Industries Inc. brought claims under both CERCLA section 113 and section 107(a), alleging that New England Container Co. (NECC) had stopped complying with CERCLA section 106 unilateral administrative orders, which mandated that both Emhart and NECC perform removal actions at a site in Rhode Island.<sup>250</sup> The district court held that the section 106 administrative orders were not a "civil action" under section 113(f)(1) of CERCLA, and thus Emhart could sue NECC for contribution under that section.<sup>251</sup> The court also found that Emhart, as a non-"innocent" PRP, could not use section 107(a) for a direct cost recovery action against NECC.<sup>252</sup> Note, though, that this decision occurred just months before the decision in *Atlantic Research* put the section 107 issue in a new corrected interpretative posture.

However, largely because Emhart would otherwise be precluded from recovering its equitable share of costs from NECC, the court found that section 107(a) granted PRPs an "implied right to contribution."<sup>253</sup> Therefore, it was consistent with the eventual resolution of *Atlantic Research*, but sequentially before its time. Emhart was permitted to proceed under CERCLA section 107 to recover a portion of its costs from NECC. Thus, consistent with *Atlantic Research*, the court ruled that a PRP may bring an action against another PRP under section 107(a) of CERCLA.

### B. *Second Circuit*

The Second Circuit was in an opposite mode and extremely active: after both of the 2004 and 2007 Supreme Court decisions, *W.R. Grace & Co. v. Zotos International, Inc.* overruled the Second Circuit's prior holding in

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248. *Id.* at 103.

249. *Emhart Indus., Inc. v. New England Container Co., Inc.*, 478 F. Supp. 2d 199, 204 (D.R.I. 2007).

250. *Id.* at 202.

251. *Id.* at 203.

252. *Id.* at 202.

253. *Id.* at 204.

light of, and consistent with, the Supreme Court's opinions.<sup>254</sup> Although only in dicta, *Zotos* not only embraced *Atlantic Research's* holding that a private PRP may assert a claim under section 107, it also went further to answer some questions left open by the 2007 Supreme Court decision. *Zotos* held that a PRP who had voluntarily entered into an administrative consent order prior to remediation can assert a claim under CERCLA section 107(a).<sup>255</sup> The plaintiff, Grace, voluntarily entered into an administrative order on consent (AOC) with the New York state environmental agency. According to the AOC, Grace would reimburse the agency for some of the response costs already spent and would conduct RI/FS and remediation activities. The court applied both *Atlantic Research* and *Aviwall* to hold that a private party that had not yet been sued by the state or federal agency, but that had merely "voluntarily" entered into a cooperative agreement with either of those entities and as a result incurred response and remediation costs, could seek recovery of response and remediation costs under section 107(a)(4).<sup>256</sup>

The *Atlantic Research* decision employs the term "voluntary," but it does not define the term. The Second Circuit tried to define section 107's "voluntary" cleanup by differentiating voluntary cleanup actions from involuntary consent decrees. In *Niagara Mohawk Power Corp. v. Consolidated Rail Corp.*, the plaintiff entered into two consent decrees with the state that did not give it the ability to bring a section 113 contribution action.<sup>257</sup> Since the plaintiff had entered into two consent orders, it could not be deemed a "volunteer" who was entitled to seek recovery under section 107.<sup>258</sup> The court held that nothing in *Atlantic Research* provides authority to change the Circuit's previous decisions, in which it ruled that a party that has incurred expenditures under a consent order with a government agency and was found partially liable under § 113(f)(1) could not seek to recoup those expenditures under section 107(a).<sup>259</sup>

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254. *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009). The Second Circuit's former precedent, *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998), limited recoveries by PRPs to actions brought under section 113(f) and held that a PRP is limited to a section 113 claim for contribution. *Bedford Affiliates* points out that section 113(f)(1) "apportions liability based on equitable considerations and has a three-year statute of limitations," whereas "section 107(a) has a six-year statute of limitations." *Id.* Thus, the Second Circuit reasoned, if a PRP could choose, section 113(f)(1) would become a nullity, as "[a] recovering liable party would readily abandon a § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a)." *Id.*

255. *W.R. Grace & Co.-Conn.*, 559 F.3d at 93.

