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Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits

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INVERTING THE LAW: SUPERFUND HAZARDOUS SUBSTANCE LIABILITY AND SUPREME COURT REVERSAL OF ALL FEDERAL CIRCUITS

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INTRODUCTION: A TOTAL JUDICIAL ECLIPSE

In its 2006-2007 term, the Supreme Court decided five environmental law cases, a significant amount to fall under one subject area.¹ Of particular importance in the constellation of decisions was the Court's reversal of unanimous judicial precedent, announced unanimously in 2007 in *United States v. Atlantic Research Corp.*² The Supreme Court explored the seldom visited issue of hazardous waste, having done so only once since the turn of the twenty-first century.³ There is more than meets the eye. This decision turned the legal liability for hazardous waste upside down, but is as noteworthy for enshrining a new era of "plain meaning" interpretation by the Roberts Court.⁴

Seldom in judicial history does the Supreme Court decide a case where it can, let alone will, reverse the standing precedent articulated by every federal judicial circuit. It is as rare as a total eclipse. The *Atlantic Research* decision launched such an eclipse.

¹ ROBERT MELTZ, CRS REPORT FOR CONGRESS: THE SUPREME COURT TAKES FIVE ENVIRONMENTAL CASES FOR ITS 2006-2007 TERM 1 (2007), available at https://www.policyarchive.org/bitstream/handle/10207/4463/RS22618_20070308.pdf?sequence=1.

² 127 S. Ct. 2331 (2007).

³ See *Cooper Indus., Inc. v. Aviall Servs., Inc.* 543 U.S. 157 (2004). Only a rare few constructions of the Superfund statute have been granted certiorari by the Court. See, e.g., *United States v. Cordova Chem Co. of Mich.*, 113 F.3d 572 (6th Cir. 1997), cert. granted sub nom. *United States v. CPC Int'l, Inc.*, 522 U.S. 1024 (1997) and vacated sub nom. *United States v. Bestfoods*, 524 U.S. 51 (1998) (discussing parent corporate liability); *Key Tronic Corp. v. United States*, 984 F.2d 1025 (9th Cir. 1992), cert. granted, 510 U.S. 1023 (1993); *Pennsylvania v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987), cert. granted, 485 U.S. 958 (1988) (discussing state liability); *Exxon Corp. v. Hunt*, 481 A.2d 271 (N.J. Super. App. Div. 1984), prob. juris. noted, 472 U.S. 1015 (1985) (discussing Superfund expenses). However, until *Aviall*, none of these had directly construed the cost allocation mechanisms of sections 107 and 113 of CERCLA. See Comprehensive Environmental Response Compensation and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, §§ 107, 113, 94 Stat. 2767, 2781-85, 2795 (1980), amended by Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, sec. 113, § 113, 100 Stat. 1613, 1647-52 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (2000)).

The Supreme Court has heard many cases contesting the ability of cities, towns, and states to restrict the interstate transport of *solid*, as opposed to hazardous, waste, as well as related flow control statutes, which have reached the Court more than a half dozen times since the approximate time of the enactment of RCRA and CERCLA. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

⁴ *Cooper Indus., Inc. v. Aviall Servs., Inc.* 543 U.S. 157, 165-68 (2004).

There are significant differences between the two liability provisions of the Superfund statute: Sections 107 and 113.⁵ Key advantages unique to section 107 are the application of joint and several liability, a statute of limitations period twice as long to initiate suit, the necessity only to name and prosecute a few, and not all of the liable parties, and the unavailability of equitable defenses to defendants beyond the statutorily prescribed defenses.⁶ Therefore, access to these provisions is important. Nonetheless, one after the other, in a compressed period, eleven federal circuits barred the use of the statute's section 107 cost recovery by plaintiffs.⁷

This judicial cascade occurred at a time when the Superfund hazardous substance clean-up effort was starved by budgetary deprivation. EPA had to delay beginning remediation activities at 34 separate priority sites in FY 2004 because of funding shortfalls.⁸ The practical result of the 2004 Supreme Court decision in *Aviall*, coupled with the decisions of the eleven circuit courts regarding section 107, combined to greatly discourage voluntary remediation activities at some of the 450,000 contaminated sites in the U.S.⁹ The nation's hazardous liability scheme descended into total chaos. The federal circuit courts were caught in a judicial cascade, where later courts followed questionable earlier decisions of other circuits.¹⁰

The decisions of these circuit courts paralyzed hazardous waste clean-up across the nation, until the Supreme Court found a decisional vehicle through which it could reverse the precedent. In 2007, the Supreme Court unanimously reversed a decade of consistent precedent from these eleven unanimous federal circuit courts.¹¹

⁵ Compare CERCLA § 107, 42 U.S.C. § 9607 (2000 & Supp. II 2002) with CERCLA § 113, 42 U.S.C. § 9613 (2000 & Supp. II 2002).

⁶ *Id.* § 9607. See also *Adhesives Research, Inc. v. Am. Inks & Coatings Corp.*, 931 F. Supp. 1231, 1237 (M.D. Pa. 1996) ("[A]lthough not expressly stated within the text of the statute, courts to rule on the issue have nearly unanimously determined that liability under § 107 is joint and several unless the defendant can demonstrate that the harm is divisible.").

⁷ The Seventh Circuit in July 1994, the First Circuit in August 1994, the Tenth Circuit in March 1995, the Eleventh Circuit in September 1996, the Third Circuit in May 1997, the Ninth Circuit in July 1997, the Fifth Circuit in August 1997, the Fourth Circuit in April 1998, the Sixth Circuit in August 1998, the Second Circuit in September 1998, and the Eighth Circuit in August 2003. See *infra* Part II.A.1.

⁸ Linda Roeder, *Insufficient Funds for Cleanup Operations, Supreme Court Decision Lead EPA Concerns*, 36 BNA ENV'T REP., S-14, S-15 (2005).

⁹ See U.S. GEN. ACCOUNTING OFFICE, RCED-00-178, COMMUNITY DEVELOPMENT: LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 118 (2000).

¹⁰ See *infra* Part III for a discussion and analysis of the circuit court opinions.

¹¹ *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007).

As important as the substantive outcome of this decision was in rectifying national waste liability, *Atlantic Research* enshrines a fundamental judicial interpretive shift in Supreme Court statutory construction. The *Atlantic Research* precedent elevates a new era of construction and decision rule by the new Roberts Court. Building on the rationale of the Supreme Court's 2007 global warming decision, the *Atlantic Research* decision establishes a new interpretive rule of "plain meaning" construction of federal statutes enacted by the third branch of government.¹² The lasting legacy of this decision may be its new judicial interpretive rule, more than its substantive pivot in hazardous waste liability. This article analyzes the following:

- Part I substantively examines the operation of the federal hazardous substance statute, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), with particular emphasis on its two statutory routes for hazardous clean-up cost allocation, emphasizing strategic advantages of each.
- Part II analyzes in comparative detail:
 - (A) How eleven federal circuits, between 1994 and 2004, often reversing well-reasoned opinions of their trial courts, walled off private hazardous waste cost recovery and descended the entire national system into chaos;
 - (B) Professor Cass Sunstein's theory of misinformed judicial cascades, here applied to circuit court environmental decisions;
 - (C) The pivotal impact of the 2004 Supreme Court decision in *Aviall*, complicating the lower court precedential chaos; and
 - (D) The 2007 procedural and substantive groundbreaking unanimous Supreme Court opinion in *Atlantic Research* that changed national hazardous waste liability based on statutory "plain meaning."

¹² *Atl. Research*, 127 S. Ct. at 2336-37, 2339; see also *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457-63 (2007).

- Part III charts the policy implications and documents the resulting chaos wrought by the circuit court decisions, and efforts of litigants to try to surmount the chaos.
- Part IV traces the applicable precedent overlooked by the circuit courts, and their failure to apply relevant canons of statutory construction.
- The article concludes by discussing the new era of “plain meaning” Supreme Court statutory interpretation that emerges from these key environmental decisions.

The 2007 Supreme Court decision represents a fundamental watershed both substantively and with regard to the future rules of statutory interpretation. I first start with an examination of the complexities of the hazardous waste laws under CERCLA, focusing on two key provisions of CERCLA—sections 107 and 113—that so confounded eleven federal circuits. From there, I will examine how the Supreme Court changed the course and future of statutory interpretation. Lasting judicial imprints and transcendent impacts are examined throughout this article.

I. HOW LIABILITY DISTINCTIONS MATTER BETWEEN SECTIONS 107 AND 113 OF THE FEDERAL SUPERFUND

This section analyzes the liability mechanisms operation of Superfund, contrasting the avenues under sections 107 and 113. If the reader is knowledgeable about the liability of Superfund, and the nuances between the operations of sections 107 and 113 of Superfund, he or she might advance over this material to Part II.

A. *Key Provisions*

The federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), or Superfund law, forces a massive reallocation of private wealth in the United States.¹³ There are currently 1255 sites on the National Priorities List (“NPL”) as well as 63 proposed sites.¹⁴ EPA’s projected average clean-up costs for sites was \$140 million

¹³ See CERCLA, 42 U.S.C. §§ 9601-9675 (2000).

¹⁴ U.S. Env’tl. Prot. Agency, National Priorities List (NPL): NPL Site Totals by Status and Milestone, <http://www.epa.gov/superfund/sites/query/queryhtm/npltotals.htm> (last visited

for megasites and \$12 million for non-megasites.¹⁵ The most expensive of these megasites has remained on the NPL since 1983.¹⁶ To date, that site has received \$165 million of Superfund Trust fund money, and the EPA plans to disperse another \$150 million for clean-up efforts there in the future.¹⁷ In addition to the sites listed on the NPL, there are 44,997 other federally identified hazardous waste sites.¹⁸

CERCLA, a comprehensive statute, gives the President the authority to command both private parties and government agencies to clean up hazardous waste sites.¹⁹ CERCLA cost recovery litigation actions typically require potentially responsible parties ("PRPs") to fund the clean-up of hazardous waste sites.²⁰ This includes substantial costs for both removing hazardous wastes and responding to the remnant hazardous conditions.²¹ Section 107 of CERCLA specifies both the liabilities that may be imposed on private parties as well as potential defenses that may be asserted to avoid liability.²²

Although CERCLA clearly provides for complete reimbursement for the government's costs, allocation among various private PRPs is less

Feb. 5, 2009). The United States Environmental Protection Agency ("EPA") uses a "hazardous ranking system" ("HRS") to quantify the potential risks of each site. Sites in need of remedial or removal action are placed on the NPL. *See* U.S. Env'tl. Prot. Agency, National Priorities List (NPL): Basic Information, http://www.epa.gov/superfund/sites/npl/npl_hrs.htm (last visited Feb. 5, 2009). *See also* 42 U.S.C. § 9605(a)(8) (2000) (setting forth the criteria used to determine the priority and ranking requirements for the NPL).

¹⁵ *See* SUPERFUND SUBCOMM. OF THE NAT'L ADVISORY COUNCIL FOR ENVTL. POL'Y AND TECH., FINAL REPORT 16-18 (2004). Megasites are Superfund sites where the total clean-up costs are expected to exceed \$50 million). *Id.* at 17.

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 17-18. This monetary estimate does not include the money expended by the PRPs or work already conducted by PRPs at the site. Furthermore, some of the projected \$315 million expended for actual or planned obligations for the site may be cost-recoverable. *Id.* at 18.

¹⁸ *See* U.S. Env'tl. Prot. Agency, National Priorities List (NPL), <http://www.epa.gov/superfund/accomp/ei/hpl.htm> (last visited Mar. 16, 2009); U.S. Env'tl. Prot. Agency, Superfund, <http://www.epa.gov/superfund/about.htm> (last visited Mar. 16, 2009). In theory, non-NPL sites do not pose a serious health and environmental risk, as such the problems associated with them can be addressed through short-term clean-ups, as opposed to the long-term clean-ups required for NPL sites. However, listing on the NPL requires an act of Congress, and is influenced by political factors.

¹⁹ *Key Tronic Corp v. United States*, 511 U.S. 809, 814 (1994).

²⁰ *Id.*

²¹ *Id.* *See also* CERCLA, 42 U.S.C. §§ 9601(23)-(24), 9607 (2000 & Supp. II 2002) (defining "removal" and "remedial action" and describing liabilities).

²² *Key Tronic*, 511 U.S. at 814. (describing provisions of 42 U.S.C. § 9607(a)-(b)).

well-defined.²³ Gaps in the statutory allocation process exist due to the interaction of several factors. First, CERCLA itself provides no express details for the apportionment of liability among PRPs. Specifically, under Section 113(f)(1) it is the responsibility of the court to allocate response costs among responsible parties utilizing those equitable factors that the court deems appropriate.²⁴ Second, joint, several, and strict liability are created among an often unrelated group of responsible parties. Section 9607(a)(4)(B) makes all PRPs liable for "any . . . necessary costs of response incurred by any other person . . ."²⁵ Because this provision of CERCLA is nondescript and nonspecific, any party deemed a PRP might be held responsible for clean-up costs at the site regardless of its degree of involvement. Third, there is no specified distributive share of liability among different categories of owners, operators, generators, or transporters of waste.²⁶ Finally, the statute provides two separate and distinct mechanisms—sections 107 and 113—for allocating responsibility.²⁷

PRPs who settle with the government can recover expended response costs from other responsible parties under Section 107(a), or contribution to clean-up expenses under Section 113(f) of CERCLA.²⁸ Under Section 107(a), liability of PRPs in cost recovery actions against PRPs is strict.²⁹ By utilizing the provisions of Section 107, the plaintiff can shift liability to named defendants jointly and severally as a class. Section 107 shifts joint and several liability to the defendants, unless a defendant can affirmatively demonstrate that the harm is divisible.³⁰ Joint and several

²³ 42 U.S.C. § 9607(a)(4)(A)-(B). *See also* Karras v. Teledyne Industries, Inc., 191 F. Supp. 2d 1162, 1165-66 (S.D. Cal. 2002).

Section 107(a) establishes that PRPs shall be liable for: (A) all costs of removal action incurred by the United States Government or a State of an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

Id. at 1166.

²⁴ 42 U.S.C. § 9613(f)(1) (2000). *See also* Durham Mfg. Co. v. Merriam Mfg. Co., 294 F. Supp. 2d 251, 264 (D. Conn. 2003) (citing Goodrich Corp. v. Town of Middlebury, 311 F.3d 154, 168 (2d Cir. 2002)).

²⁵ 42 U.S.C. § 9607(a)(4)(B) (2000).

²⁶ *See generally id.* §§ 9607, 9613 (2000 & Supp. II 2002) (omitting reference to a specified distributive share of liability among different categories of owners, operators, generators, or transporters of waste).

²⁷ *See id.* §§ 9607, 9613(f).

²⁸ *Id.* §§ 9607(a), 9613(f).

²⁹ Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 348 (6th Cir. 1998).

³⁰ *Id.* *See also* 42 U.S.C. § 9607(a).

liability, however, is generally the norm because of the difficulty imposed on a PRP to affirmatively demonstrate the divisibility of the harm.³¹

Recovery under section 113 is more complicated. Since liability under section 113(f) is not joint and several, but merely several, plaintiffs must prove the proportionate share of liability for each and every defendant severally.³² The burden, therefore, is on the plaintiff to definitively prove each defendant's liability and equitable share of the costs.³³ Furthermore, liability is never completely shifted from the PRP plaintiff; rather, the plaintiff still retains its equitable share of the clean-up, as well as the share of any PRP against whom the plaintiff cannot sustain its burden.³⁴ These different avenues cause radically different outcomes for the tens of thousands of businesses and persons caught in the Superfund liability net.

B. *The CERCLA Scheme*

CERCLA, enacted in 1980, was created to "provide for liability, compensation, clean-up, and emergency response for hazardous substances released into the environment, and the clean-up of inactive hazardous waste disposal sites."³⁵ CERCLA includes four fundamental elements: (1) a system for information-gathering and analysis; (2) federal authority to respond to and clean up releases of hazardous substances; (3) a hazardous substance superfund (the "Superfund") to fund clean-ups; and (4) a liability scheme for releases of hazardous substances.³⁶

1. Remediation Authority

The second basic CERCLA element authorizes the federal government to clean up sites from which releases of hazardous substances

³¹ *Centerior*, 153 F.3d at 348.

³² *Id.* See also 42 U.S.C. § 9613(f).

³³ *Centerior*, 153 F.3d at 348. See also 42 U.S.C. § 9613(f).

³⁴ See 42 U.S.C. § 9613.

³⁵ *Arc Ecology v. U.S. Dep't of Air Force*, 294 F. Supp. 2d 1152, 1156 (N.D. Cal. 2003) (quoting CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980)). "Response," as defined in 42 U.S.C. §§ 9601(25) (2000), includes enforcement activities related to responses.

³⁶ COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1981: 12TH ANNUAL REPORT 99-101 (1981) [hereinafter CEQ REPORT]. The first element of CERCLA—information gathering—requires owners of hazardous waste sites to notify EPA of the nature of hazardous wastes stored at those sites. This system of notification enables EPA and federal and state authorities to compile a list of problem sites throughout the country, assess the relative potential danger of these sites to the public, and develop appropriate response plans. *Id.* at 99.

occurred or are occurring.³⁷ Two categories of federal response activities are authorized: (1) short-term removal or emergency response activities, and (2) long-term remedial activities.³⁸ The President is also authorized to issue orders.³⁹ Section 104 of CERCLA provides the President with the authority to issue compliance orders after appropriate notice and opportunity for consultation.⁴⁰ Section 106 of CERCLA provides the President with so-called "imminent hazard" authority if the President determines that an "imminent and substantial endangerment to the public health or welfare or the environment" is posed by "an actual or threatened release of a hazardous substance from a facility."⁴¹

Options available to EPA under section 106 include civil judicial injunctive actions and unilateral EPA administrative orders.⁴² An alternative in some jurisdictions may be for a party to voluntarily step forward at an early stage, negotiate a favorable settlement as to its liability with the government (especially if it is a large volume party with the potential for significant liability), and then attempt to instigate a section 107 cost recovery action against a select group of defendants. Therefore, the courts' recognition of these distinctions between the avenues of allocation and

³⁷ CERCLA § 104, 42 U.S.C. § 9604 (2000 & Supp. V 2005). Implementation of health-related authorities provided in CERCLA section 104 is a joint responsibility of the EPA and the Agency for Toxic Substances and Disease Registry ("ATSDR"), which was established under section 104. *Id.* § 9604 (i) (providing a listing of responsibilities of the ATSDR administrator and of other EPA/ATSDR joint responsibilities).