256. *Id.*

257. *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 401 (N.D. N.Y. 2006).

258. *Id.* at 403.

259. *Id.*

During the 2004–2007 interim between the two Supreme Court opinions, and thus before section 107 was reopened, the Second Circuit held that section 107 was available for private parties to recoup cleanup costs where cleanup had occurred “voluntarily, not under a court or administrative order or judgment.”<sup>260</sup> Additionally, the Court of Appeals considered in this interim period whether liable parties have a cause of action under section 107, holding that they might, pursuant to case-by-case consideration on a fact-by-fact basis.<sup>261</sup> According to the Second Circuit, section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but would be held liable under section 107(a) if sued, to recover necessary response costs incurred voluntarily rather than under a court or administrative order or judgment.<sup>262</sup> Therefore, this did not open the section 107 door as widely as the Supreme Court would correctively later do in *Atlantic Research*.

After this second 2007 Supreme Court decision, the Second Circuit found in 2008 that *future* CERCLA response costs are not covered under section 107. In *New York v. Next Millennium Realty, L.L.C.*, the defendant based its section 107 claim on remediation costs it already incurred coupled with the future costs anticipated under section 107(a). However, the defendant did not demonstrate that it incurred these necessary costs of response within the meaning of section 107(a).<sup>263</sup> The court found that a section 107(a) action is viable where a party itself incurred cleanup response costs as opposed to reimbursing costs paid by other parties, which are more appropriately covered under section 113(f).<sup>264</sup>

Contrary to this decision, at about the same time a different panel of the Second Circuit held that section 107 is available not just for “volunteers” but also for parties that have conducted a cleanup pursuant to a consent decree entered with the government.<sup>265</sup> The court held, however, that a party conducting a cleanup pursuant to a consent decree must have conducted at least some cleanup activities prior to entering into the consent decree.

After both Supreme Court opinions, a district court within the Second Circuit, in *Champion Laboratories v. Metex Corp.*, amended its decision in light of the *Atlantic Research* opinion and reinstated Champion’s section

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260. *Consol. Edison Co. of N.Y. v. UGI Util. Inc.*, 423 F.3d 90, 100 (2d Cir. 2005).

261. *Id.*

262. *Id.*

263. *New York v. Next Millennium Realty, L.L.C.*, No. CV-03-5985(SJF)(MLO), 2008 WL 1958002, at \*7 (E.D. N.Y. May 2, 2008).

264. *Id.* at \*6.

265. *Schaefer v. Town of Victor*, 457 F.3d 188, 201–02 (2d Cir. 2006).

107 claim against Metex for contamination at the Champion site.<sup>266</sup> Following both Supreme Court decisions in another district court case within the Circuit, *New York v. Solvent Chemical Co.*, the defendant sustained expenses pursuant to a consent decree following suit under section 107(a) but did not incur costs voluntarily or reimburse the costs of another party.<sup>267</sup> The court allowed the defendant to assert section 107 claims relating to response costs incurred following the consent decree. The court ruled that Solvent Chemical Company had a cause of action for cost recovery against the defendant under section 107, since it directly incurred response costs in performing remedial activities: “regardless of what section of CERCLA is involved, it will make every effort to fairly and equitably apportion liability.”<sup>268</sup>

In a final district court opinion within the Circuit, a non-settling defendant can be a PRP under CERCLA if it is a successor to a company that disposed of waste at the landfill. In *United States v. Kramer*, an extensively litigated case, settling defendants at the Helen Kramer landfill in New Jersey were entitled to contribution for cleanup costs from a non-settling defendant, Alumax, a successor entity to the company that had arraigned for the disposal of waste materials at the landfill.<sup>269</sup> The successor was also responsible for the release of hazardous substances at the facility.<sup>270</sup>

The Second Circuit, and federal district courts within the Circuit, have implemented the recent Supreme Court CERCLA opinions and proceeded further to flexibly interpret many of the open issues still pending after these decisions.