³⁸ *See id.* § 9604(a)(1) (2000). *See also id.* § 9601(23) (defining "removal"); *id.* § 9601 (24) (defining "remedial action"). The President is authorized to acquire real property, or any interest therein necessary, in the President's discretion, to conduct remedial actions. *Id.* § 9604(j)(1) (2000). *See also id.* § 9601(33) (defining "pollutant or contaminant"); *id.* § 9605 (discussing the preparation contents, revision, and republication of the national contingency plan).

³⁹ 42 U.S.C. § 9604 (2000). The President has the authority to act under section 104 of CERCLA to:

remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

Id. § 9604(a)(1).

⁴⁰ *Id.* § 9604(e)(5)(A).

⁴¹ *Id.* § 9606(a).

⁴² *Id.* § 9606(a)-(b). CERCLA section 106 directs the federal courts to use their equitable powers to cause responsible parties to abate the danger caused by the release or threatened release. *Id.* § 9606(a).

the stages of CERCLA suits can serve to promote earlier private party remediation and settlement with the government.

There are situations where the government is willing to make advantageous settlements with certain parties.⁴³ Early settlement leaves both the government and the settling parties free to initiate section 113 contribution or section 107 response costs actions against nonsettling parties. There is a potential advantage to the government because it gets an immediate settlement, either in the form of a cash settlement, a commitment to perform response actions, or both. Whatever discount the government affords settlers in litigation can be recouped jointly and severally from any nonsettlor. Where the government knows that not all the parties will settle and that viable nonsettling parties will remain, this strategy may offer both advantages and less risks to the government.⁴⁴

For private settling parties, there can also be advantages to an early settlement. First, voluntary settlement avoids the potential liability to EPA for treble damages if EPA performs response actions itself in the face of recalcitrant PRPs.⁴⁵ It also avoids a compulsive order from EPA pursuant to section 106, with its \$25,000 per day penalties for each violation.⁴⁶

Second, delay in reaching settlement can escalate private costs in several ways. Postponement of remediation expenditures causes the

⁴³ EPA Region I and the Commonwealth of Massachusetts employed this strategy in settling a matter involving four sites. *See* *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027 (D. Mass. 1989) *aff'd*, 899 F.2d 79 (1st Cir. 1990). Most of the major non-*de minimis* parties received an initial settlement at a discount of approximately seventy-five percent from their proportionate shares based on waste-in volume. *Id.* at 1041 n.18. Subsequently, individual governments sued several dozen additional nonsettling parties, requiring them to make the governments whole by incurring approximately nine times their proportional share of costs. Small volume parties received *de minimis* settlements crafted in several stages. Also note that non-settling PRPs may not bring contribution actions against settling *de minimis* parties. *See* 42 U.S.C. §§ 9613(f)(2), 9622(g)(5) (2000); *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp. 1132 (D.R.I. 1992).

⁴⁴ 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.

⁴⁵ *See* CERCLA § 107, 42 U.S.C. § 9607 (2000 & Supp. II 2002). Multiple damages also exist at the state level. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 21E, § 11 (West 2002).

⁴⁶ 42 U.S.C. § 9606(b)(1).

expenditures to be priced in inflated dollars in subsequent years. Delay also risks statutory amendment or evolution of precedent so as to require changed requirements or more exacting clean-up standards. Over time, the technical ability to detect the presence of small quantities of hazardous substances has increased, exposing responsible parties to more precise technical parameters of detection and more exacting standards for remediation. Delay also allows for protracted scrutiny and involvement by neighbors or by government agencies. Finally, during the period of delay, additional legal expert and transactional costs are often incurred by private parties, increasing the ultimate cost of resolution.

2. The Superfund

The third basic CERCLA element establishes the Superfund to finance the federal government's response to actual and threatened releases of hazardous substances, and claims for natural resource damages.⁴⁷ Sales taxes on chemical corporations and general appropriations originally provided funding for the trust fund.⁴⁸ However, this "polluter pays" provision expired in 1995, when the trust fund contained an all-time high of \$3.6 billion.⁴⁹ By 2004, the fund was depleted completely, thus forcing the government to pay entirely for Superfund clean-ups from annual federal appropriations and amounts recovered from liable parties.⁵⁰ The government acquires the right to seek reimbursement from PRPs for costs incurred and paid from the Superfund for clean-up, administration, legal removal, oversight, and resource restoration.⁵¹

⁴⁷ See 42 U.S.C. § 9611 (2000). If the Superfund is exhausted in response to public health threats, natural resource damage claims are not payable out of the Superfund that year. *Id.* § 9611(e)(2).

⁴⁸ 42 U.S.C. § 9631 (1982), *repealed by* Pub. L. No. 99-499, § 517, 100 Stat. 1772, 1774 (1986) (codified at 26 I.R.C. § 9507) ("The Hazardous Substance Superfund established by the amendments made by this section shall be treated for all purposes of law as a continuation of the Hazardous Substance Response Trust Fund established by section 221 of the Hazardous Substance Response Revenue Act of 1980.").

⁴⁹ J.R. Pegg, *Funding Woes Plague Superfund Clean Up*, ENVTL. NEWS SERVICE, Aug. 7, 2003, <http://www.ens-newswire.com/ens/aug2003/2003-08-07-10.asp> (last visited Dec. 18, 2008).

⁵⁰ See *id.*

⁵¹ See 42 U.S.C. §§ 9607(a), 9612(c) (2000). Thus, the EPA may respond quickly to a hazardous substance release with the assurance of Superfund monies to pay for clean-up. See *id.*

3. Liability Allocation

The fourth basic CERCLA element provides a liability allocation scheme.⁵² CERCLA precedent imposes strict, joint and several liability for clean-up costs incurred as a result of releases, or threats of release, of hazardous substances on four categories of responsible parties: (1) owners and operators of a facility from which hazardous substances were threatened to be released or actually released, (2) persons who owned or operated a facility at the time of hazardous substance disposal, (3) persons who arranged for disposal of hazardous substances, and (4) persons who transported hazardous substances and selected the disposal sites.⁵³ One EPA enforcement approach to hazardous substance releases under CERCLA is clean-up by private parties, either voluntarily or pursuant to enforcement order issued by EPA.⁵⁴ EPA compiles lists of priority sites and related PRPs to promote and maximize the number of privately funded clean-ups, marshalling the Superfund to finance those priority clean-ups for which there is an inadequate private response, or no response at all.⁵⁵

The allocation of liability under CERCLA usually involves two stages.⁵⁶ The first stage is the macro-level shift of remediation expenses from the plaintiff to the defendants. This stage involves determining whether liability should be imposed on the entire group of liable PRPs jointly and severally or divided equitably.⁵⁷ In the Superfund context this dimension triggers issues of joint and several responsibility, contribution, allocation among categories of responsible parties, and plaintiff's choice of the cause of action and designation of named defendants.⁵⁸

⁵² Pursuant to 42 U.S.C. § 9607, in order to establish a *prima facie* case for liability, the government must prove four things:

- (1) that the site is a "facility," as that term is defined in 42 U.S.C. § 9601(9);
- (2) that a "release" or "threatened release" of a "hazardous substance" from the site has occurred, as required by 42 U.S.C. § 9607(a);
- (3) that the release or threatened release has caused the United States to incur "response costs," as required by 42 U.S.C. § 9607(a); and
- (4) that each of the defendants is a "person," as that term is defined in 42 U.S.C. § 9607(a).

⁵³ 42 U.S.C. § 9607(a) (2000).

⁵⁴ *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1071 (11th Cir. 2002).

⁵⁵ *Fireman's Fund Ins. Co. v. City of Lodi*, 271 F.3d 911, 924 (9th Cir. 2001).

⁵⁶ Some courts have merged these two stages together. When harm is divisible, there is no need for apportionment of harm which occurs in the second stage. See *infra* Part II.C.2.a.

⁵⁷ See 42 U.S.C. § 9613(f).

⁵⁸ See *id.* § 9613(f)(1).

The second stage entails a micro-level reallocation of response costs among 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.⁵⁹ This second dimension 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 or to recover its own response costs, the government can bring suit under section 107 to shift the liability for clean-up to the defendants PRPs.⁶⁰ 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.⁶¹ If some PRPs settle with the government, they in turn can bring suit against other PRPs by either shifting their incurred response costs under section 107, or by seeking cost contribution under section 113 from nonsettling PRPs.⁶²

CERCLA provides two non-parallel routes—section 107 and section 113—to assign liability and reach an allocation among private parties.⁶³ Section 107, which contemplates the recovery of response costs, does not incorporate equitable factors. Under the express language of the statute, this provision may be used by “any other person”—either by the government or a private party plaintiff—to shift liability “jointly and severally” to responsible defendant parties.⁶⁴ In effect, these settling PRPs step into the same cost-shifting shoes of the government.

The second avenue, section 113, contemplates an equitable reallocation of total costs incurred “severally” among PRPs.⁶⁵ The difference between several liability and joint and several liability is profound. Not only do these two routes yield potentially different reallocations, but they also yield distinct outcomes depending on whether or not the plaintiff has previously settled its liability with the EPA.

⁵⁹ *Id.* (“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.”).

⁶⁰ *Id.* § 9607(a).

⁶¹ *Id.* § 9613(f)(1).

⁶² CERCLA §§ 107, 113, 42 U.S.C. §§ 9607, 9613 (2000).

⁶³ *Id.*

⁶⁴ *See id.* § 9607 (a)-(c).

⁶⁵ *Id.* § 9613.

C. *The Alternative Allocation Schemes of CERCLA Section 107 and Section 113*

1. Section 107 Joint and Several Liability

Both the government and private parties can recover the response costs they have incurred.⁶⁶ The plaintiffs can impose liability on PRPs by bringing claims under section 107 of CERCLA, which provides for the recovery of:

- (A) all costs of removal and remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.⁶⁷

Courts have interpreted this provision as allowing plaintiffs to recover all costs of remediation jointly and severally against defined categories of responsible parties.⁶⁸ Consequently, under a theory of joint and several liability, any one liable defendant may bear the total burden of the damages. Although the final version of CERCLA deleted all reference to joint and several liability,⁶⁹ courts have held that PRP liability is joint and several if no basis exists for dividing the harm of the contamination and the response costs.⁷⁰

⁶⁶ See *id.* § 9607(a)(4)(A)-(B). Response costs are those costs associated with removal and remediation actions at the waste site. *Id.* § 9601(25).

⁶⁷ 42 U.S.C. § 9607(a)(4)(A)-(B).

⁶⁸ See, e.g., *United States v. Chem-Dyne Corp.*, 573 F. Supp. 802, 809-10 (S.D. Ohio 1983) (stating that where the harm is indivisible, each liable party is responsible for the entire harm).

⁶⁹ See 126 CONG. REC. 31,965 (1980).

⁷⁰ See *Amoco Oil Co. v. Borden Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989). See also *United States v. Monsanto Co.*, 858 F.2d 160, 169-70 (4th Cir. 1988) (stating that it was sufficient for plaintiff to show that a waste like that sent by the defendants was found at the site); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486 (D. Colo. 1985) ("It is clear, however, that the deletion of all references to joint and several liability from [CERCLA] did not signify that Congress rejected these standards of liability."). But see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 n.13 (2d Cir. 1985) (stating that joint and several liability is not absolute under certain circumstances). Courts have used different standards when determining whether or not there exists as basis of divisibility. See, e.g., *In re Bell Petroleum Servs., Inc.*, F.3d 889, 903 (5th Cir. 1993) (holding that joint and several liability

In addition, "[b]ecause CERCLA incorporates by reference, section 311 of the Clean Water Act, which holds violators strictly liable for damages, courts have correspondingly overwhelmingly held that strict liability applies to PRPs for cost recovery actions under CERCLA section 107, regardless of negligence by owners, operators, transporters, or generators."⁷¹ According to these decisions, plaintiffs can shift their burden entirely to any one or all of the PRPs, who could bear the total burden.⁷² "Plaintiffs are therefore not required to link their response costs with particular releases by particular defendants, because to require such 'fingerprinting' of wastes would eviscerate CERCLA's liability provisions and would be inconsistent with Congress's intent."⁷³

Thus, plaintiffs establish the requisite causation against a generator or transporter of hazardous substances once they show that: (1) the defendant is a generator or transporter who shipped hazardous substances to (2) a facility, (3) the defendant's hazardous substances, or substances like those of the defendant, were present at the site, (4) there was a release or threatened release of hazardous substances at the site, and (5) this release or threatened release caused the incurrence of response costs.⁷⁴ Unless PRPs can avail themselves of one of the extremely limited defense doctrines available,⁷⁵ liability is joint, several, and strict.⁷⁶ Furthermore,

should be imposed only in "exceptional circumstances" when the "expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability," and that the court should not be dissuaded from dividing liability just because apportionment is difficult to determine with certainty).

⁷¹ Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 234 (1988).

⁷² *Monsanto*, 858 F.2d at 168 ("Under section 107(a)(2), any person who owned a facility at a time when hazardous substances were deposited there may be held liable for all costs of removal or remedial action.") (emphasis in original); *Ne. Pharm. & Chem. Co.*, 579 F. Supp. at 844.

⁷³ See Ferrey, *supra* note 71, at 235.

⁷⁴ 42 U.S.C. § 9607(a)(4) (2000); *United States v. S. Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 992 (D.S.C. 1984, *aff'd sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988)). Proximate cause, however, must be shown to impose liability on transporters of hazardous substances, whom both the statute and case law link to clean-up costs only if the transporters selected the disposal site. See 42 U.S.C. § 9607(a)(4) (2000); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 191 (W.D. Mo. 1985).

⁷⁵ See 42 U.S.C. §§ 9607(b) (limiting the availability of defenses to occurrences where releases of hazardous materials are caused by: (1) acts of war, (2) acts of God, or (3) acts of unrelated third parties with whom a PRP has no director or indirect contractual link, where the PRP exercises due care with respect to any hazardous substances, and where the PRP took precautions against foreseeable acts or omissions of any such third party).

⁷⁶ Other possible defenses, though limited, include a lack of authorization for national service. See, e.g., *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22, 29 n.7

when a municipality, country, or state agency owns or operates the disposal site, CERCLA treats the entity like a private person.⁷⁷

A settling PRP can also strategically choose which nonsettling defendants to sue under section 107.⁷⁸ It is much easier for a plaintiff to prove damages against a lesser number of defendants; if section 107 is employed, only a few defendants need to be named to potentially shift the entire liability to the named defendants. This is much easier than bearing the burden of proof severally against every PRP.

2. Section 113 Several Liability

Section 113(f) provides an alternative avenue for the allocation of response costs or liability.⁷⁹ It was held to provide an implied right of contribution, even before the 1986 amendments made the right statutorily express.⁸⁰ This statutory section codifies common law equitable remedy

(D. Mass. 1987); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 28-29 (E.D. Mo. 1985). *But see* *United States v. Bliss*, 23 ERC 1638, 1645 (E.D. Mo. 1985) (finding that CERCLA authorizes nationwide service of process for abatement actions under section 106). Another possible defense is unjust enrichment to prevent a landowner from obtaining contribution or indemnification. *Cf.* *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170-71 (D. Del. 1974) (denying contribution in a federal securities action on unjust enrichment grounds), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976). A possible final defense is the statute of limitations. *See* 42 U.S.C. § 9612 (d) (2000).

⁷⁷ 42 U.S.C. § 9601 (21); *Ferrey*, *supra* note 71, at 239; *see also* *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 1355 (D. Del. 1985) (finding that Congress did not intend to differentiate between governmental and nongovernmental entities for purposes of CERCLA liability).

⁷⁸ 42 U.S.C. § 9613(f) (2000).

⁷⁹ *Id.*

⁸⁰ *See, e.g.*, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986); *NL Inds., Inc. v. Kaplan*, 792 F.2d 896 (9th Cir. 1986); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312; (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311 (6th Cir. 1985); *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986); *New York v. Exxon Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986); *Colorado v. Asarco Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *Wehner v. Syntex Agribusiness Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985); *United States v. A&F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982). *But see* *United States v. Westinghouse Elec. Corp.*, 22 ERC 1230 (S.D. Ind. 1983). A few courts also found that parties had a right of contribution under federal common law. *See, e.g.*, *Asarco*, 608 F. Supp. at 1489 (D. Colo. 1985). This rationale is of note for the later discussion in Part IV wherein we compare that while the circuit courts have applied this finding, they have diverged from this principle dramatically in one area of CERCLA litigation involving precisely these private party response costs.

principles⁸¹ and imposes only "several" liability.⁸² Pursuant to this avenue, the liability is divided among the PRPs according to their proven equitable proportionate shares.⁸³ This follows the general common law rule of contribution that requires all joint tortfeasors to contribute equally to satisfy a collective burden.⁸⁴ 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).⁸⁵

a. Equitable Apportionment

One recurring theme for the circuit courts denying access of PRPs party-plaintiffs to claims under section 107 of CERCLA is the inability to employ equitable factors in adjudicating a section 107 claim.⁸⁶ "Equitable factors" empower a court to cut the Superfund liability pie as it sees fit, injecting a variety of objective and subjective variables in deciding which PRPs should bear what costs for hazardous waste clean-up. "Equitable factors" empower judges to make Solomonian decisions and depart from rigid formulae.⁸⁷

Some courts have employed equitable considerations to allocate relative degrees of responsibility based on the conduct of the parties.⁸⁸ In

⁸¹ Barbara J. Gulino, Note, *A Right of Contribution under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668 (1986).