### C. Third Circuit

The Third Circuit has also responded to the Supreme Court holdings. In *E.I. du Pont de Nemours and Co. v. United States*,<sup>271</sup> the court vacated its prior holding in light of the Supreme Court’s decision in *Atlantic*

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266. *Champion Labs. v. Metex Corp.*, Civ. No. 02-5284 (WHW), 2008 WL 1808309, at \*4 (D.N.J. Apr. 21, 2008).

267. *New York v. Solvent Chem. Co.*, No. 83-CV-1401C, 2008 WL 3211273, at \*4 (W.D. N.Y. Aug. 6, 2008).

268. *Id.* at \*6.

269. *United States v. Kramer*, No. 89-4340(JBS), 2008 WL 5046846, at \*6 (D.N.J. Nov. 19, 2008).

270. *Id.* at \*7.

271. *E.I. du Pont de Nemours & Co. v. United States*, 508 F.3d 126, 135 (3d Cir. 2007).

*Research*.<sup>272</sup> Du Pont admitted that it contaminated its industrial facilities throughout the U.S. with hazardous substances but alleged that the U.S. also contaminated parts of the sites. After du Pont voluntarily cleaned up a site jointly polluted by both parties, du Pont filed suit under CERCLA seeking an order requiring the government to reimburse it for a share of the cleanup costs. The Third Circuit differentiated between “those who voluntarily admitted their responsibility” and those who have “in fact been held responsible (via adjudication or settlement with the EPA)” under section 107(f).<sup>273</sup> According to this decision, a PRP who communicates with a regulatory agency concerning site cleanup does not make a PRP that admits liability and accepts responsibility any less a volunteer under CERCLA.

A federal district court within the Third Circuit has since addressed the issues of “voluntary” action and joint and several liability left unresolved in *Atlantic Research*.<sup>274</sup> In *Reichhold, Inc. v. U.S. Metals Refining Co.*, the plaintiff brought suit to recover costs from other liable defendants for the cleanup of hazardous waste on its copper refinery in New Jersey.<sup>275</sup> In determining joint and several liability, the court applied the Restatement (Second) of Torts, section 433(A), wherein liability is joint and several unless defendant can prove divisibility.<sup>276</sup> Pursuant to the Restatement, the New Jersey Court construed “voluntary” as having responded to no litigation or order on the record, but it recognized the element of coercion by concluding that any other interpretation of “voluntary” would leave such plaintiffs with no remedy.

Updating the prior holding in another case in the Third Circuit, another federal district court held that the decade-earlier decision in *New Castle County v. Halliburton NUS Corp.*,<sup>277</sup> which held that PRPs may not bring a recovery action under section 107, no longer applied to state or federal entities even when they are PRPs.<sup>278</sup>

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272. See *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 544–45 (3d Cir. 2006) (holding that section 113 provided the sole means for potentially responsible persons to obtain contribution for clean-up costs). In their earlier opinion, the Third Circuit held that du Pont could not pursue an action under CERCLA to recover from the United States a portion of its cleanup costs.

273. *Id.* at 546.

274. *Reichhold, Inc. v. U.S. Metals Refining Co.*, Civ. No. 03–453 (DRD), 2008 WL 5046780, at \*6 (D.N.J. Nov. 20, 2008).

275. *Id.* at \*1.

276. *Id.* at \*7.

277. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 (3d Cir. 1997).

278. *United States v. Simon Wrecking, Inc.*, 481 F. Supp. 2d 363 (E.D. Pa. 2007).