⁸² 42 U.S.C. § 9613(f)(1) (2000).

⁸³ See *id.* The language of section 113 states that courts should determine the equitable share on a case-by-case basis. *Id.*

⁸⁴ See *McDonald v. Magruder*, 28 U.S. 470, 477 (1830); *Adamson v. McKeon*, 225 N.W. 414, 416-17 (Iowa 1929); *Easterly v. Barber*, 66 N.Y. 433, 435-40 (1876). Contribution is inherently equitable, and courts are free to fashion equitable remedies. *Yates v. Donaldson*, 5 Md. 389, 394-95 (1854).

⁸⁵ *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571-74 (6th Cir. 1991). Note that this case is a subsequent opinion in *United States v. Northernair Plating Co.*, which held defendants jointly and severally liable under section 107(a), F. Supp. 742, 748-49 (1987), *aff'd sub nom.* *United States v. R.W. Meyer, Inc.*, F.2d 1497 (6th Cir. 1989).

⁸⁶ See *infra* Part III.

⁸⁷ See *In re Tutu Wells Contamination Litig.*, 994 F. Supp. 638, 662 n.34 (1998) ("[W]hile a defendant in a Section 107 action can only avoid joint and several liability by demonstrating that the harm at a given site is divisible, parties to a Section 113 action may allocate among potentially responsible parties based on equitable considerations.").

⁸⁸ See, e.g., *Chem. Waste Mgmt., Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987) (holding that the extent of the private party's recovery was to be determined based on "relative fault, the volume of waste deposited, and the relative toxicity of such waste."). See also *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78 (D. Me. 1988), *aff'd sub nom.* *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989). In its consideration of whether the apportionment of damages is fair, the court cited factors such as:

applying equitable factors to a claim, some courts have applied the factors contained in the congressionally rejected Gore Amendment to apportion liability among defendants.⁸⁹ However, in their decisions over the past decade, circuit courts have rejected the application of the Gore Amendment factors as a defense to liability in a section 107 action.⁹⁰ Instead, courts hold that Gore Amendment factors would be appropriate only in a subsequent contribution action under section 113.⁹¹ This would include equitable factors such as unclean hands.⁹²

(1) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id. at 86.

⁸⁹ See, e.g., *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256-57 (S.D. Ill. 1984). The Gore Amendment to CERCLA would have apportioned damages according to the following criteria:

(i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (ii) the amount of hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

126 CONG. REC. 26,781 (1980).

⁹⁰ *United States v. W. Processing Co.*, 734 F. Supp. 930, 937-38 (W.D. Wash. 1990) (rejecting defendants' arguments that liability in a section 107 action with a government plaintiff should be apportioned according to equitable factors and reaffirming government plaintiff's right to selectively sue fewer than all PRPs). The court held that it is consideration of all environmental conditions at the site, not the expenditure of money by the government on specific tasks, that must be considered to determine whether a harm is divisible; the mere fact of different expenditures does not equate to divisibility. *Id.* at 937. See also *United States v. Monsanto Co.*, 858 F.2d 160, 171 n.22 (4th Cir. 1988) (explaining that equitable factors are inappropriate to the question of joint and several liability).

⁹¹ See *W. Processing*, 734 F. Supp. at 938.

⁹² See *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.* 814 F. Supp. 1285, 1288 (E.D. Va. 1993) (holding that the unclean hands defense is relevant to contribution phase of litigation, but not to basic liability issue); *In re Sundance Corp.* 149 B.R. 641, 664 (Bankr. E.D. Wash. 1993) (stating that the court is free to apply equitable factors).

Much of the circuit court imbroglio over section 107, and the resulting chaos after *Aviall*, was justified by circuit courts claiming that use of "equitable factors" can only be logically utilized under section 113 by finding an implied Congressional intent, which the Supreme Court has now restricted. However, this is a false premise. First, there is no indication that Congress sought to inject "equitable factors" into every Superfund cost response action. Second, there is no express statutory prohibition against equitable considerations applied to claims adjudicated under section 107.⁹³

b. Allocation Pursuant to State Model Statutes

The legislative history of the 1986 Superfund and Reauthorization Act ("SARA") Superfund amendments indicates that federal common law should govern CERCLA determinations.⁹⁴ Accordingly, courts deciding CERCLA issues have generally looked to federal common law to resolve these issues.⁹⁵ Even though the legislative history designates federal common law as the basis for deciding allocation pursuant to section 113, some courts employ state statutory model laws, unrelated to hazardous substances, to interpret the allocation of liability under this CERCLA provision. This use, or non-use, of the various state tort acts further adds to the disparate and unpredictable allocation of liability under CERCLA.

Courts have primarily used two model uniform acts to interpret section 113: the Uniform Contributions Among Tortfeasors Act ("UCATA")

⁹³ See *United States v. Hardage*, 116 F.R.D. 460, 465-66 (W.D. Okla. 1987) (raising equitable factors as a defense to bar government's section 107 claims).

⁹⁴ See H.R. REP. NO. 99-253, pt. 3, at 18-19 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 3041-42.

The committee emphasizes that courts are to resolve claims for apportionment on a case-by-case basis pursuant to Federal common law, taking relevant equitable considerations into account. Thus, after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment.

Id.

⁹⁵ See, e.g., *United States v. Nicolet*, 712 F. Supp. 1193, 1202 (E.D. Pa. 1989) (holding that there is a strong federal interest in uniform national enforcement and that application of state law would frustrate objectives of the federal program regarding alter ego claims); *United States v. Bliss*, No. 84-2086C(1), 20 E.L.R. 20,879, 20,882 (E.D. Mo. Sept. 27, 1988) (stating that because of substantial federal interests, Congress intended courts to apply federal common law principles to fill gaps in the statutory scheme); *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22, 31 (D. Mass. 1987) (holding that federal law should control determination of corporate separateness).

and the Uniform Comparative Fault Act ("UCFA").⁹⁶ Both acts are designed for interpretation of negligence principles, rather than the strict liability contemplated by CERCLA.⁹⁷ Both also allocate several liability, as opposed to joint and several liability, making them appropriate to a section 113, but not a section 107, claim.⁹⁸ Moreover, even though federal common law is designated by the legislative history as the basis for interpretation, where a court interprets CERCLA using one of two state statutory model laws not related to hazardous substances, its decision can be influenced by state precedent interpreting the application of these statutes.⁹⁹ Consequently, the allocation of liability under these uniform statutes can produce results somewhat at odds with those contemplated by CERCLA.

1) Uniform Contribution Among Tortfeasors Act

Many courts have decided that one of these model state tort allocation statutes, UCATA, is best suited to resolve cost allocation pursuant to section 107 claims brought by government plaintiffs.¹⁰⁰ Each party pays a *pro rata* share, defined in the UCATA without consideration of relative or proportionate degrees of fault or liability among the parties. Comparative negligence principles play no part in an allocation pursuant to the UCATA. Where there is a symbiotic confluence of factors causing indivisible damage, liability is indivisible and is apportioned *pro rata*.¹⁰¹ This application of UCATA results in a *pro tanto* scheme of allocation between settlers and nonsettlers. The liability of nonsettling parties is reduced only by the amount of the settlement, not by the settlers' proportionate share of liability.¹⁰² This makes the government whole without any excess recovery by the government, which courts have held is implied by section 113(f)(2).¹⁰³

⁹⁶ Nineteen states have adopted the UCATA in either the 1939 or 1955 versions. See UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 193, 200 (2008). Two states have adopted the UCFA. See UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 121 (2008).

⁹⁷ See UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, *supra* note 96; UNIF. COMPARATIVE FAULT ACT, *supra* note 96.

⁹⁸ See *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 684-85 (S.D.N.Y. 1996).

⁹⁹ See *supra* Parts II.A, E.

¹⁰⁰ See, e.g., *United States v. SCA Servs. Of Ind., Inc.*, 827 F. Supp. 526, 534 (N.D. Ind. 1993).

¹⁰¹ *Id.* at 97-98.

¹⁰² *Id.* at 98.

¹⁰³ See, e.g., *Watson v. Reg'l Transp. Dist.*, 762 P.2d 133, 140 (Colo. 1988) (en banc) (stating that the UCATA is "designed to permit the equitable apportionment of losses among

The UCATA prevents the effects of a plaintiff placing the entire burden of a common injury on a single joint tortfeasor.¹⁰⁴ To fairly distribute the liability, the UCATA allows a liable party to seek contribution from the other liable parties.¹⁰⁵ The UCATA provides that no settling tortfeasor is entitled to contribution from another tortfeasor unless the former's settlement is in excess of its share.¹⁰⁶ The right of contribution exists to a settling tortfeasor who pays more than her *pro rata* share of common liability, and recovery is limited to the amount in excess of the *pro rata* share that was paid.¹⁰⁷ A *pro rata* share is the result of equally dividing the liability by the number of responsible parties.¹⁰⁸ For example,

multiple tortfeasors."); *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. 1982) ("This uniform act establishes the right of a person liable for damages for an unintentional wrong to compel others, who are liable with him for the same damages, to share in discharging the common liability.") (quoting the Act's Prefatory Note).

¹⁰⁴ See *Markey v. Skog*, 322 A.2d 513, 518 (N.J. Super. Ct. Law Div. 1974) (holding that a liable party may seek contribution from another party even if plaintiff's statute of limitations against the latter party has run).

¹⁰⁵ Section 1(a) of the UCATA reads:

Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 201 (2008).

¹⁰⁶ Section 1(d) of the UCATA reads:

A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

Id. at 202.

¹⁰⁷ Section 1(b) of the UCATA reads:

The right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his *pro rata* share. No tortfeasor is compelled to make contribution beyond his own *pro rata* share of the entire liability.

Id. at 201-02.

¹⁰⁸ Section 2 of the UCATA reads:

In determining the *pro rata* shares of tortfeasors in the entire liability, (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 2, 12 U.L.A. 263-64 (2008).

if there are five responsible parties, each party bears one-fifth of the liability, regardless of her actual contribution to the harm.

Thus, the UCATA allocates liability without consideration of relative or proportionate degrees of fault among the parties.¹⁰⁹ Such an allocation scheme, with its simple mathematical formula, greatly facilitates the allocation of responsibility among all tortfeasors by the conclusion of litigation. The concept of the UCATA, under which simple division by the number of parties determines each individual's share of liability, is consistent with the commingled and indivisible nature of contamination encountered at most multi-party Superfund sites.

As applied to CERCLA situations, imposition of liability under UCATA results in a *pro tanto* scheme of allocation between settling PRPs and nonsettling PRPs. The UCATA stipulates that any settlement reduces the amount of liability of nonsettlers by the amount of the original settlement or the amount of consideration paid for it, whichever is greater.¹¹⁰ The settling party is totally discharged from all liability, including liability for contribution to nonsettlers.¹¹¹ Importantly, the nonsettlers' liability is only reduced by the amount of the settlor's settlement, not by any proportionate share of liability.¹¹²

The UCATA provides an incentive for parties to settle with the government if they can do so on favorable terms. The integrity of that settlement is preserved under the UCATA. Nonsettlers remain potentially liable for the amount of the liability not relieved by the settlement, regardless of their proportionate or equitable share of liability. Therefore, the integrity of a settlement of liability with the government is not reopened in a subsequent section 113 action between liable PRPs.

¹⁰⁹ *Id.*

¹¹⁰ UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(a), 12 U.L.A. 284 (2008).

¹¹¹ UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(b), 12 U.L.A. 284 (2008).

¹¹² *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1048 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990) (finding that it is of no consequence that nonsettlers absorb a larger amount of liability than the settlers under the UCATA scheme). *See also* *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 307 (7th Cir. 1999); *Hillsborough County v. A & E Road Oiling Serv.*, 853 F. Supp. 1402, 1408 (M.D. Fla. 1994); *Allied Corp. v. Frola*, 730 F. Supp. 626, 638 (D.N.J. 1990); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1029 (D. Mass. 1989) (stating that a proportionate scheme of liability would allow nonsettlers to challenge the settlement after the fact, and that incentives to settlers are justified); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 677-78 (D.N.J. 1989) (stating that to promote quick remediation, nonsettlers can be left with a larger amount of liability); *United States v. Pepper's Steel & Alloys, Inc.*, 658 F. Supp. 1160, 1168 (S.D. Fla. 1987).

2) Uniform Comparative Fault Act (UCFA)

The second state liability allocation statute applied to CERCLA settlements at the discretion and initiative of some courts is the Uniform Comparative Fault Act ("UCFA").¹¹³ The UCFA applies a liability scheme whereby each party is liable for a proportionate, or otherwise "equitable" share of the total liability. In contrast to the UCATA, the share of liability is based upon the nature of each PRP's conduct and the relation of the conduct to the damages or response costs.¹¹⁴

Courts have elected to apply UCFA where the plaintiff is a PRP seeking to recover costs from other PRPs in a section 113 contribution action.¹¹⁵ This typically results because section 113(f)(1) provides that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."¹¹⁶ With regard to the effect of settlement upon the allocation of liability, the UCFA would reduce the liability of the nonsettlers by the proportionate or equitable share of the settlers, regardless of the amount of the settlement.¹¹⁷ Hence, in a subsequent contribution action,

¹¹³ See UNIF. COMPARATIVE FAULT ACT (Prefatory Note), 12 U.L.A. 121-23 (2008). As of 1977, thirty-three states had adopted some form of comparative fault. Because of its more recent vintage, coupled with the fact that only two states have adopted the UCFA without significant modification, there is much less interpreted precedent utilizing the UCFA than there is precedent utilizing the UCATA. When proposed in 1977, the UCFA offered a uniform act to states that wished to adopt tort principles of comparative fault. At the time of the proposal of the UCFA, the UCATA had existed for several years. The Commissioners on the Uniform Laws consciously chose not to amend the UCATA to include comparative fault principles. Rather, a new alternative model was proposed. Therefore, the UCATA was preserved intact and unchanged for states utilizing traditional noncomparative tort principles. The UCFA was proposed as a separate scheme applicable only to those states that elected to apply comparative fault principles. *Id.*

¹¹⁴ See *Rohm & Haas Co.*, 721 F. Supp. at 677.

¹¹⁵ See, e.g., *Am. Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 219 (D.R.I. 1993); *Allied Corp. v. ACME Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 223 (N.D. Ill. 1993); *Comerica Bank-Detroit v. Allen Indus., Inc.*, 769 F. Supp. 1408, 1414 (E.D. Mich. 1991).

¹¹⁶ CERCLA §113(f)(1), 42 U.S.C. § 9613(f)(1) (2000).

¹¹⁷ Section 6 of the UCFA states as follows:

A release, covenant not to sue or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other person liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of section 2.

UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 147 (2008). Section 2 of the UCFA provides, in part:

settlers would not receive the benefits of their settlement, but only of their proportionate share, however determined.

Under the UCFA, “a release, covenant not to sue, or similar” provision, discharges the settling party “from all liability for contribution,” and reduces the claim of the releasing party against other responsible persons by the amount of the released person’s equitable share.¹¹⁸ Therefore, this proportionate rule of the UCFA requires the court to allocate responsibility among all parties on an informal *ad hoc* basis. This approach is a substantial undertaking that involves much judicial time and effort. It also results in the possibility of there being “orphan shares” that are not recovered.¹¹⁹ A proportionate rule of allocation allows a nonsettlor a subsequent opportunity to strike a better deal than if she were required to live with the terms of a prior settlement between the government and a

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under section 6, the court unless otherwise agreed by all parties shall instruct the jury special interrogatories if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under section 6. For all purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of causal relations between the conduct and damages claimed.

UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135-36 (2008).

¹¹⁸ UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 147 (2008). Unless it so provides, a release with one settling party does not release the other nonsettling parties. This provision is similar to that of the UCATA. “Orphan shares” and other uncollectable amounts are re-allocated proportionately among the solvent parties. *Id.* (Commissioner’s Comments).

¹¹⁹ The UCATA, applied in the CERCLA context, impliedly allocates responsibility for “orphan” and bankrupt shares of potentially responsible parties regarding cleanup. The UCATA, by setting the settlers’ share of liability at the amount of their settlement, by implication allocates “orphan shares” to nonsettlers in subsequent litigation. *See supra* Part II.C.2.b.1. By contrast, the UCFA, by reducing nonsettlers’ liability by the amount of an equitable share of the settlers’ liability, could effectively be used to allocate “orphan shares” to either group—settlers or nonsettlers. This could be accomplished by the court deciding what is equitable in a particular situation. It is conceivable that neither settlers nor nonsettlers would pay for “orphan shares.” It is also possible that the reduction of liability for nonsettlers would leave the settlers responsible for “orphan shares.” *See supra* Part II.C.2.b.2.

third party PRP. A proportionate scheme provides little risk to nonsettlers who ignore, or even frustrate, their own early settlement opportunities.

Some courts have noted the disadvantages of the UCFA applied in Superfund cases, including the fact that the recovery of the full amount of damages by the plaintiff is "entirely fortuitous when there has been a partial settlement."¹²⁰ This uncertainty discourages voluntary settlements and imposes additional barriers to plaintiffs' recovery because of the necessity at trial to convince the court of not only the plaintiffs' minimal fault, but also the minimum fault of all settlers, thus minimizing the reallocation by the court of responsibility back to the plaintiffs.¹²¹ While not as widely applied as the UCATA, some courts have applied the principles of the UCFA to fashion Superfund common law.¹²² While neither is designated by Congress to apply in the Superfund context, both have been applied as prudential principles by federal courts adjudicating Superfund matters.

c. The Shield of Contribution Protection after Certain Approved Settlements

To encourage settlement and reduce litigation costs, Congress provided contribution protection to all settling PRPs under section 113(f).¹²³ A PRP which has settled with the government in a judicially or administratively approved settlement is protected from additional liability to both the government and other private PRPs for matters which are covered in the settlement.¹²⁴ Contribution protection is effective as soon as

¹²⁰ *United States v. W. Processing Co.*, 756 F. Supp. 1424, 1431 (W.D. Wash. 1990).

¹²¹ *Id.*

¹²² Compare *Denver v. Adolph Coors Co.*, 829 F. Supp. 340, 345 (D. Colo. 1993) (finding the UCFA to be inconsistent with the intent of Congress) and *Allied Corp. v. Frola*, 730 F. Supp. 626, 638 (D.N.J. 1990) with *W. Processing*, 756 F. Supp. at 1431 (adopting the UCFA as the preferred uniform rule of allocation) and *Lyncott Corp. v. Chem. Waste Mgmt., Inc.*, 690 F. Supp. 1409, 1418-19 (E.D. Pa. 1988) (finding the UCFA was in accord with section 113(f)(2) for the purposes of allocation of liability among PRPs in private party settlements), and *Edward Hines Lumber Co. v. Vulcan Materials Co.* 15 Chem. Waste. Litig. Rep. 554, 555-56 (N.D. Ill. 1987) (employing the UCFA allocation scheme).

¹²³ CERCLA § 113(f), 42 U.S.C. § 9613(f) (2000).

¹²⁴ *Id.* § 9613(f)(2). Typically, settlements of CERCLA liability by private parties involve both 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.

a settlement is signed, and it is not dependant on the fulfillment of any duties undertaken by the settlor.¹²⁵ A settlement with the government confers absolute protection against counterclaims by nonsettling defendants.¹²⁶ In order to ensure this protection, however, the settling PRP must settle via a consent decree,¹²⁷ as opposed to responding to a unilateral administrative order from EPA under section 106.¹²⁸ This distinction is critical.

Whether or not this optional provision is inserted in a consent decree, CERCLA appears to automatically grant contribution protection as part of any qualifying settlement.¹²⁹ The question of whether a state government settlement can trigger this federal contribution protection emerged as a critical issue after the Supreme Court's *Aviall* opinion.¹³⁰ It is addressed in the final section of this article.

A settling PRP, or group of PRPs, can settle for the entire response cost, its proportionate share, or even less than its proportionate share.¹³¹ The settling PRP can then pursue nonsettling PRPs for the response costs

¹²⁵ *Dravo Corp. v. Zuber*, 13 F.3d 1222, 1226 (8th Cir. 1994) (holding that, pursuant to section 122(a), *de minimis* settlors receive automatic and instantaneous protection against contribution actions).

¹²⁶ 42 U.S.C. § 9613(f) (2000).

¹²⁷ *Id.*

¹²⁸ *Id.* While there are many differences between EPA's model consent decree and EPA's model unilateral administrative order, there is a critical distinction in the provision of contribution protection to settlors. The model consent decree utilized by EPA contains an optional paragraph pertaining to the contribution protection contained in section 113(f)(2). Model RD/RA Consent Decree, available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf>. See also *Dravo Corp.*, 13 F.3d at 1227-28 (holding that contribution protection applies to administrative settlement as well as to consent decrees). The court held that it lacked jurisdiction to second-guess EPA on administrative settlements. *Id.* at 1228. While nonparticipating settlors can object during the standard 30-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. *Id.* Effectively, this removes judicial review of administrative *de minimis* settlements.

¹²⁹ See 42 U.S.C. § 9613(f)(2). This contribution protection occurs when a settlement is either judicially or administratively approved. *Id.* Some courts hold that this protection operates as a complete bar to its contribution claims. See *United States v. Pretty Prods., Inc.*, 780 F. Supp. 1488, 1493-94 (S.D. Ohio 1991); *Comerica Bank-Detroit v. Allen Indus., Inc.*, 769 F. Supp. 1408, 1413 (E.D. Mich. 1991); *Allied Corp. v. Frola*, 730 F. Supp. 626, 639 (D.N.J. 1990); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 675 (D.N.J. 1989). Under this theory, such protection could not be waived by the beneficiary of the protection.

¹³⁰ See *supra* Part I.

¹³¹ See 42 U.S.C. § 9613(f) (2000).

of the settlement via either of two alternative allocation avenues. First, pursuant to section 107, the settling party may seek restitution of response costs under a theory of joint and several liability.¹³² Alternatively, pursuant to section 113, the settling party may seek contribution of liability under a theory of several liability.¹³³ The ultimate allocation is only clear after a subsequent cost recovery or contribution action lodged by the settling PRP against other nonsettling responsible parties.¹³⁴

Contribution actions shift some of the settlor's costs to nonsettlers. However, the theories employed by courts to effect such redistribution focus not on the original settlement liability of the settling PRP, but rather on the residual liability of nonsettling PRPs. Courts have calculated this "residual liability" in one of two ways: (1) by reducing the overall liability by the amount of the settlement, or (2) by reducing the overall liability by the settlor's proportionate share.¹³⁵ The method chosen is critical to the final allocation of liability under contribution and can shift millions of dollars of the clean-up burden.

d. The Contrasts in Liability Allocation Schemes

There are significant differences between sections 107 and 113. Key advantages of section 107 are the application of joint and several liability, a statute of limitations with a period twice as long to initiate suit, the necessity only to name and prosecute a few and not all of the liable parties, and the unavailability of equitable defenses to defendants beyond the statutorily prescribed defenses.¹³⁶ Section 107 is less likely to result in the plaintiff absorbing "orphan shares" of unfunded party liability.¹³⁷

The significant potential of section 107 joint and several liability in private cost recovery actions was dramatically articulated in 1991 in

¹³² *Id.* § 9607(a)(4)(B).

¹³³ *Id.* § 9613(f)(1).

¹³⁴ *Id.*

¹³⁵ In dealing with the effect of settlements on the liability of the nonsettlers, courts have used state model tort law principles. *See supra* text accompanying note 80.

¹³⁶ CERCLA § 107, 42 U.S.C. § 9607 (2000). *See also* *Adhesives Research, Inc. v. Am. Inks & Coatings Corp.*, 931 F. Supp. 1231, 1237 (M.D. Pa. 1996) ("[A]lthough not expressly stated within the text of the statute, courts to rule on the issue have nearly unanimously determined that liability under § 107 is joint and several unless the defendant can demonstrate that the harm is divisible.").

¹³⁷ For a detailed example of orphan share allocation under sections 107 and 113, *see* STEVEN FERREY, *ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS* 409-18 (4th ed. 2007).

United States v. Kramer.¹³⁸ The court in *Kramer* recognized the dual sword and shield of private section 107 claims by allowing a private-party PRP to bring a cost recovery action invoking section 107 joint and several liability.¹³⁹ The court held that only the three statutorily provided CERCLA defenses are available to defendants in a section 107 action,¹⁴⁰ thereby eliminating the infusion of equitable principles, and accepting the defense of divisibility.¹⁴¹ Finally, the court recognized that contribution claims are only brought appropriately under section 113.¹⁴²

The *Kramer* court clearly stated that a private party, whether or not it is liable for contamination, may voluntarily clean up a site and elect to seek its response cost reimbursement under section 107 or equitable contribution under section 113.¹⁴³ However, settling parties receive

¹³⁸ 757 F. Supp. 397. The matter came before the court on plaintiff's motion to strike two hundred of the almost three hundred affirmative defenses set forth in the answers of some of the defendants. *Id.* at 404. The claims of the government were brought pursuant to section 107(a) of CERCLA. *Id.* The motion to strike affirmative defenses related to those defenses which may be asserted pursuant to a section 107(a) claim. *Id.* Also at issue was a potential counterclaim against the government plaintiff for its contribution of wastes subject to the site. *Id.* at 405. The issue arose as to whether equitable claims could be raised in the context of section 107(a) litigation. *Id.* at 413. Several municipalities also disposed of municipal solid waste at the facility. *Kramer*, 757 F. Supp. at 407. The government sued twenty nine PRPs. *Id.* at 406. Some of these defendants then filed a third party complaint naming more than two hundred fifty additional defendants, including seventeen municipal governments. *Id.* The third party complaint sought contribution pursuant to section 113(f). *Id.*

¹³⁹ *Id.* at 413.

¹⁴⁰ *Id.* at 418-19 (referring to the three defenses listed at 42 U.S.C. § 9607(b)). In this matter, the plaintiff government agency was also potentially liable. *Kramer*, 757 F. Supp. at 397-98. While the government as a prosecutor has discretion not to name itself as a defendant in section 107 litigation, it remains potentially liable in a concurrent or subsequent section 113 contribution claim. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000). The liability of the defendants in a section 107(a) action is joint and several, while the liability of third party defendants is several only. See *id.* § 9607(a); see also H.R. REP. NO. 99-253, pt.1, at 79-80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861-62.

¹⁴¹ *Kramer*, 757 F. Supp. at 405.

¹⁴² *Id.* at 417.

¹⁴³ *Id.* at 416. Arguably, a private party that incurred costs and subsequently commenced a section 107(a) action could have incurred those costs voluntarily in a manner consistent with the NCP, or it could have incurred those costs as a function of a prior settlement with a government agency. As part of this latter arrangement, the settling party would receive contribution protection from the government under section 113(f) covering claims from other private and governmental entities. 42 U.S.C. § 9613(f) (2000). This potentially positions the settling party to utilize section 107(a) as a "sword." The court concluded that it will not allocate cleanup costs among defendants in a section 107 action, except on proof of divisibility of these costs. *Kramer*, 757 F. Supp. at 405. Allocation on other principles will get accomplished in a section 113 action. *Id.* at 416.

statutory contribution protection against liability in subsequent section 113 actions.¹⁴⁴

There are critical distinctions between these two litigation routes regarding the allocation and shifting of total response costs. If the plaintiff chooses to use a section 113 claim as a "sword," the settlor 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 and diminishes the probability of a full recovery.¹⁴⁵

Comparatively, under section 107, the settlor can settle for any amount—more or less than the settlor's proportionate share—and then initiate litigation against some nonsettling PRPs to shift the settlor's costs under joint and several liability principles.¹⁴⁶ An appropriate government-approved settlement could become a section 107 incentive for settlers. An additional advantage of a section 107 action is that it operates pursuant to a six-year statute of limitations, while a section 113 action carries only a three-year statute of limitations.¹⁴⁷

II. THE CHAOS IN ALTERED WASTE LIABILITY LAW

A. *The Federal Circuit Courts Construct a Liability Wall*

From 1994 to 2004, there were unanimous decisions from every one of the eleven federal circuits which had considered the section 107 Superfund issue.¹⁴⁸ Often overruling lower courts, one after the other federal circuits cascaded down the same chute, negating all rights of private developers to utilize section 107 of Superfund to recover their remediation response costs.¹⁴⁹

¹⁴⁴ CERCLA § 113(f), 42 U.S.C. § 9613(f) (2000).

¹⁴⁵ Because liability is several only in a section 113 action, plaintiff must shoulder the burden of proving the liability of every PRP defendant and defend successfully against all defenses raised by each defendant. 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. *See* 42 U.S.C. § 9613 (2000).

¹⁴⁶ Compared to a section 113 action, only a few defendants need be named, and only one need be successfully prosecuted to shift liability *jointly and severally*. *Id.*

¹⁴⁷ 42 U.S.C. § 9613(g)(2)-(3). *See also* *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 97, 98 (1st Cir. 1994).

¹⁴⁸ *See infra* Part II.

¹⁴⁹ *See infra* notes 156-166 and accompanying text.

1. No Private Access to Section 107 According to Circuit Precedent

Since first suggested in the *Kramer* opinion, the section 107 route has been the preferred path of private party plaintiffs for cost reallocation.¹⁵⁰ Prior to 1994, none of the circuit courts had directly addressed the issue of whether a PRP had standing under section 107 to recover clean-up costs, and the Supreme Court had only touched upon the question as a background issue.¹⁵¹ District courts split on whether a PRP could choose between a section 107 and a section 113 claim.¹⁵²

A decade of cascading federal circuit opinions began in 1994. Over the course of four years, ten circuits confronted the question of whether or not section 107 of CERCLA could be utilized by PRPs to reallocate their cost of voluntary cleanup at a hazardous waste site, as set forth in the prior section.¹⁵³ Each of the circuits,¹⁵⁴ many reversing their district courts, blocked the path dictated by section 107's unambiguous language. The Eighth Circuit followed suit in 2003, and that decision became the eventual vehicle for the 2007 Supreme Court decision.¹⁵⁵

In a compressed period of four years, ten of the twelve circuits decided or opined on the availability of section 107 cost recovery in the following sequence: the Seventh¹⁵⁶ (July 1994), the First¹⁵⁷ (Aug. 1994), the

¹⁵⁰ Section 107 has a longer statute of limitations, does not require suing all parties, and imposes joint and several liability. See 42 U.S.C. § 9607 (2000 & Supp. V 2005).

¹⁵¹ See *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). The Court did not decide 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. *Id.* at 819.

¹⁵² For examples of district courts that allowed a PRP to raise a section 107 claim, see, e.g., *Companies for a Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994); *United States v. SCA Servs. of Indiana, Inc.*, 849 F. Supp. 1264, 1272 (N.D. Ind. 1994); *Transp. Leasing Co. v. California*, 861 F. Supp. 931, 937-38 (C.D. Cal. 1993). For district courts that have held that a PRP may not use section 107 to recover response costs, see *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1362-65 (D.N.J. 1996); *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1215 (N.D. Cal. 1994).

¹⁵³ See *infra* notes 156-166, and accompanying text.

¹⁵⁴ *Id.*

¹⁵⁵ *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006) *aff'd sub nom. United States v. Atl. Research Corp.*, 127 S.Ct. 2331 (2007).

¹⁵⁶ See *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 770 (7th Cir. 1994). The court unilaterally converted the section 107 claim against plaintiff's pleadings and upheld the district court's holding that Akzo was actually seeking contribution under section 113(f)(1), not cost recovery under section 107(a), regardless of Akzo's claim. *Id.* at 764.

¹⁵⁷ See *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994).

Tenth¹⁵⁸ (Mar. 1995), the Eleventh¹⁵⁹ (Sept. 1996), the Third¹⁶⁰ (May 1997), the Ninth¹⁶¹ (July 1997), the Fifth¹⁶² (Aug. 1997), the Fourth¹⁶³ (Apr. 1998), the Sixth¹⁶⁴ (Aug. 1998), and the Second¹⁶⁵ (Sept. 1998). The Eighth Circuit followed in 2003.¹⁶⁶ All closed off section 107 to private party plaintiffs.¹⁶⁷ The D.C. Circuit Court is the only circuit court not among the group. It did not get a case to decide.

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 sections 107 and 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 held only that their often strained reading of CERCLA did 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 sections 107 and 113, six of the eleven circuit courts discuss SARA and how the 1986 amendment codified the common law right to contribution.¹⁶⁸

¹⁵⁸ See *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1539 (10th Cir. 1995).

¹⁵⁹ See *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1508, 1514 (11th Cir. 1996).

¹⁶⁰ See *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119, 1126 (3d Cir. 1997).

¹⁶¹ See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *rev'g* 926 F.Supp. 1400 (D. Ariz. 1996). The thinking of the Arizona district court was adopted in the decision of a Pennsylvania district court in *Adhesives Research, Inc. v. Am. Inks & Coatings Corp.*, decided prior to *Pinal Creek* being overturned by the Ninth Circuit. See 931 F. Supp. 1231, 1243 (M.D. Pa. 1996).

¹⁶² See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1583 (5th Cir. 1997).

¹⁶³ See *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998).

¹⁶⁴ See *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 345, 355-56 (6th Cir. 1998) (affirming the district court's holding that PRPs are precluded from seeking joint and several cost recovery under section 107(a); *Adhesives*, 931 F. Supp. at 1243-44).

¹⁶⁵ See *Bedford Affiliates v. Sills*, 156 F.3d 416, 432 (2d Cir. 1998).

¹⁶⁶ See *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 532 (8th Cir. 2003).

¹⁶⁷ See sources cited *supra* notes 156-166.

¹⁶⁸ See *California v. Neville Chem. Co.*, 358 F.3d 661, 668 (9th Cir. 2004); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 (3d Cir. 1997); *United States v. Colorado & E. R.R.*, 50 F.3d 1530,

The Second, Third and Tenth Circuits most exhaustively develop the arguments for why an analysis of SARA, which did *not* alter the pre-existing section 107, by silent implication precludes a PRP from using section 107.¹⁶⁹ In distinguishing “cost recovery actions” under section 107’s contrary language from “contribution actions” under section 113, five 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.¹⁷⁰ The Sixth, the Seventh, and the Tenth Circuits referred to either Black’s Law Dictionary, the Restatement (Second) of Torts (§ 886A), or American Jurisprudence in defining the term ‘contribution’ in legal context.¹⁷¹

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. . . .”¹⁷² To give effect and force to section 113, many of these circuit courts then ignored the language of section 107, straining to avoid confronting or construing the plain language of section 107’s empowerment of “any other person.” The

1535 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 97 (1st Cir. 1994). See also SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

¹⁶⁹ The three courts reasoned that SARA, as well as the pre-SARA case law recognizing an implicit right of contribution, established 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 423-24; *New Castle County*, 111 F.3d at 1121; *Colorado & Eastern R.R.*, 50 F.3d at 1535. Legislative history indicates that a principal goal in creating section 113 was to clarify 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.” S. REP. NO. 99-11, at 44 (1985).

¹⁷⁰ See *Centerior*, 153 F.3d at 344; *New Castle County*, 111 F.3d at 1116; *Colorado & E. R.R.*, 50 F.3d at 1531; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *United Techs. Corp.* 33 F.3d at 96.

¹⁷¹ See *Centerior*, 153 F.3d at 350-351 (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)) (also referring to 18 AM. JUR. 2D *Contribution* § 9); *Colorado & E. R.R.*, 50 F.3d at 1536 (referring to RESTATEMENT (SECOND) OF TORTS § 886A (1979)); *Akzo Coatings*, 30 F.3d at 764 (referring to RESTATEMENT (SECOND) OF TORTS §§ 886A (1979)).