#### D. Fourth Circuit

The Fourth Circuit has not altered its precedent. Its early decision in *Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad* barring use of section 107 remains undisturbed law.<sup>279</sup> In 2008, a district court recognized the recent holding of *Atlantic Research* in its decision in *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*<sup>280</sup> The affected site changed owners many times and Ashley II, the present owner, filed a claim against one of the previous owners claiming it was a PRP for the release of hazardous substances. The court denied the defendant's cost recovery claim under section 107 because it was not a voluntary PRP and had only reimbursed other parties' remediation costs and had not incurred any of its own cleanup costs.<sup>281</sup>

#### E. Fifth Circuit

Similarly, the Fifth Circuit precedent prohibiting the use of section 107 has not been overruled.<sup>282</sup> In the interim, between the two 2004 and 2007 Supreme Court decisions, a federal district court held that a PRP could bring CERCLA section 107 cost-recovery claims for voluntary cleanup costs in *Vine Street L.L.C. v. Keeling*.<sup>283</sup> The court held "that a potentially responsible party that voluntarily works with a government agency to remedy environmentally contaminated property should not have to wait to be sued to recover cleanup costs since Section 113(f)(1) is not meant to be the only way to recover cleanup costs."<sup>284</sup> The *Vine Street* Court reached this decision by reasoning that a party not sued by an environmental regulator was indeed "innocent" and should be entitled to the benefits of a section 107 cost recovery action.<sup>285</sup>

The federal districts were not all in accord. The Southern District of Texas mirrored the Texas Northern District's post-2004 Supreme Court decision on remand in *Aviall v. Cooper Industries*,<sup>286</sup> holding that section 107(a) does not give a PRP a statutory right to bring a cost recovery action

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279. *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769 (4th Cir. 1998).

280. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, No. 2:05-2782-CWH, 2008 WL 2462862 (D.S.C. June 13, 2008).

281. *Id.* at \*6.

282. *OHM Remediation Serv. v. Evans Cooperage Co.*, 116 F.3d 1574, 1583 (5th Cir. 1997).

283. *Vine Street L.L.C. v. Keeling*, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005).

284. *Id.* at 763.

285. *Id.* at 762.

286. *Aviall Servs. v. Cooper Indus.*, No. 3:97-CV-1926-D, 2006 WL 2263305, at \*10 (N.D. Tex. Aug. 8, 2006).

against other PRPs.<sup>287</sup> Following *Aviall*, the Southern District of Texas determined that the legislative intent behind section 113 was to have a separate contribution remedy, subject to its own specific conditions and limitations distinct from section 107(a).<sup>288</sup> This was not immediately expressly stricken, notwithstanding the 2007 Supreme Court decision in *Atlantic Research*.

### F. Sixth Circuit

*Atlantic Research* partially overruled the Sixth Circuit's section 107 impediment precedent in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*<sup>289</sup> After both Supreme Court decisions, there were more lower court decisions in this Circuit. In *Moraine Properties, L.L.C. v. Ethyl Corp.*, following *ITT Industries, Inc. v. BorgWarner, Inc.*,<sup>290</sup> the court held that "§ 107(a) [was] the appropriate vehicle for a party that, as an assignee, 'stands in the shoes' of the true plaintiff."<sup>291</sup>

The Sixth Circuit struggled with whether a PRP who was required to incur costs pursuant to a consent decree may bring a section 107(a) cost recovery action.<sup>292</sup> Prior to *Atlantic Research*, the Sixth Circuit held that these PRPs were not entitled to bring a section 107(a) cost recovery action.

287. *Differential Dev.-1994 Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 753 (S.D. Tex. 2007).

288. *Id.*

289. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998), *abrogated by* *United States v. Atl. Research Corp.*, 551 U.S. 128, 144 (2007) (holding that section 107(a) provides a potentially responsible party with a cause of action to recover costs).

290. *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 454–55, 458 (6th Cir. 2007).

291. *Moraine Properties, L.L.C. v. Ethyl Corp.*, No. 3:07-cv-229, 2008 WL 4758692, at \*4 (S.D. Ohio Oct. 27, 2008).