¹⁷² *United Techs. Corp.*, 33 F.3d at 101. 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. *Id.*

Ninth Circuit and the Sixth Circuit ignored the "any other person" language in section 107 as moot because they surmised that sections 107 and 113 work in conjunction in contribution claims.¹⁷³ Thus, a contribution claim brought pursuant to section 107 and its "any other person" language is transformed into, and limited by, the mechanisms of section 113, thereby allowing only several liability. The First and the Sixth Circuits left open the question of which statute of limitations provision applies if a PRP initiates a clean-up with government prodding.¹⁷⁴

2. Overcoming Their Own District Courts' Dissent

It is particularly noteworthy that many of the 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 a section 107 action by private plaintiff parties.¹⁷⁵ Beginning with *Sand*

¹⁷³ See *Pinal Creek v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-03 (9th Cir. 1997). The court also points toward legislative history, stating that section 113 "clarifies and confirms existing law" to support the contention that the two provisions work together. See also *Centerior*, 153 F.3d at 349-50. The Sixth Circuit adds that "one must necessarily look to § 107 in contribution actions involving § 113(f) . . . [because] § 107 [provides] the basis and the elements of a claim for recovery of response costs and lists the parties who are liable." *Id.* at 350. A contribution claim under section 113 is therefore an effort to recoup the necessary costs of response by the person referred to in section 107. See *id.*

¹⁷⁴ See *United Techs. Corp.*, 33 F.3d at 99-100 n.8; *Centerior*, 153 F.3d at 354.

¹⁷⁵ See *Barnet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159, 161-62 (W.D. Ky. 1995); *United States v. Atlas Minerals & Chems.*, No. 91-5118, 1995 U.S. Dist. LEXIS 13097, at *227-28 (E.D. Pa. 1995); *Town of Walkill v. Tesa Tape, Inc.*, 891 F. Supp. 955, 959-60 (S.D.N.Y. 1995); *Bethlehem Iron Works, Inc. v. Lewis Indus.*, 891 F. Supp. 221, 223 (E.D. Pa. 1995); *United States v. SCA Servs. of Ind.*, 865 F. Supp. 533, 546-47 (N.D. Ind. 1994); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579-80 (D. Conn. 1994); *Barton Solvents, Inc. v. Southwest Petro-chem, Inc.* No. 91-2382-GTV, 1993 WL 382047, at *3 (D. Kan., Sept. 30, 1993); *Charter Twp. of Oshtemo v. American Cyanamid Co.*, No. 1:92:CV:843, 1993 WL 561814, at *2 (W.D. Mich. Aug. 19, 1993); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993); *Transp. Leasing Co. v. California*, 861 F. Supp. 931, 938 (C.D. Cal. 1993); *Chesapeake and Potomac Tel. Co. v. Peck Iron Metal Co.*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992); *United States v. Kramer*, 757 F. Supp. 397, 412 (D.N.J. 1991) (finding no distinction between government or "any other person" employing section 107 for cost recovery); *Gen. Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1417 (8th Cir. 1990) (overruled on other grounds by *Key Tronic Corp. v. United States*, 984 F.2d 1025, 1027-28 (9th Cir. 1993)); *United States v. Hardage*, 750 F. Supp. 1460, 1495 (W.D. Okla. 1990); *Kelley v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990); *Allied Corp. v. Acme Solvents Reclaiming, Inc.* 691 F. Supp. 1100, 1119 (N.D. Ill. 1988); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 915-16 (N.D. Okla. 1987).

Springs in 1987,¹⁷⁶ these decisions were elevated to eloquent expression by the *Kramer* opinion in 1991,¹⁷⁷ and proliferated through the mid-1990s. In the mid-1990s, the circuit courts began their scramble to reverse and effectively block the section 107 route, resulting in a majority of the circuits so holding by 1998.¹⁷⁸ While it is, of course, the proper function of the circuits to interpret issues of law, the wholesale cascade of the circuits contradicting many of their trial courts was notable.

Unlike the eleven circuit courts, many of the district courts were not so persuaded. District courts allowing use of section 107 generally base their conclusions on a plain meaning review of CERCLA. One of these contrary trial court opinions eventually reached the Supreme Court in 2007.¹⁷⁹ In *Adhesives Research v. American Inks & Coatings*, the district court began its inquiry by dissecting the plain language of the statute, which invests standing under section 107 to “any other person” who incurs response costs.¹⁸⁰ The court found each of these terms to be unambiguous.¹⁸¹ The court stated that if a statutory term was clear in meaning, then a court should not alter that term solely because allowing the term makes the statute broader in scope.¹⁸² Noting that the term “any,” although broad in scope, is clear and unambiguous, the court determined that applying the plain meaning standard of review ends judicial review of the statute.¹⁸³ The *Adhesives Research* court held that the “any other person” language of §107(a)(4)(B) confers standing on persons who incur response costs, regardless of their own potential liability.¹⁸⁴ Following this logic to completion, the court held that a plaintiff PRP has standing to bring a cost recovery action under CERCLA §107.¹⁸⁵

Had the Eighth Circuit not overruled its trial court, allowing this lone dissent to reach the Supreme Court earlier, the national crisis could have been averted. The district court in *Laidlaw Waste Systems v. Mallinckrodt* spurned its own circuit precedent and likewise found that

¹⁷⁶ 670 F. Supp. at 915-16.

¹⁷⁷ 757 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).

¹⁷⁸ See *infra* Part IV.A.

¹⁷⁹ *United States v. Atl. Research Corp.*, 127 S.Ct. 2331 (2007).

¹⁸⁰ 931 F. Supp. 1231, 1238-39 (M.D. Pa. 1996).

¹⁸¹ *Id.* at 1239.

¹⁸² *Id.*

¹⁸³ *Id.* at 1238.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1246.

the plain language of sections 107 and 113 does not deny plaintiff PRPs bringing claims pursuant to section 107.¹⁸⁶

The district court in *Pinal Creek Group v. Newmont Min. Corp.* explained that section 107 confers standing upon any party that has incurred response costs, as the plain meaning of the statute does not provide a modifier that should be applied to "any other person."¹⁸⁷ The court stated that the only limitation the statute provides is that the plaintiff must have incurred response costs.¹⁸⁸ This limitation is not based on the "innocent" status of an individual, PRP or non-PRP, but limits the action based on the form of injury incurred and redress sought.¹⁸⁹

In *Pinal Creek*, the court was concerned about the inability to control the "orphan shares" under section 107.¹⁹⁰ In *Redwing Carriers, Inc., v. Saraland Apartments*, the court converted a claim by a PRP under section 107 into an action under section 113, stating that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under section 107(a). Rather, it is a claim for contribution under section 113(f)."¹⁹¹

Courts fear the reallocative power of section 107 joint and several liability. Thus the courts in *Centerior*, *Pinal Creek* and *Redwing* all collapsed the distinctions between sections 107 and 113, leaving available

¹⁸⁶ 925 F. Supp. 624, 630 (E.D. Mo. 1996).

¹⁸⁷ 926 F. Supp. 1400, 1405-06 (D. Ariz. 1996), *rev'd*, 118 F.3d 1298 (9th Cir. 1997). This district court decision was overturned by the Ninth Circuit, but its holding was retained by *Adhesives Research*, which adopted the *Pinal Creek* court's discussion of CERCLA policy in its entirety. *Adhesives Research*, 931 F. Supp. 1231, 1243-44 (M.D. Pa 1996).

¹⁸⁸ *Pinal Creek*, 926 F. Supp. at 1406.

¹⁸⁹ *Id.* at 1405-06.

¹⁹⁰ See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997). Specifically, the court stated, "we hold that, under CERCLA, a PRP does not have a claim for the recovery of the totality of its clean-up costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability." *Id.* at 1306.

Likewise, the Pinal Group seeks to avoid the effect of § 113. By trying to obtain the totality of its costs immediately (subject to contribution counterclaims), it seeks to avoid the delay (and burden-of-proof rules) implicit in § 113(f)'s mechanism for the equitable allocation of costs among PRPs . . . without establishing any special per se rules.

Id. at 1304.

¹⁹¹ 94 F.3d 1489, 1513 (11th Cir. 1996).

While the 'divisibility' defense to joint and several liability is frequently invoked in cost recovery actions brought under a § 107(a) action, a contribution claim under § 113(f) is a means of equitably allocating response costs among responsible or potentially responsible parties.

Id. (citing S. REP. NO. 99-11, at 44 (1985)).

only the latter, without any statutory basis for this reduction.¹⁹² “Plain language” interpretation would not merge the distinctions between section 107 response costs and section 113 contribution. The courts’ belief that the two paths should merge, which in fact they do not, does not justify arbitrary elimination of one statutory avenue.

3. The Circuit Courts’ Retention of Equitable Factors In the Judicial Toolbox

Many of the circuits (with the exception of the First, Fifth and Twelfth circuits) have held that there are no equitable defenses available to a section 107 claim. In *Velsicol Chemical Corp. v. Enenco, Inc.*, the Sixth Circuit 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.¹⁹³ In

¹⁹² See *supra* notes 187-191 and accompanying text.

¹⁹³ 9 F.3d, 524, 530 (9th Cir. 1993). *Accord* *Town of Munster v. Sherwin-Williams Co.* 27 F.3d 1268 (7th Cir. 1994). The court specifically stated:

While it may be logical to permit equitable defenses in an inherently equitable proceeding, and sections 106 and 113 both permit equitable considerations, the clear answer for section 107 is that Congress explicitly limited the defenses available to only those three provided in section 107(b). It is within the powers of Congress to so limit the district court’s discretion, and Congress did so in section 107.

Id. (quoting *United States v. Kramer*, 757 F. Supp. 397, 427 (D.N.J. 1991). The appellee, Sherwin-Williams, argued that it should be able to raise the equitable doctrine of laches as an affirmative defense. *Id.* at 1270. The court based its reasoning on section 107(a), which states in relevant part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) . . . Section 107(b) further states: There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3); an act or omission of a third party other than an employer or agent of the defendant; or (4) any combination of the foregoing paragraphs. 42 U.S.C. § 9607(b). Under § 113(f), any party found liable for clean-up costs may seek contribution from other liable or potentially liable parties and in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. . . .

Id. The court used the specific language of CERCLA to hold that “CERCLA does not permit equitable defenses to § 107 liability, although [they] do conclude that equitable factors may be considered in the allocation of contribution shares.” *Id.* The court went on further to explain that:

General Electric Co. v. Litton Industrial Automation Systems, Inc., the appellants argued unsuccessfully that the court should allow a section 107 "unclean hands" defense.¹⁹⁴ The court in *California ex rel California Dep't of Toxic Substances v. Neville Chemical Company* held that "the three statutory defenses [to CERCLA liability expressly listed in § 107(b)] are the only [defenses] available, and . . . traditional equitable defenses are not."¹⁹⁵

Here the clear and unambiguous language of § 107(a) imposes liability notwithstanding any other provision or rule of law, and subject *only* to the defenses set forth in subsection (b). . . . Sections 107(a) and (b), read together, plainly evince the exercise of Congress' authority to restrict the equitable powers of the federal courts.

Id. at 1271.

¹⁹⁴ 920 F.2d 1415, 1418 (8th Cir. 1990). The court held that "unclean hands" is not a defense to a private party's action to recover CERCLA response costs under § 107, stating:

CERCLA is a strict liability statute, with only a limited number of statutorily-defined defenses available [under § 107(b)] CERCLA does not provide for an "unclean hands" defense; the liability imposed by [§ 107(a)] is subject only to the defenses [in § 107(b)]. . . . The purpose of allowing a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites. This purpose would be frustrated if a plaintiff's motives were subject to question.

Id. (internal citations omitted).

¹⁹⁵ 358 F.3d 661, 672 (9th Cir. 2004). The court stated that "[e]very court of appeals that has considered the precise question whether § 9607 permits equitable defenses has concluded that it does not, as the statutory defenses are exclusive." *Id.*

The argument was that Neville cannot be liable under CERCLA for the costs of overseeing the clean-up incurred by the Department because the Department had promised that it would not sue Neville for full recovery costs if Neville conducted the research, planning, and clean-up of the site. The district court ruled that Neville could not assert equitable defenses to a CERCLA recovery action.

Id. at 671. The Ninth Circuit stated:

Suits for contribution, however, are entirely distinct under the statute from suits for recovery of costs. The former is governed by [§113(f)(1)]. . . . The provisions of CERCLA governing suits for recovery of costs, [§§ 107(a) and 113(g)(2)], make no such reference to equitable factors. Also, "the critical distinction between [suits for contributions and suits for cost recovery] is that under § 107, the court merely determines whether the party is jointly and severally liable, without regard to the amount of fault; but under § 113, the court also divides the fault of the parties, using equitable factors. California is not bringing suit here for contribution, so the specific language allowing the court to consider equitable factors when apportioning contribution is inapplicable.

Id. at 672-673. *See also* Gen. Elec. V. Litton Indus. Automation Sys., 920 F.2d 1415, 1418 (8th Cir. 1990) (holding that CERCLA does not provide an "unclean hands" defense)

To have equitable discretion at their disposal, courts have gravitated to section 113 claims while refusing to sanction section 107 claims. Some circuits have found that although PRPs must bring suit for recovery for contribution under section 113, it is possible that PRPs can recover 100% of their costs if the court determines that they are not responsible for contamination of the site. Courts require the parties as PRPs to bring a claim for contribution under section 113, but due to equitable considerations of section 113, allow for 100% cost recovery.¹⁹⁶ This result mirrors

(questioned on other grounds in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994)); *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1304 (11th Cir. 2002) (holding that CERCLA bars equitable defenses); *Velsicol*, 9 F.3d at 530 (also holding that CERCLA bars equitable defenses) “In resolving contribution claims, the court may allocate response costs among liable parties using such factors as the court determines are appropriate. . . .” *Munster*, 27 F.3d at 1270 (quoting 42 U.S.C. § 9613(g)).

¹⁹⁶ See *Dent v. Beazer Materials and Services*, 156 F.3d 523 (4th Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998); *Morrison Enterprises v. McShares, Inc.*, 1302 F.3d 1127 (10th Cir. 2002); *W. Properties v. Shell Oil Co.* (9th Cir. 2004). But see *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (expressly holding that a PRP “can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor—and not an innocent party—that ultimately must bear its pro rata share of cleanup costs under § 107(a).”). In *Dent v. Beazer Materials and Services v. Braswell Shipyards, Inc.*, the owner of a creosote processing facility appealed a district court finding that it was 100% liable under section 113, and the other PRPs, prior owners of land adjacent to the facility who admitted to using fertilizer which contained lead on the property, were found to have zero liability. 156 F. 3d. 523, 530-31 (4th Cir. 1998). The court held that the district court:

correctly ruled as a matter of law on the undisputed facts before it that no harm caused by wood-treating constituents could fairly be attributed to Conoco and Agrico. . . .

Neither did the district court err in finding that the fertilizer constituents, for whose disposal Conoco and Agrico were potentially liable persons, had caused no harm requiring remediation.

Id. This decision showed that it is possible for a court to hold one or more PRPs 100% liable for clean-up costs, and that another PRP is liable for none of the clean-up costs under section 113 when the contamination by the PRP held not responsible for any costs was so minimal that their contamination did not require any clean-up in and of itself. *Id.*

In *PMC, Inc.*, the appellant, Sherwin-Williams, unsuccessfully argued that the district court judge abused his equitable discretion in holding it 100% liable for all clean-up costs under section 113, and finding that PMC was not liable for any of the costs. 151 F.3d at 616. The court held that “PMC’s spills may have been too inconsequential to affect the cost of cleaning up significantly, and in that event a zero allocation to PMC would be appropriate.” *Id.*

In *Morrison Enterprises*, the court agreed with *Pinal Creek*, stating that “[i]f the plaintiffs are truly innocent PRPs, then there should be little difficulty in making the additional required showing that the defendant PRPs should bear the entire cost under the equitable factors.” 1302 F.3d at 1135.

what some courts fear would result if section 107 were enforced and the entire PRP liability were shifted to the defendants.

Courts can also mitigate against inequitable results or windfalls by allowing limited section 113 counterclaims when applying section 107 to the primary cause of action. The First Circuit, in *United Technologies Corporation v. Browning-Ferris Industries*, made mention *in dicta* of the possibility of allowing a PRP that does the clean-up without prodding by the government to recover under section 107.¹⁹⁷ The court did not decide that issue in this case because the parties began clean-up after governmental prodding.¹⁹⁸ The 2007 Supreme Court decision in *Atlantic Research* finds that this flexibility is indeed available.¹⁹⁹

B. *Judicial Cascades and Superfund Chaos*

While many federal district courts initially followed *Kramer* to allow private use of section 107, eleven federal circuits, in a cascade—one after the other, closed the section 107 path. According to many of the federal circuit courts, the evolved rule of thumb 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.²⁰⁰ There is no statutory directive and no supportive legislative

In *Western Properties*, while the court did not allow Western Properties to assert the 7th Circuit "innocent landowner" exception, or recover response costs under section 107, the court did hold that all PRPs, regardless of reason, must recover under section 113, and that if the court finds the PRP to be a non-polluter or innocent of contamination, the court may find the other PRPs 100% liable. 358 F.3d. at 690-91. The court stated:

Because, in an appropriate case, the court might properly exercise its discretion under § 113(f)(1) to allocate a smaller portion or even no portion of the cleanup cost to a non-polluting PRP landowner, there is no reason to read such authority into § 107(a) against the limitations of the words of § 107(b). . . .

On the other hand, if non-polluting PRP landowners could recover through § 107(a) in addition to, or notwithstanding § 113, they could evade the § 113(f)(1) requirement that factors for allocation be 'equitable,' and potentially could obtain double recoveries.