292. *BorgWarner*, 506 F.3d at 455. A successor corporation to a previous owner and operator at a superfund site brought a CERCLA claim seeking recovery of response costs and contribution from other PRPs after it incurred expenses in investigating and addressing hazardous conditions on two sites regulated by the EPA. This PRP sustained expenses pursuant to a consent decree following a suit under section 106 section 107(a). Therefore, in this case the PRP did not incur costs voluntarily and did not reimburse the costs of another party. In *BorgWarner*, the Sixth Circuit affirmed a PRP's right to pursue cost recovery but rejected ITT's right to bring a contribution action under section 113(f). *Id.* at 457–61. *BorgWarner* concerned two different operable units of the North Bronson Industrial Area Superfund Site, which the EPA placed on the National Priorities List after finding trichloroethylene contamination at the site. The contamination stemmed from the manufacturing of fishing reels. As a corporate successor to the fishing reel manufacturer, the EPA named ITT Industries a PRP, and ITT sought to recover cleanup costs from others that had previously owned or operated the sites when hazardous substances were deposited on the property. *Id.* at 455. ITT entered into an AOC and agreed to undertake a remedial investigation and feasibility study (RI/FS) for one of the operable units, which cost approximately \$2 million. The Michigan Department of Environmental Quality (MDEQ) supervised cleanup of the other operable unit. ITT and several other parties entered into a consent decree with MDEQ to perform the cleanup, incurring \$1.6 million in costs pursuant. The Sixth Circuit reversed the district court's dismissal of ITT's section 107(a) cost recovery claim and remanded that action to the district court for further consideration in light of the *Atlantic Research* decision. *Id.* at 458.

In *BorgWarner*, however, the Sixth Circuit reversed the district court's dismissal of the plaintiff's section 107(a) cost recovery claim and remanded that action to the district court for further consideration in light of the *Atlantic Research* decision.<sup>293</sup> In 2009, the district court held that the party was an involuntary plaintiff because it was required to incur cleanup costs at one site pursuant to a consent decree and therefore could not bring a cost recovery claim with respect to that site.<sup>294</sup>

### G. Seventh Circuit

*Atlantic Research* distinguished the Seventh Circuit precedent in *Akzo Coatings, Inc. v. Aigner Corp.*<sup>295</sup> The Seventh Circuit relaxed its "innocent parties" requirement by allowing section 107 to apply to PRPs who have voluntarily initiated cleanup without having been subject to any kind of EPA administrative order.<sup>296</sup> In *Metropolitan Water*, the plaintiff-landowner sought recovery of costs for voluntarily cleaning up hazardous waste substances released by a tenant.<sup>297</sup> The court, following *Aviall*, held that the plaintiff could not bring a claim under section 113 because it had not been sued by the government and, as a landowner, the plaintiff was not an innocent third-party free to bring a claim under section 107.<sup>298</sup> The court held that a PRP could sue under section 107(a) where that PRP neither settled any liability with the government, nor had been subject to a CERCLA suit, and had also not been the subject of an EPA administrative order under section 106.<sup>299</sup>

Despite the *Atlantic Research* Court's use of the terms "voluntary" and "involuntary" to distinguish between costs recoverable under section 107(a) and those recoverable under section 113(f), at least one lower federal district court adheres to the principle that section 107(a) is available to

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293. *Id.* at 458.

294. *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646–48 (W.D. Mich. 2009). On remand, the Western District of Michigan held that the plaintiff, who was required to pay clean-up costs at one site pursuant to consent decree, could not bring a cost recovery claim for that site. *Id.* at 646.

295. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 770 (7th Cir. 1994). The court unilaterally converted the section 107 claim against the plaintiff's pleadings and upheld the district court's holding that the plaintiff was actually seeking contribution under section 113(f)(1), and not cost recovery under section 107(a).

296. *See Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824, 836 (7th Cir. 2007) (allowing a PRP to sue under section 107(a) where that plaintiff-PRP neither settled any liability with the government, nor had been subject to a CERCLA suit, and had also not been the subject of an EPA administrative order under section 106).

297. *Id.* at 825.

298. *Id.* at 829.

299. *Id.* at 836.

recover payments only in cases where section 113(f) is not.<sup>300</sup> In *Appleton Papers Inc. v. George A. Whiting Paper Co.*, the court held that the cleanup costs incurred pursuant to a consent decree were not incurred voluntarily; the court noted that payments made under government duress are definitely not voluntary.

### H. Eighth Circuit

The Supreme Court's *Atlantic Research* decision affirmed a 2006 post-*Aviall* opinion of the Eighth Circuit<sup>301</sup> and opened up private PRP access to section 107 cost recovery.<sup>302</sup> A district court within the Eighth Circuit changed its holding after this Supreme Court decision. On reconsideration, the Eastern District of Missouri held that a state AOC can form the basis of a contribution claim. In *Westinghouse Electric Co. v. United States*, the Missouri court considered whether a state consent decree lacking an express EPA delegation of authority to the state could be a judicially approved CERCLA settlement triggering a section 113(f) claim.<sup>303</sup> It held that a section 107(a)(4)(a) response cost claim does not need a section 104 authorization from the state in order for the state to recover.<sup>304</sup>

### I. Ninth Circuit

The Ninth Circuit officially overruled its section 107 liability holding in *Pinal Creek Group v. Newmount Mining Corp.*<sup>305</sup> in 2008 after *Atlantic Research*.<sup>306</sup> In *Kotrous v. Gross-Jewett Co. of Northern California*, a plaintiff who had not been sued under section 106 or section 107 could file a cost recovery action under section 107.<sup>307</sup> The case also addressed an

300. *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1042–43 (E.D. Wisc. 2008).

301. *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007).

302. *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 (2007).

303. *Westinghouse Elec. Co. v. United States*, No. 4:03CV861(SNL), 2008 WL 2952759, at \*3–6 (E.D. Mo. July 29, 2008).

304. *Id.* at \*7.

305. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997). PRP actions for directly incurring recovery costs are provided by section 107, which provides liability, and section 113, which provides relief. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824 (7th Cir. 2007); *see City of Rialto v. U.S. Dep't of Defense*, 274 F. App'x 515, 517 (9th Cir. 2008).

306. *Kotrous v. Gross-Jewett Co. of N. Cal.*, 523 F.3d 924, 932–33 (9th Cir. 2008); *see Adobe Lumber, Inc. v. Hellman*, No. CIV. 05–1510, 2009 WL 256553, at \*2 (E.D. Cal. Feb. 3, 2009) (noting the recent rulings by the Supreme Court and the Ninth Circuit).

307. *Kotrous*, 523 F.3d at 934.

issue not decided in *Atlantic Research*—whether a section 113 claim was an appropriate counter-claim to a section 107 claim. The Ninth Circuit determined that any defendant sued under a section 107 could counter with a section 113 claim for contribution.<sup>308</sup> This would seem contrary to the precise nature of section 113(f)'s statutory contribution protection, but the court plastically implemented it as a practical prudential element.

A federal district court within the Ninth Circuit recently held in *Port of Tacoma v. Todd Shipyards Corp.* that *Aviall* and CERCLA definitively establish that no section 113(f)(1) contribution action may be brought in the absence of a prior CERCLA section 106 or section 107 action directly against the would-be contribution plaintiff.<sup>309</sup> The *Port of Tacoma* court held that *Atlantic Research* did not alter the holding in *Aviall* with regard to the viability of actions under section 113(f)(1).<sup>310</sup> The court reiterated the *Aviall* analysis that section 113(f)(1) requires would-be plaintiffs to have been the subject of a section 106 or section 107 action in order to state a claim for contribution.<sup>311</sup>

In *BNSF Railway Co. v. California*, the defendants counterclaimed against the state agency for contribution under section 113 seeking to recover attorney's fees and to identify other parties that may have been responsible for contaminating the agency's property. The federal district court found that the costs BNSF incurred did not advance the cleanup of the site and were therefore litigation expenses, which are not recognized as response costs recoverable under CERCLA.<sup>312</sup>

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308. *Id.* at 933.