Id.

¹⁹⁷ 33 F.3d 96, 99-100 n.8 (1st Cir. 1994).

¹⁹⁸ *Id.*

¹⁹⁹ See generally 127 S. Ct. 2331 (2007).

²⁰⁰ 42. U.S.C. §9607(b) (2000).

Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance

history to this effect. To reach this conclusion, the circuits ignore plain statutory language, their own decisions in analogous CERCLA cases, and several canons of statutory construction.

This strange set of decisions at the circuit level emanated from practical consideration. The circuit courts, in requiring PRPs to recover only under section 113, can inject subjective equitable factors when apportioning liability between the parties. With the Supreme Court's decision in *Aviall*, these circuit decisions have created chaos; they close the section 107 path, while *Aviall* closes the section 113 road.

There is a demonstrated lack of clarity in the section 107 discussions of eleven circuits. They acknowledge the express universal statutory entitlement of "any person" to employ section 107, then back-handedly bar its plain implementation because it might interfere with their equitable discretion.²⁰¹ While many courts found that section 107 allows "any person" to recover all response costs from any responsible party whose liability is joint and several,²⁰² many of the same courts also found that only section 113 must be used by parties who are themselves PRPs, unless they can assert one of the specific defenses described in section 107(b) of CERCLA.²⁰³

and the damages resulting there from were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly, with the defendant

²⁰¹ See *supra* Part II.A.

²⁰² See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1999); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995); *United Techs.*, 33 F.3d at 100. In *Morrison Enterprises*, the court employed specific language from section 107(a) of CERCLA, stating that "[p]arties that have expended funds to respond to hazardous waste releases, whether they are federal, state, or private, may in turn recoup their costs from parties that might be liable under the statute, commonly known as 'potentially responsible parties' or PRPs." 302 F.3d 1127, 1132 (10th Cir. 2002). In *Carson Harbor Village, Ltd. v. Unocal Corp.*, the court stated:

CERCLA 'generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed.' 3550 *Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir. 1990). To achieve that end, CERCLA 'authorizes private parties to institute civil actions to recover the costs involved in the clean-up of hazardous wastes from those responsible for their creation.'

270 F.3d 863, 870 (9th Cir. 2001).

²⁰³ See *New Castle Co. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 n. 2 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996);

The adoption of this precedent is also evidence of the tendency of circuits to follow other circuits without reanalyzing the issue anew. Professor Cass Sunstein and others in the context of appellate decisions, have discussed the availability cascade, a chain reaction of plausible interpretation that may rest on an initial misperception that is followed thereafter by other courts.²⁰⁴ This results in a self-reinforcing process where publicly available preceptors of key decision makers spawn a cascading chain reaction of perception in which followers adopt similar views and judicial outcomes. Kuran and Sunstein observe that judges are subject to reputational incentives and availability cascades.²⁰⁵ Sometimes a single decision of one court shapes the entire constellation of perception about a legal issue. Dissonant positions are punished and their holders are ostracized or risk "reputational sanctions" in judicial circles, according to Kuran and Sunstein.²⁰⁶

To a certain degree, an availability cascade is one explanation of what may have occurred with regard to unanimous circuit court interpretation of CERCLA section 107.²⁰⁷ The subsequent decisions lean heavily

Colorado R.R., 50 F.3d at 1536; *United Techs.*, 33 F.3d at 99; see also *Morrison Enterprises*, 302 F.3d at 1133 ("Under § 9613(f)(1), '[a]ny person may seek contribution from any other person who is liable or potentially liable under Section 9607(a)."; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) ("[A claim by a potentially responsible person] is a quintessential claim for contribution."); *Bedford Affiliates v. Sills*, 156 F.3d 416, (2d Cir. 1998) ("[A] potentially responsible person under § 107(a) that is not entitled to any of the defenses enumerated under § 107(b)-like Bedford-cannot maintain a § 107(a) action against another potentially responsible person.").

²⁰⁴ See, e.g., Timork K. Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STANFORD L.R. 683 (1999); Heather K. Gerken, *Dissenting By Deciding*, 57 STANFORD L.R. 1745 (2005).

²⁰⁵ Kuran & Sunstein, *supra* note 204, at 765 n.291, (citing Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994)).

²⁰⁶ *Id.* at 766 n.300.

²⁰⁷ See Gerken, *supra* note 204, at 1771-72.

Cascades, of course, occur precisely in such circumstances—when there appears to be an emerging consensus among the first movers Designing appellate panels to produce a more moderate set of decisions creates the risk of what Sunstein terms a "precedential cascade," where subsequent appellate panels follow the lead of the initial panels in ruling on a question. Subsequent appellate panels—or the Supreme Court—might be less likely to depart from the "moderate" view than they would be if the set of appellate decisions on a given issue varied. Dissenting by deciding (in the form of an ("ideologically amplified") decision), then would be useful to offset the precedential cascade that seems likely to take place when all appellate decisions resemble one another.

Id. (footnotes omitted).

on the early decisions in *UTC* and *OHM*. These decisions interpret the words of section 107 by refusing to construe it directly. Instead, they repackage judicial preference and practicality through the back-handed interpretation of section 113, which is the cousin once-removed of section 107. Some later courts cascaded into conformance along this norm, apparently without new independent analysis. However, behavioral research indicates that changes in the availability of information will alter the degree of such a cascade.²⁰⁸

While the outcome may seem similar to a court, the litigation input of the plaintiffs is radically different. Section 107 actions are plaintiff-friendly, while section 113 actions are resource intensive and often prohibitive to plaintiffs.²⁰⁹ Inputs and incentives are important to encourage private voluntary clean-ups, which will not occur if section 107 is restricted.

C. *The 2004 Aviall Supreme Court Decision Traps the Last Avenue of the Circuits*

There was a visible tremor in 2004 when the U.S. Supreme Court knocked out certain private party access to section 113 of the Superfund statute. However, the Court could not deconstruct the wall constructed by the eleven circuit courts regarding section 107 of Superfund. In its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*,²¹⁰ the Supreme Court went around the wall created by the Circuits between 1993 and 2004.²¹¹ This decision threw the hazardous waste cost allocation scheme

²⁰⁸ Kuran & Sunstein, *supra* note 204, at 767.

²⁰⁹ The duality of this choice was recognized by some courts, but other courts oddly fold section 107 into section 113 as a subpart. There is no rationale for this in the statute. In *Centerior*, the court held that:

Under such a reading, if § 113(f) is incorporated under § 107, then a § 113(f) action is an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be an action for contribution. We agree. Section 107(a) clearly establishes the right of parties to seek 'necessary costs of response.' It does not specify whether these costs will arise from joint and several liability or sound in contribution. As noted above, before the adoption of § 113(f), courts found that § 107(a) created an implied right of action for both contribution and joint and several recovery. Additionally, as the government asserts, parties seeking contribution under § 113(f) must look to §107 to establish the basis and elements of the liability of the defendants, as well as any defenses to that liability.

Id.

²¹⁰ 543 U.S. 157 (2004).

²¹¹ See *infra* Part III.

for billions of dollars of hazardous waste liability, as previously allowed by most of the circuit courts, into a state of chaos. The Supreme Court's opinion in *Aviall* prohibits a private party from initiating a claim under section 113(f)(1) of CERCLA against other PRPs for contribution to hazardous waste clean-up expenses, unless and until that plaintiff party has first been sued for response costs by (or settled with) the government under section 107(a) or section 106 of CERCLA.²¹²

Legally, this was significant. The federal government only sues private responsible parties at very high profile waste sites in limited situations. The existing system relies on voluntary private action to remediate hazardous waste contamination.²¹³ It also relies on subsequent private judicial proceedings to reallocate the clean-up cost from the volunteering party to others who contributed to, or are liable for, the contamination.²¹⁴ With the cost-reallocation mechanism judicially disabled, the incentive for voluntary clean-up of hazardous waste sites disappears because cost recovery for the volunteering party becomes difficult or impossible.

The facts in *Aviall* are straightforward.²¹⁵ 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.²¹⁶ The Fifth Circuit

²¹² *Aviall*, 543 U.S. at 166-67.

²¹³ See Answers.com, Air and Water Resource and Solid Waste Management (SIC 9511), <http://www.answers.com/topic/air-and-water-resource-and-solid-waste-management> (last visited Mar. 16, 2009) ("[B]y the end of 1986, only 13 hazardous waste sites, out of more than 800 identified by the EPA, had been cleaned up under the Superfund program at a cost of \$780 million."); see also Matthew J. Lawlor, Comment, Super Settlements for Superfund: A New Paradigm for Voluntary Settlement?, 27 B.C. Envtl. Aff. L. Rev. 123 (1999) (discussing voluntary private action through voluntary settlement), available at http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcealr/27_1/04_FMS.htm.

²¹⁴ See STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPECTATIONS ch. 9 (4th ed. 2007).

²¹⁵ *Aviall* purchased four aircraft manufacturing and maintenance facilities from Cooper Industries. *Aviall*, 543 U.S. at 157. Hazardous substance contamination at the sites was created by both companies' operations before and after the sale. *Id.* *Aviall*, as 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.* 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.* This would prove to be a strategic legal error. *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.* at 157-58.

²¹⁶ *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. Civ.A.397CV1926D, 2000 WL 31730, at *4 (N.D. Tex. Jan. 13, 2000).

initially upheld the district court but eventually reversed the decision in an *en banc* hearing. The *en banc* decision relied on the purpose of CERCLA, “to promote prompt and effective cleanup.”²¹⁷ 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.²¹⁸

On *certiorari*, the odds on paper were stacked. Twenty-three states, as well as numerous corporations and others, joined Aviall as *amici* to argue in support of the final Fifth Circuit *en banc* decision.²¹⁹ The U.S. filed the sole *amici* brief supporting Cooper Industries.²²⁰ The Supreme Court reversed the Fifth Circuit in a forceful opinion requiring that, prior to any section 113(f) CERCLA contribution action, the private party-plaintiff must have 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.²²¹ 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, section 107 (a), and separate rights to contribution in other circumstances, §§ 113 (f)(1), 113(f)(3)(B).”²²²

It required no leaps of judicial logic for the Supreme Court to reach this outcome. The Court 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 other litigation or settlement is the only means of entitling one to bring contribution claims against other potentially liable parties under the statute.²²³ Otherwise, a more permissive interpretation of the section would “render . . . entirely superfluous”

²¹⁷ Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 681 (5th Cir. 2002).

²¹⁸ *Id.* at 687.

²¹⁹ See Brief for New York et al. as Amici Curiae Supporting Respondents, Cooper Indus. Inc., v. Aviall Services, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 782371; Brief for Superfund Settlements Project et al. as Amici Curiae Supporting Respondents, Cooper Indus. Inc., v. Aviall Services, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 782370; Brief for Atlantic Richfield Company et al. as Amici Curiae Supporting Respondents, Cooper Indus. Inc., v. Aviall Services, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 791894.

²²⁰ See Brief for the United States as Amicus Curiae Supporting Petitioner, Cooper Indus. Inc., v. Aviall Services, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 354181.

²²¹ Aviall, 543 U.S. at 167.

²²² *Id.* at 163.

²²³ *Id.* at 166-67.

the conditional "during or following" language of the Act.²²⁴ 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.

While the Supreme Court decision in *Aviall* was by a 7-2 plurality, the two dissenters did not seem to contest this core holding.²²⁵ Rather they sought to go further to address the even more pressing issue of whether there was a private right to cost recovery along the alternative road of section 107(a) of CERCLA, notwithstanding the prior contrary opinions of eleven Circuit Courts.²²⁶ However, *Aviall* had been forced in the district court to drop its alternative section 107 claim after the initiation of the litigation, consolidating all claims under the less conducive section 113. The issue was therefore not addressed in the circuit court opinion on review, and therefore was not before the Court on *certiorari*.²²⁷ The Supreme Court majority in *Aviall* did not adjudge the section 107 rights of private parties litigants *sua sponte*.²²⁸ In dissent, Justice Ginsberg, joined by Justice Stevens, would have ruled on the section 107 issue notwithstanding that it had not been briefed to the Court, potentially overturning the section 107 roadblocks erected by the circuits.²²⁹

This 2004 Supreme Court decision significantly cut off section 113 as a cost reallocation route, often leaving few avenues for private hazardous waste cost recovery and allocation. Critically, as examined later, these restrictive circuit decisions discouraged any incentives for parties to undertake voluntary clean-up, rather than engage in CERCLA obfuscation.²³⁰

²²⁴ *Id.* at 166. In his opinion for the majority, Justice Thomas 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.

²²⁵ See *Aviall*, 543 U.S. at 171 (Ginsburg, J., dissenting).

²²⁶ *Id.* at 171-74.

²²⁷ See *id.* at 157-58.

²²⁸ See *id.* at 157-59.

²²⁹ *Id.* at 271-74 (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 Ginsburg notes that in *Key Tronic* "no Justice expressed the slightest doubt that § 107 indeed enables a PRP to sue other covered persons for reimbursement . . . of cleanup costs." *Aviall*, 543 U.S. at 172.

²³⁰ See *supra* Part II.

The Supreme Court opinion cut off many of the potential section 113 cost contribution actions, where there is no litigation against the plaintiff or an administratively or judicially approved settlement with the plaintiff.²³¹ There ensued some equivocation among four circuits as to whether section 107 had been reinvigorated in the shadows of the Supreme Court *Aviall* decision, or whether the impenetrable wall of the eleven circuits remained unbreached.²³² This provided the Supreme Court an opportunity to reach the unbriefed issue it could not stretch to reach in 2004.

D. *The Road Less Traveled: The Atlantic Research Revolution*

There was drama leading up to the 2007 Supreme Court opinion in *Atlantic Research*.²³³ The Second Circuit did an immediate U-turn after *Aviall*.²³⁴ Despite its 1998 *Bedford* decision denying all PRPs access to section 107 in order not to render section 113 “a nullity,”²³⁵ it had second thoughts in *Consolidated Edison*.²³⁶ All of a sudden, the Second Circuit noted the “plain language” of section 107, and the fear that it would “impermissibly discourag[e] voluntary cleanup,”²³⁷ causing all voluntary clean-ups to grind to a halt: “This 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.’”²³⁸

²³¹ See *Aviall*, 543 U.S. at 167.

²³² Three circuits reinvigorated section 107 after the *Aviall* decision. See, e.g., *Metropolitan Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 834-35 (7th Cir. 2007); *Atl. Research Corp. v. United States*, 459 F.3d 827, 835-36 (8th Cir. 2006); *Consol. Edison Co. of New York, v. UGI Util., Inc.*, 423 F.3d 90, 97 (2d Cir. 2005). The Third Circuit held to its prior precedent. See, e.g., *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 521, 29, 43 (3d Cir. 2006).

²³³ 127 S. Ct. 2331 (2007).

²³⁴ See *Consol. Edison Co.*, 423 F.3d at 100.

²³⁵ See *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998).

²³⁶ *Consol. Edison Co.*, 423 F.3d at 97. The plaintiff entered into a “Voluntary Cleanup Agreement” with the state of New York. *Id.* at 93. 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. *Id.* at 96. 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. *Id.* at 96-97. 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.* at 97.

²³⁷ *Id.* at 100.

²³⁸ *Consol. Edison Co.*, 423 F.3d at 100 (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994)).

To make this U-turn, the Second Circuit pivoted around the 1994 decision of the U.S. Supreme Court in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). Regarding its prior contrary precedent in *Bedford*, the circuit held straightforwardly that "[t]his holding impels us to conclude that it [*Bedford*] no longer makes sense"²³⁹ However, rather than formally overrule *Bedford*, it tried to distinguish it by noting that Consolidated Edison had not been sued or found partially liable yet, unlike in *Bedford*.²⁴⁰ Here, however, the logic stops. Without settling their liability in an administratively or judicially approved settlement with the federal government there is no contribution protection, and this minimizes incentives for voluntary remediation. Even with section 107 available, without contribution protection for a settlement there is scant incentive for voluntary remediation.

The *Consolidated Edison* court viewed sections 107(a) and 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."²⁴¹ The court's holding implies that a section 113(f)(1) claim for contribution will be permitted for PRPs who are subject 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."²⁴² Section 107(a) does not exclude liable parties from raising a section 107 claim, thus section 107(a) is available to "any other person" who has incurred "any other necessary costs of response."²⁴³

In a similar vein, the Eighth Circuit provided an interesting mechanism for the circuits to side-step their prior precedent blocking the use

²³⁹ *Id.* at 99.

²⁴⁰ *Id.* at 101 n.12.

²⁴¹ *Id.* at 99. 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 precluded those PRPs who are subject to an administrative proceeding from bringing a claim for contribution under section 107(a). *Id.* at 99.

²⁴² *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

²⁴³ *Consol. Edison Co.*, 423 F.3d at 99 (citing 42 U.S.C. § 9607(a)(4)(B)). 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 also discussion *supra* Part I.C.

of section 107.²⁴⁴ After *Aviall*, it decided that a private party PRP plaintiff may avail itself of a section 107 cost recovery action.²⁴⁵ To overcome its prior contrary decision in *Dico, Inc. v. Amoco Oil Co.*,²⁴⁶ 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 the prior panel's "rationale has been undermined."²⁴⁷ The circuit found that once free of this prior decision, *Aviall* compelled it to hold that sections 107 and 113 be regarded as separate and distinct avenues both accessible to PRP plaintiffs; "any other person" in section 107 includes any parties other than governments or Indian tribes that are previously expressly included.²⁴⁸

The Eighth Circuit found no intent on the part of the Congress, when it enacted section 113(f) in 1986, to imply a repeal of just the "any other person" provision of the preexisting section 107.²⁴⁹ The court proceeded to limit the amount of response costs of a PRP that 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 107.²⁵⁰ This proportionate concept removes one of the few logical criticisms of the absolute result of section 107's shifting of private costs: that it could allow a temporary windfall.²⁵¹ The circuit goes even further to read into section 107(c) an implied right to contribution so as not to penalize parties who voluntarily remediate sites.²⁵² Therefore, this interpretation opens up to all PRPs—even those who have not settled with the government and thus have no section 113 action after the Supreme Court decision in *Aviall*—the ability to utilize section 107 for cost recovery.

But there was no unanimity for reopening the blocked section 107 path. 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 107.²⁵³ 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 because that section 107 issue was neither before the Court nor briefed in *Aviall*.²⁵⁴

²⁴⁴ See *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006).

²⁴⁵ *Id.* at 836.

²⁴⁶ 340 F.3d 525 (8th Cir. 2003).

²⁴⁷ *Atl. Research*, 459 F.3d at 830.

²⁴⁸ *Id.* at 835-36.

²⁴⁹ *Id.* at 836.

²⁵⁰ *Id.* at 835.

²⁵¹ See *United States v. Kramer*, 757 F. Supp. 397, 415-17 (D. N.J. 1991); *supra* Part III.D.

²⁵² *Atl. Research*, 459 F.3d at 836.

²⁵³ *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 527 (3d Cir. 2006).

²⁵⁴ *Cooper Indus., Inc. v. Aviall Servs., Inc.* 543 U.S. 157, 168 (2004).

On remand after the Supreme Court sent the *Aviall* case back down, the district court reexamining the controversy similarly refused to recognize the availability of the section 107 path.²⁵⁵ 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.²⁵⁶ 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 only apply to innocent parties and not PRPs.²⁵⁷ Their rationale was that allowing access to section 107 would negate the contribution protection of section 113(f)(2).²⁵⁸ The district court's ultimate defense was that the Supreme Court in its *Aviall* decision did not command that the circuit precedent on section 107 must yield.²⁵⁹ 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 cannot recover costs under any federal scheme, as both section 107 and 113 are walled off.²⁶⁰

Other courts followed both the Second and Eighth Circuit access to section 107,²⁶¹ and still other courts followed the Third Circuit denial of access to section 107 cost recovery.²⁶² The result was total chaos in cost recovery and Superfund administration.

²⁵⁵ See *Aviall Servs., Inc. v. Cooper Indus., L.L.C.*, No. 3:97-CV-1926-D, 2006 U.S. Dist. LEXIS 55040, at *36 (N.D. Tex. Aug. 8, 2006).

²⁵⁶ See, e.g., *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *Amoco Oil Co. v. Bordon, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989).

²⁵⁷ *Aviall Services*, No. 3:97-CV-1926-D, 2006 U.S. Dist. LEXIS 55040, at *14-15.

²⁵⁸ *Id.* at *22-24.

²⁵⁹ *Id.* at *29.

²⁶⁰ *Id.* at *35-36.

²⁶¹ See *Metropolitan Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 834 (7th Cir. 2007); *Vine St., L.L.C. v. Keeling*, 460 F.Supp.2d 728, 768 (E.D. Tex. 2006); *City of Bangor v. Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 223 (D. Me. 2006); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006); *Sunnyside Dev. Corp. v. Opsys U.S. Corp.*, 36 Envtl. L. Rep. 20083, at 3 (N.D. Cal. 2005); *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1133-34 (D. Or. 2006); *Aggio v. Estate of Aggio*, 35 Envtl. L. Rep. 20189 (N.D. Cal. 2005); *Ferguson v. Arcata Redwood Co.*, No. C03-05632SI, 2005 WL 1869445, at 8 (N.D. Cal. 2005); *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3, 9 (D.D.C. 2005); *Kotrous v. Goss-Jewett Co.*, No. S02-1520, 2005 WL 1417152, at 3 (E.D. Cal.2005), *vacated on other grounds* 523 F.3d 924 (9th Cir. 2008).

²⁶² *Spectrum Int'l Holding, Inc. v. Universal Coops., Inc.*, No. 04-99, 2006 WL 2033377, at 8 (D. Minn. 2006); *Adobe Lumber, Inc. v. Hellman*, 415 F. Supp. 2d 1070, 1083 (E.D. Cal. 2006); *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, No. C/A 4:02-4814-RBH, 2005 WL 2614927, at 20 (D.S.C. Oct. 13, 2005); *Montville Twp. v. Woodmont Builders*, No. 03-2680DRD, 2005 WL 2000204, at 13 (D.N.J. 2005); *City of Rialto v. U.S. Dept. of Def.*, No. EDCV 04-00079-VAP (SSx), 2005 U.S. Dist. LEXIS 26941, at 11-12 (C.D. Cal. 2005); *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 437 (E.D. Pa. 2005); *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL

In mid-2007 the Supreme Court affirmed a 2006 post-*Aviall* opinion of the Eighth Circuit that opened up private PRP access to section 107 cost recovery.²⁶³ This was consistent with changes of opinion in the Second and Seventh Circuits.²⁶⁴ The Court relied on a plain language interpretation in holding against the government's strained interpretation of section 107 of Superfund.²⁶⁵ The Court acknowledged that persons in different procedural positions have access to either section 107 or the recently limited section 113, as the situation merits.²⁶⁶

The Supreme Court opined on issues that every prior circuit decision obscured or missed.²⁶⁷ Section 113 is available for equitable apportionment of costs, including those not directly incurred, among jointly liable parties.²⁶⁸ 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.²⁶⁹ Sections 107 and 113 are complementary avenues, not the excluded avenues determined by eleven circuits.²⁷⁰

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 litigation counterclaims pursuant to section 113, which would cause a court to equitably apportion the total cost burden among co-liable litigants.²⁷¹ This dicta by the Supreme Court resolves the intriguing question originally posed in *Kramer*, to wit, whether a section 107 plaintiff could recover a windfall from shifting an inordinate share of its own equitable share of costs to defendants.²⁷² In the view of the Supreme Court, that answer is "no."²⁷³

1532955, at 6 (W.D. Mo., 2005); *Atlantic Research Corp. v. United States*, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484, at 9-10 (W.D. Ark. 2005), *rev'd* by 459 F.3d 827 (8th Cir. 2006); *City of Waukesha v. Viacom Int'l Inc.*, 362 F. Supp. 2d 1025, 1027-28 (E.D. Wis. 2005); *Mercury Mall Assocs. v. Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 520 (E.D. Va. 2005).
²⁶³ See *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2339 (2007) *aff'g sub nom.* *Atl. Research Corp. v. United States*, 459 F.3d 827, 835-37 (8th Cir. 2006).

²⁶⁴ See *Atl. Research*, 127 S. Ct. at 2334.

²⁶⁵ *Id.* at 2335-37.

²⁶⁶ *Id.* at 2338.

²⁶⁷ See cases *supra* note 163.

²⁶⁸ *Atl. Research*, 127 S. Ct. at 2338.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 2338-39.

²⁷² *United States v. Kramer*, 757 F. Supp. 397, 416-17 (D. N.J. 1991).

²⁷³ *Atl. Research*, 127 S. Ct. at 2338.

III. CHANGING THE LAW

A. *The Policy Implications of Judicially Eliminating Waste Remediation Recovery Routes*

The practical result of the 2004 Supreme Court decision in *Aviall*, coupled with the decisions of the eleven circuit courts regarding section 107,²⁷⁴ combined to greatly discourage voluntary remediation activities at some of the 450,000 contaminated sites in the U.S.²⁷⁵ This occurred at a time when the Superfund hazardous substance clean-up effort was starved by budgetary deprivation. EPA had to delay beginning remediation activities at 34 separate sites in FY 2004 because of funding shortfalls.²⁷⁶ Consequently EPA was not listing any new sites on the National Priorities List and was delaying all additional site remediation.²⁷⁷ In January 2004, the EPA's own Inspector General acknowledged that "[w]hen funding is not sufficient, [cleanup of] sites cannot begin, cleanups are performed in less than an optimal manner; and/or activities are stretched over longer periods of time."²⁷⁸

The Superfund Trust Fund raised money from a tax on chemical and petroleum companies to fund federal hazardous waste remediation efforts.²⁷⁹ This tax expired in 1995, after the change in political control of the House of Representatives.²⁸⁰ President Bush had not favored reauthorization of the tax and Superfund trust.²⁸¹ Efforts by Democrats in the Senate to reinstate the Superfund tax on industry were rejected by Senate Republicans, who stated that the tax does not target polluters but taxes members of industry in general.²⁸² Until its 1995 expiration, this distinct Superfund tax separately contributed \$1.45 billion annually

²⁷⁴ See *infra* Part V.B.2.a for a discussion and analysis of the circuit court opinions.

²⁷⁵ U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at 118.

²⁷⁶ Roeder, *supra* note 8, at S-14 to S-15.

²⁷⁷ *Id.* There are 1237 sites on the National Priority List as of 2005, with 68 additional sites proposed for addition. *Id.* at S-15.

²⁷⁸ OFFICE OF INSPECTOR GENERAL, U.S. ENVTL. PROT. AGENCY, REP. 2004-P-00001, CONGRESSIONAL REQUEST ON FUNDING NEEDS FOR NON-FEDERAL SUPERFUND SITES 4 (2004).

²⁷⁹ Roeder, *supra* note 8, at S-16. The funds were created by a three-part tax: a 9.7 cent per barrel excise tax on petroleum, a feedstock excise tax on 42 listed chemicals, and an income tax on corporations earning more than \$2 million per year. *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Meredith Preston & Susan Bruninga, *Amendment to Reinstate Industry Tax to Support Trust Fund Defeated in Senate*, 35 Env't Rep. (BNA)No. 11, at 536 (Mar. 12, 2004).

between 1990-1995 to the Superfund trust fund, in addition to the regular federal line item for site clean-up appropriated annually as part of the EPA budget.²⁸³

Clean-ups were still funded by the second source of funds, the annual Congressional appropriation of approximately \$1.25 billion.²⁸⁴ Between 1999 and 2003, the EPA annual clean-up budget declined 11% in nominal outlays.²⁸⁵ In FY 2004, Congress approved a \$15 million decrease from the FY 2003 level for the Superfund.²⁸⁶ The federal appropriation for CERCLA cleanup was frozen for FY 2005 at the FY 2004 level.²⁸⁷ Adjusting for inflation, this amounts to a real decrease.²⁸⁸ The Bush Administration requested 7.4% less in its FY 2006 request compared to the Administration's FY 2005 budget request.²⁸⁹ The House Appropriations Committee approved the proposed FY 2007 Superfund budget of \$1.25 billion, which is a decline in real terms from the FY 2006 budget.²⁹⁰ The budget would allow the completion of 40 clean-ups nationwide.²⁹¹

Against this static nominal budget level and real decline, the cost of clean-ups was increasing.²⁹² Since the enactment of Superfund in 1980, the average cost of site cleanup has doubled.²⁹³ In FY 2004, more than half the EPA budget for long-term remediation had to be devoted to just nine sites.²⁹⁴ This created at least a \$750 million shortfall in required funds

²⁸³ Roeder, *supra* note 8, at S-15, S-16.

²⁸⁴ *Id.* at S-15. The Bush Administration had requested \$1.38 billion for FY 2005. *Id.* EPA augmented the funds by recovering \$109 million from PRPs in FY 2004. Linda Roeder, *EPA Faces Continued Funding Challenges in Cleaning Up Nation's Contaminated Sites*, 36 Env't Rep. (BNA) No. 39, at 2057 (Oct. 7, 2005).

²⁸⁵ Roeder, *supra* note 8, at S-15. The FY 1999 level was \$1.71 billion and by FY 2003 it had declined to an inflation-adjusted \$1.52 billion. *Id.*

²⁸⁶ Meredith Preston, *Bigger Increase in Spending May be Needed for Superfund Cleanups than 2005 Request*, 35 Env't Rep. (BNA) No. 6, at 254 (Feb. 6, 2004).

²⁸⁷ Roeder, *supra* note 8, at S-15, S-16.

²⁸⁸ *Id.* at S-14, S-15.

²⁸⁹ *2006 Proposed EPA Budget*, 36 Env't Rep. (BNA) No. 6, at S-1, S-40 tbl. (Feb. 11, 2005). The FY 2006 budget request was \$1.279 billion for the Superfund, as opposed to \$1.381 billion requested in the FY 2005 budget. *Id.* This is a 7.4% decrease between the two years. *Id.*

²⁹⁰ Joyce Hedges, *Committee Approves \$7.56 Billion for EPA*, 37 Env't Rep. (BNA) No. 19, at 1018 (May 12, 2006).

²⁹¹ Dean Scott, *Bush Proposed 4 Percent Cut for EPA; Plan Targets Revolving Loans, State Grants*, 37 Env't Rep. (BNA) No. 6, at 277 (Feb. 10, 2006).

²⁹² See Roeder, *supra* note 8, at S-15.

²⁹³ *Id.*

²⁹⁴ Roeder, *supra* note 284, at 2057.

over two years.²⁹⁵ According to the U.S. General Accounting Office, when adjusted for inflation, funding for the Superfund had declined 35% since 1993.²⁹⁶ Representative John Dingell characterized this as a "failure of the administration and the Republican-controlled Congress to properly fund Superfund site cleanups."²⁹⁷

Between 1992 and 2000, the budget allowed for completion of between 60 and 90 priority site remediations annually.²⁹⁸ Since 2000, because the Superfund was not replenished by additional tax revenues, the number of sites completed has fallen by about 50% or more each year.²⁹⁹ Each year since 2002, remediation projects that were ready to begin were not able to be funded.³⁰⁰ In response, Democrats claimed that this budget shortfall frustrated clean-ups planned at 46 contaminated sites.³⁰¹ The EPA has, for each of the past four years, completed 40 site remediations, a significant decrease from the 85 to 88 annual site completions during the second term of the Clinton administration.³⁰² Superfund's surplus, which was responsible for hazardous waste site clean-ups since Superfund's taxes expired in 1995, dwindled from \$3.6 billion dollars to an estimated \$28 million and falling in 2003.³⁰³ The administration of the Superfund was placed in jeopardy due to an extreme lack in funding.³⁰⁴ Despite recovered funds pursuant to CERCLA being redeposited into the trust fund when recovered from PRPs, the fund is now essentially empty.³⁰⁵

²⁹⁵ Roeder, *supra* note 8, at S-15.

²⁹⁶ Meredith Preston, *Report Shows Drop in Funding Since 1993 When Budgets Account for Yearly Inflation*, 33 Env't Rep. (BNA) No. 9, at 429 (Feb. 27, 2004). In FY 1993, \$1.903 billion was appropriated in constant 2003 dollar equivalent, while in FY 2004 \$1.241 billion in constant 2003 dollars was appropriated for Superfund. *Id.*

²⁹⁷ Michael Janofsky, *Changes May be Needed in Superfund, Chief Says*, N.Y. TIMES, Dec. 5, 2004, at N36.

²⁹⁸ Roeder, *supra* note 8, S-16 tbl.

²⁹⁹ *Id.*

³⁰⁰ Preston, *supra* note 286, at 254.

³⁰¹ Meredith Preston, *Democrats Say 46 Pending Cleanup Projects Delayed by Funding Shortfall in Fiscal 2004*, 35 Env't Rep. (BNA) No. 34, at 1775 (Aug. 20, 2004).

³⁰² Preston, *supra* note 286, at 254; Roeder, *supra* note 8, at S-16 tbl.

³⁰³ *Superfund Program: Cleanups and Funding Issues: Hearing on Oversight of the Environmental Protection Agency's Management of the Superfund Program Before the Subcomm. On Superfund, Toxics, Risk, and Waste Management of the S. Comm. on Environment and Public Works*, 107th Cong. 59 (2002) (statement of Grant Cope, on Behalf of the U.S. Public Interest Research Group).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 12 (statement of Sen. Barbara Boxer).

About 5,000 sites annually were cleaned up by involved private parties prior to 2004.³⁰⁶ The EPA during a recent decade has added an average of 28 sites annually to the NPL.³⁰⁷ This underscored the dimensions of voluntary initiatives: For every site EPA traditionally cleans up, private parties clean up 100 sites.³⁰⁸ There lay the rub: EPA had less funding for its share, and *Aviall* and the circuit court opinions eviscerated the legal paths and incentives for private volunteer clean-up.

This resulted in a fiscal crisis: "I cannot foresee any time in the near future when we are going to get additional funding," stated Thomas Dunne, EPA Acting Assistant Administrator for Solid Waste and Emergency Response.³⁰⁹ The Office of Management and Budget has found that overall the benefits derived from EPA regulation outweigh the costs.³¹⁰ Over the period from 1980 to 2004, an estimated 17,000 sites were addressed publicly or privately in some way, motivated by the tools of CERCLA. However, this was less than 5% of the estimated sites in the nation requiring some remediation or monitoring.³¹¹ A report by the EPA found that addressing the 350,000 remaining contaminated sites in the United States over the next three decades would cost up to one-quarter trillion dollars.³¹² This would require an expenditure of \$6 to 8 billion

³⁰⁶ OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS 1-10 (2004), available at <http://clu-in.org/market/>.

³⁰⁷ *Id.* at 1-6. The averages were calculated over the decade of 1993 to 2003. *Id.* at 1-6, 1-7. There are still significant discoveries each year of new sites and new leaking underground storage tank locations. *Id.* at 1-6.

³⁰⁸ *Id.* at 1-4.

³⁰⁹ Roeder, *supra* note 8, at S-15. Sen. Frank Lautenberg (D-N.J.) commented, "These [sites] could be potentially serious public health threats to our constituents and greater funding is needed to remove the contamination and ensure the safety of drinking water supplies." *Id.* at S-16.

³¹⁰ See OFFICE OF MGMT. AND BUDGET, 2007 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 4 (2007), available at http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_cb_final_report.pdf. But see James T. Hamilton and W. Kip Viscusi, *How Costly is "Clean"? An Analysis of the Benefits and Costs of Superfund Site Remediations*, 18 J. POL'Y ANALYSIS & MGMT. 2 (1999) (finding "that at the majority of sites the expected number of cancers averted by remediation is less than 0.1 cases per site and that the cost per cancer case averted is over \$100 million").