309. *See generally* *Port of Tacoma v. Todd Shipyards Corp.*, No. C08-5132(BHS), 2009 WL 113852 (W.D. Wash. Jan. 14, 2009).

310. *Id.* at \*3. The Port of Tacoma brought a section 113 contribution action against Todd Shipyards Corp., seeking to recover costs the Port incurred in carrying out a consent decree it had entered into with the United States to resolve a section 107 action filed against the Port. *Port of Tacoma v. Todd Shipyards Corp.*, No. C09-5132BHS, 2008 WL 4454136, at \*2–3 (W.D. Wash. Sept. 30, 2008). Todd Shipyards asserted a third party contribution claim against the government, and the government moved to dismiss the claim because Todd had not been sued under section 106 or section 107. *Port of Tacoma*, 2009 WL 113852, at \*3.

311. *Port of Tacoma*, 2009 WL 113852, at \*3. Despite previously concluding that a contribution action was authorized under *Atlantic Research* if it “stemmed” from an action instituted under section 106 or section 107, Judge Settle's, reconsidered opinion, recognized that *Atlantic Research* did not alter the holding in *Cooper Industries* with respect to the timing of actions under section 113(f)(1). In order to proceed, such claims must be brought by PRPs “with common liability” stemming from an action instituted under section 106 or section 107. A contribution plaintiff may not rely on the mere *possibility* that it will be held liable under section 106 or section 107, but must actually be subject to a claim brought under those sections. *Id.*

312. *BNSF Railway Co. v. California*, No. 2:08-CV-02225-JAM-JFM, 2009 U.S. Dist. Lexis 2802, at \*7 (E.D. Cal. Jan. 6, 2009).

### *J. Tenth Circuit*

The Tenth Circuit has not modified its earlier liability holdings. The court's precedent, *United States v. Colorado & Eastern Railroad Co.*, remains standing law, holding that if PRPs can bring a claim under section 113(f), they could not bring a claim under section 107(a).<sup>313</sup> In *Raytheon Aircraft Co. v. United States*, the District Court of Kansas followed *Atlantic Research* to conclude that a PRP can demand joint and several liability under section 107.<sup>314</sup> The court held that a non-settling defendant is entitled to full credit for a plaintiff's previous settlements, including amounts received in settling insurance claims arising from liability for response costs.<sup>315</sup> The Tenth Circuit entitles non-settling plaintiffs to broader flexibility, unless the settlement relates to divisible harm or contains specific allocation language demonstrating the parties' intent to venture from the plain language of CERCLA.<sup>316</sup>

### *K. Eleventh Circuit*

The Eleventh Circuit also has not made significant changes to its precedent. The circuit precedent, *Redwing Carriers, Inc. v. Saraland Apartments*, is still good law, allowing a PRP to demand joint and several liability.<sup>317</sup> In the interim between *Aviall* and *Atlantic Research*, the Eleventh Circuit found that a PRP who entered into an agreement with the government could sue another PRP under section 113 because the agreement fulfills the civil action requirement.<sup>318</sup>

### *L. D.C. Circuit*

Prior to the initial *Aviall* decision in 2004, the D.C. Circuit was the only federal circuit court that had not decided a case on the private party plaintiff

313. *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1539 (10th Cir. 1995).

314. *See Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306, 1309–13 (D. Kan. 2007) (reasoning that permitting PRPs to pursue cost-recovery claims under section 107(a) would allow PRPs to “eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a)”).

315. *Id.*

316. *Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1210–11 (10th Cir. 2009) (describing cost allocation and the need to clearly indicate any departure from the statutory language).

317. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1514 (11th Cir. 1996), *as recognized in Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006) (holding that if plaintiff attempted to use section 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under section 113(f)).

318. *Atlanta Gas Light Co. v. UGI Util. Inc.*, 463 F.3d 1201, 1204 (11th Cir. 2006).

use of section 107 to recover response costs. Therefore, the court did not join the cascade of every other federal circuit court, all of which ultimately were reversed by a unanimous Supreme Court in 2007. It is unclear how the D.C. Circuit would have ruled had it received a section 107 case to adjudicate.

However, the D.C. Circuit did receive a section 107 case after *Aviall* and before *Atlantic Research*. In *Viacom, Inc. v. United States*, a PRP sued the federal government for recovery of response costs under section 107(a).<sup>319</sup> The court held that a PRP who cannot bring a contribution claim under section 113 may bring a claim to recover cleanup costs under section 107. The D.C. Circuit appears to have been able to anticipate the Supreme Court decision in *Atlantic Research*.

### CONCLUSION

Thus, the lasting precedential imprint of the 2007 *Atlantic Research* decision is that it unknots the entire paralysis in the Superfund program created by conflating overturned decisions of eleven circuit courts barring access to section 107, with the Supreme Court's 2004 *Aviall* decision limiting access to section 113 contribution. The Supreme Court fundamentally altered the allocation of, and responsibility for, hazardous substance liability and cost allocation in the United States. Settlement is necessary before a private-plaintiff PRP can utilize section 113(f)(1) to reallocate contribution, and the Court removed barriers to private-party use of section 107 cost recovery. However, the Supreme Court did not decide whether settlement provides a section 107 plaintiff with a particular level of protection against a defendant's counterclaim for equitable contribution under section 113.

In *Atlantic Research*, the Court spoke generally about the lower court's discretion to apply "traditional rules of equity."<sup>320</sup> However, despite this general statement in dicta, how the lower courts apply rules of equity will vary from district to district. The mechanics and incentives for settlement of Superfund responsibility have changed radically because of the progression of federal court decisions. As a result of eleven federal circuit courts blocking private-party PRP access to section 107 cost recovery

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319. *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) (concluding that both a "plain reading" of section 107 and the Supreme Court's prior ruling in *Key Tronic* compelled the conclusion that a right of cost recovery existed under section 107(a) for those PRPs not subject to section 113(f) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994)).

320. *United States v. Atl. Research Corp.*, 551 U.S. 128, 141 (2007).

between 1994 and 2003, the incentive to settle voluntarily at multi-party sites was eliminated.<sup>321</sup>

The Supreme Court's decision in *Aviall* further blocked the incentive to settle because no mechanism for private-party cost contribution was thereafter available to a PRP unless it had an eligible prior civil action or settlement.<sup>322</sup> *Atlantic Research* removed the circuit court blockade of cost recovery under section 107 for PRPs but simultaneously clouded the shield of section 113(f)(2) previously protecting those who settled with the government against subsequent section 107 private cost-recovery claims.<sup>323</sup> This progression has been a long and often conflicted process. My 1994 article's<sup>324</sup> legal conclusion, which convinced no federal circuit courts during the 1994 to 2003 cascade of unvarying opinions discouraging voluntary private party remediation of multi-party contaminated sites, was endorsed when the Supreme Court unanimously reversed the decisions of all circuits in *Atlantic Research*. Both a retrospective look at the legal crisis created by the sum of the parts, as well as a look forward at how the courts may internalize the recent Supreme Court determinations, reveal trends in the administration of cost allocation law.

While the Supreme Court in its 2007 unanimous opinion reinvigorated CERCLA cost recovery, the long-standing protections afforded by the statute to settlers were left in limbo. This leaves uncertainties in the basic mechanics of CERCLA cost allocation. Furthermore, over the two years after these Supreme Court opinions, there is a checkerboard pattern of the circuit courts conforming to this new precedent. While the Supreme Court has provided a clear direction, it remains unclear whether and how the lower courts will follow.

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321. *See supra* Section II.

322. *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 167 (2004).

323. *Atl. Research Corp.*, 551 U.S. at 139–41.

324. Steven S. Ferrey, *Allocation & Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L. J. 36 (1994), cited in *United States v. Kramer*, 953 F. Supp. 592, 600 (D.N.J. 1997).