³¹¹ EPA SCIENCE ADVISORY BOARD, SUPERFUND BENEFITS ANALYSIS ES-3 (2005), available at <http://www.epa.gov/superfund/accomp/news/benefits.pdf>; U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at vii.

³¹² See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 306, at viii-xi. This list includes 125,000 leaking underground storage tanks, 6,400 Department of Defense facilities, 3,800 RCRA "corrective action" sites, 736 NPL Superfund sites, 5,000 Department

annually—from all sources—over the next three decades.³¹³ Now, the actions of the circuit courts and the Supreme Court have decoupled legal paths from economic incentives.

B. Chaos Created by the Aviall Wall

Aviall created uncertainty and chaos. Parties and states reacted. In the words of *Aviall*'s counsel more than a year after the decision, "the controversy continues, sites remain unremediated, parties who act responsibly remain uncompensated, and flagrant polluters still scoff at potential liabilities."³¹⁴ Post-*Aviall*, there were two types of newly minted initiatives by private party plaintiffs to try to end-run the roadblocks. First, in new and future settlements, parties were insisting that state agencies include language that the agency otherwise would not include, to the effect that the intent of the settlement is to resolve federal CERCLA and state liability to the extent covered in the settlement. Some parties were going even further, proactively working with state environmental authorities to have the state file a friendly suit, to be immediately resolved by a consensual settlement, which would then be judicially approved by stipulation of the parties.³¹⁵

Second, 25 years of prior settlements remained in limbo. Past settling parties were claiming that even though not recited in past administrative settlements with state environmental agencies, the silent intent of the parties was to resolve federal CERCLA liability. Some states also are supporting this revisionist initiative, stretching long-past settlements so as to empower such settlers to avail themselves of section 113 federal contribution rights.³¹⁶ The first cases demonstrated that it is not a straightforward proposition to navigate the post-*Aviall* world.³¹⁷

of Energy sites, and 150,000 sites that will be addressed by other remediation programs. *Id.* at 1-6 tbl. See also Linda Roeder, *EPA Report Puts \$253 Billion Price Tag On Cleanup of Nation's Contaminated Sites*, 35 Env't Rep. (BNA) No. 49, at 2533 (Dec. 10, 2004).

³¹³ OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 306, at viii.

³¹⁴ Richard O. Faulk et al., *Cost Recovery Under CERCLA Section 107 After Cooper v. Aviall*, 37 Env't Rep. (BNA) No. 12, at 641 (Mar. 24, 2006).

³¹⁵ See *infra* notes 340-370 and accompanying text.

³¹⁶ *Id.*

³¹⁷ See, e.g., *W.R. Grace & Co. v. Zotos Int'l*, 61 Env't Rep. Cases (BNA) 1474, 1482 (W.D.N.Y. May 3, 2005); *Vine St. L.L.C. v. Keeling*, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005); *City of Waukesha v. Viacom Int'l Inc.*, 362 F. Supp. 2d 1025, 1027-28 (E.D. Wis. 2005); *Esso Standard Co. v. Rodriguez-Perez*, 2005 U.S. Dist. LEXIS 4267, at *13-14

Unlike the unanimity of eleven circuit opinions initially barring section 107, the response to the Supreme Court 2004 *Aviall* opinion was fractured and inconsistent, both among and within the trial courts. After *Aviall*, some courts tried to play the carom. A number of courts moved immediately post-*Aviall* to dismiss contribution suits under section 113 by plaintiffs who had neither reached a judicially or administratively approved settlement with, nor been sued by, the government.³¹⁸ A few trial courts, including trial courts in the Fifth and Ninth Circuits, took a pragmatic approach and allowed section 107 claims to be amended to pending litigation post-*Aviall* that still-binding circuit opinions prohibit.³¹⁹

Yet, other courts, as set forth in the next two subsections, struggled to rationalize past settlements that did not seem to meet the Supreme Court's requirement of section 113 actions.³²⁰

(D.P.R. Mar. 21, 2005); *Pharmacia Corp. v. Clayton Chem. Acquisition L.L.C.*, 382 F. Supp. 2d 1079, 1091 (S.D. Ill. 2005); *Elementis Chem. Inc. v. T.H. Agric. and Nutrition LLC*, 59 Env't Rep. Cases (BNA) 2071, 2082-83 (S.D.N.Y. Jan. 31, 2005); *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, 11 (E.D.N.Y. 2004); *Johnson v. City of San Diego*, 2005 Cal. App. Unpub. LEXIS 1979, at *27-28 (Cal. Ct. App. Mar. 4, 2005).³¹⁸ *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 518 (3d Cir. 2006); *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, 2005 WL 2614927, at *5 (D.S.C. Oct. 13, 2005); *W.R. Grace*, 61 Env't Rep. Cases (BNA) at 1474-75; *Metropolitan Water Reclamation Dist. v. Lake River Corp.*, 365 F. Supp. 2d 913, 915, 19 (N.D. Ill. 2005); *Vine St.*, 362 F. Supp. 2d at 761; *Waukesha*, 362 F. Supp. 2d at 1026-27; *Mercury Mall Assocs. v. Nick's Market*, 368 F. Supp. 2d 513, 515 (E.D. Va. 2005).

³¹⁹ See, e.g., *Kotrous v. Goss-Jewett Co. of N. Cal.*, 2005 WL 1417152 at *3 (E.D. Cal. June 16, 2005) (rationalizing that section 107 is the original source of contribution). *Vine St.*, 362 F. Supp. 2d at 763-64 (permitting access to section 107 as a default alternative where section 113 is not available after *Aviall*). Note that the Fifth Circuit is where the *Cooper v. Aviall* opinion arose, and returned on remand. However, on remand following the Supreme Court's decision, the district court refused to recognize the availability of the section 107 path. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 63 Env't Rep. Cases (BNA) 1622, 1623 (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. *Id.* at 1624. 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 cannot recover costs under any federal scheme, as both section 107 and section 113 are walled off. *Id.* at 1631. 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. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988).

³²⁰ See *infra* Part III.B.2, particularly the discussions of *Pharmacia*, *Zotos*, and *Boarhead Farm*.

1. Controlling the Future: Crafting Original Post-*Aviall* Compliant Settlements

To craft future settlements that allow access to section 113 for cost contribution, it is not as simple as a mere recitation of magic words in a settlement. First, 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.³²¹ No party is deemed indispensable to an EPA enforcement action and EPA does not allow interlocutory challenge to a section 106 order until after compliance or remediation.³²² EPA can enter settlements as it chooses, or not. Therefore, a PRP without its own litigation-established defendant liability vis-à-vis the EPA under CERCLA, or without an approved settlement, lacks the requisites to bring a section 113 action under the Court's new interpretive strictures.

In August 2005, in response to the *Aviall* decision, the EPA revised its model administrative order on consent.³²³ The new language stated that

³²¹ See Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, § 106, 94 Stat. 2767 (codified as amended at 42 U.S.C. § 9606 (2000)).

³²² 42 U.S.C. § 9606. 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). 42 U.S.C. § 9613. 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, or (4) a citizen suit brought under section 310 of CERCLA, or a section 106 citizen action to compel remedial action. *Id.* See also *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 151-52 (3d Cir. 1994) (rejecting the citizen's allegation that such a bar was unconstitutional because it denied access to the federal courts at any meaningful time). Relying on the doctrine of sovereign immunity, the court concluded that the Congress can limit suits against the EPA as it wishes. *Id.* at 151-52. Such a position is consistent with those taken by the Seventh, Eighth, Ninth, and Eleventh Circuits. CERCLA section 106 provides authority for the EPA to act by administrative order instead of seeking judicial relief. 42 U.S.C. § 9606. 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*, have ruled that such orders are not reviewable except in defense of EPA enforcement suits. See 800 F.2d 310, 314-15 (2d Cir. 1986).

³²³ Memorandum from Susan Bromm, Dir., Office of Site Remediation Enforcement and Bruce S. Gelber, Chief, Envtl. Enforcement Section, Envtl. and Natural Resources Division, to various EPA and Dep't of Justice Directors, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section

the Administrative Order on Consent ("AOC") is designed to resolve liability to the federal government and protect the settlers' rights to file contribution claims against other parties.³²⁴ The optics also are altered. The title of future orders will be changed from AOC to "administrative settlement and order on consent," and the word "settlement" will be substituted for the term "order" in the text of the document.³²⁵ These newly word-smithed documents will apply to AOCs for RI/FSs, remedial designs, and removal actions.³²⁶

For those courts content to look for certain magic words in a document, such changes address that. This would address some of the concern voiced by the southern district of Illinois in 2005 in *Pharmacia*.³²⁷ However, courts are still confronted with the fact that by whatever name they are labeled, these orders/settlements are implemented pursuant to EPA authority under section 106 of CERCLA which authorizes unilateral EPA orders, rather than under section 122 which authorizes settlements.³²⁸ It was far from clear how courts would respond after 25 years of EPA calling unilaterally issued administrative orders pursuant to section 106 "orders," to EPA labeling these same documents "settlements," when the settlement authority of CERCLA is not formally invoked.

It is not as simple a solution as the solo pronouncement of a state official; courts remain as the final arbiters of all things CERCLA. In the post-*Aviall* limbo, private parties could not count on section 113 contribution rights if they voluntarily remediated a site in the absence of an EPA settlement that qualifies as judicially or administratively approved. Responding to an agency AOC or unilateral order from 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.³²⁹

113(f) (Aug. 3, 2005) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

³²⁴ *Id.* at 2.

³²⁵ *Id.*

³²⁶ *Id.* at 3.

³²⁷ *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1085-86 (S.D.Ill. 2005).

³²⁸ Compare 42 U.S.C. § 9606 (authorizing unilateral EPA orders) with 42 U.S.C. § 9622 (authorizing settlements).

³²⁹ 42 U.S.C. § 9613.

Nor will settlements with a state agency necessarily trigger section 113 to allow a private contribution action by the settling party against other recalcitrant and non-cooperating liable parties.³³⁰

Second, there are significant issues as to exactly what constitutes an administratively approved settlement. The great bulk of hazardous substance site remediation is driven by the enforcement efforts of state environmental agencies, rather than the federal EPA.³³¹ The states conduct 90% of enforcement actions, as well as 97% of the inspections at regulated facilities, compared to the remainder, which are performed by the federal EPA.³³² The states operate under their own state statutes.³³³ In the significant majority of instances, where private parties at a contaminated site settle with state environmental agencies pursuant to state law rather than with the EPA, does such settlement qualify as the CERCLA "administratively approved" settlement that after *Aviall* qualified as a settlement triggering entitlement to a section 113 cost recovery action?

The facile answer might initially appear in the affirmative: CERCLA section 113(f) does not define or limit what is an administratively approved settlement.³³⁴ Moreover, the Court's language contemplates recourse to a section 113 contribution action "after an administrative or judicially approved settlement that resolves liability to the United States or a State."³³⁵ In the disjunctive, it would 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 so as to recover costs of clean-up.

However, a prearranged "sweetheart" settlement can be attacked later by the defendant PRPs on at least three grounds. First, many state environmental agencies do not have memoranda of understanding with EPA to allow the state to be able to discharge or resolve any federal claims via a settlement with the state.³³⁶ Second, a pre-arranged settlement can be attacked as resulting from a collusive arrangement in the first instance

³³⁰ *Id.*

³³¹ See Dean Scott, *State Officials Urge Funding Shift to Restore Fiscal Year 2007 Grants*, 37 Env't Rep. (BNA) No. 8, at 401 (2006).

³³² *Id.*

³³³ See *id.*

³³⁴ See 42 U.S.C. § 9613.

³³⁵ *Pharmacia Corp. v. Clayton Chem. Acquisition, LLC*, 382 F. Supp. 2d 1079, 1084 (S.D.Ill. 2005).

³³⁶ See U.S. Env'tl. Prot. Agency, Memoranda of Agreement (MOAs) on State Voluntary Cleanup Programs (VCPs), <http://www.epa.gov/brownfields/html-doc/statemoa.htm> (last visited Mar. 7, 2009).

where there was no case or controversy, and thus have no binding effect. Third, the state only has rights under CERCLA or state law to recover its own specific site response and clean-up costs, which by definition do not include any federal response costs or rights.³³⁷ Therefore, the state settlement cannot qualify as a settlement under CERCLA, which creates contribution rights after federally approved settlements.³³⁸ Any springboard from CERCLA section 113(f) to recover response costs in a contribution action after *Aviall* must settle CERCLA claims.

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.³³⁹ While easy for them to say, it is not necessarily legally binding. The courts have voiced skepticism that state settlements qualify under CERCLA to allow subsequent federal section 113 cost recovery.³⁴⁰ For example, a federal judge ruled that settlements by consent with the New York state environmental agency only resolve liability as against the state and not potential federal CERCLA claims, thereby not entitling a settling party to utilize federal section 113 contribution actions under the *Aviall* precedent.³⁴¹ The court held that a right of contribution under state law cannot flow from the federal CERCLA statute.³⁴² The district court preempted any claim for section 113 federal contribution not based on the two limited avenues specified by the *Aviall* court, including any implied state right to section 113 contribution.³⁴³

³³⁷ See 42 U.S.C. § 9607.

³³⁸ See 42 U.S.C. § 9613.

³³⁹ Memorandum of Law of the State of New York as Amicus Curiae in Opposition to Defendant's Motion to Dismiss at 1, *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279 (W.D.N.Y. 2006) (No. 95-CV-6400L) (2005 WL 4089408). 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 asserting that all settlements are meant to satisfy section 113(f) requirements. *Id.* at 1. 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, had held that orders of consent in New York qualified as approved settlements under section 113(f)(3) of CERCLA. *Id.* at 6. 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.* at 7.

³⁴⁰ See, e.g., *W.R. Grace & Co. v. Zotos Int'l*, 61 Env't Rep. Cases (BNA) 1474, 1482 (W.D.N.Y. May 3, 2005).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

Therefore, any party who is liable pursuant to CERCLA is preempted from maintaining a separate state law claim for contribution that would conflict with the limitations in *Aviall*.³⁴⁴ Regardless of the defendant's liability, the court found that the plaintiff was precluded from shifting liability to that defendant.³⁴⁵ Such decisions made the partially blocked section 113 route after *Aviall* an even more significant impediment.

State agencies can typically issue letters to 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.³⁴⁶ Such a letter does not rise to the level of an administratively or judicially approved settlement.³⁴⁷ A letter of no further action neither invokes the contribution protection for settling parties under section 113(f), nor triggers the ability to utilize section 113 for a federal contribution action after *Aviall*.³⁴⁸ This is important in that the great majority of hazardous substance enforcement actions are prosecuted by state, rather than federal, agencies.³⁴⁹

Where there is a settlement with a state environmental enforcement agency, the settlement typically references state statutory provisions. It typically may not reference CERCLA at all. Under CERCLA, most states have no dollar liability to resolve in their settlements with private parties, as the state often itself has incurred no federally cognizable and required response costs.³⁵⁰ Some courts find that this 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*.³⁵¹

³⁴⁴ *Id.* at 1484 (citing *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998)) (where both plaintiff and defendant are PRPs pursuant to CERCLA, CERCLA's savings clause does not allow a party to obtain contribution under state law, predicated on that CERCLA liability, since that would nullify or veto the CERCLA limitation).

³⁴⁵ *Id.*

³⁴⁶ Environment, Health and Safety Online, All About Superfund Brownfields: Remediation and CERCLA, SARA, Superfund Guidance, <http://www.ehso.com/brownsfields.htm> (last visited Mar. 7, 2009).

³⁴⁷ For some of the precedent interpreting what is an administratively approved settlement, look to the requirements of section 122 of CERCLA, 42 U.S.C. § 9622 (2000), which sanctions settlements of the agencies. *See also* *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85, 90-91 (1st Cir. 1990); *General Time Corp. v. Bulk Materials, Inc.*, 826 F. Supp. 471, 474-75 (M.D. Ga. 1993); *United States v. Serafini*, 781 F. Supp. 336, 338-39 (M.D. Pa. 1992).

³⁴⁸ *See* Environment, Health and Safety Online, *supra* note 346.

³⁴⁹ *See* Scott, *supra* note 331, at 401.

³⁵⁰ *See* 42 U.S.C. § 9607.

³⁵¹ *See* *City of Waukesha v. Viacom Int'l*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005); *W.R. Grace & Co. v. Zotos Int'l*, 61 Env't Rep. Cases (BNA) 1474, 1476-78 (W.D.N.Y. May 3, 2005).

Where PRPs encountered a post-*Aviall* judicial minefield, attorneys for PRPs attempted post-*Aviall* to squeeze around its restrictive contours. Some tried to collude on behalf of their settling PRPs with state environmental authorities to create a settlement: a prearranged quick suit filed against the PRP by the state making very broad allegations and immediately filing a prearranged settlement, then offering this administratively or judicially approved settlement as the on-ramp to a section 113 claim against other non-settling PRPs.³⁵²

In a Texas case, the federal district court created the concept that the prohibition on section 107 actions created by the federal circuits applied only where a separate section 113 action was available, so as to restrict duplicative actions.³⁵³ Since the Supreme Court's *Aviall* opinion had made section 113 actions unavailable in many instances, the Texas court reasoned this meant that section 107 actions were not barred in such circumstances.³⁵⁴ It then proceeded to hold that section 107 *includes* contribution actions, despite their distinct separation in space, time, and role in the statute.³⁵⁵

This, of course, is pure legal sophistry. There is absolutely nothing anywhere in the legislative history of CERCLA to suggest that section 107 cost recovery, which was initially drafted into the statute in 1980, was designed to be available to private parties only when section 113 contribution, which was later added in 1986, was not available.³⁵⁶ This does not follow logically or under any canons of statutory construction. Moreover, section 107 cost recovery is distinct procedurally and substantively from, and is not an action for, contribution. As discussed in Part II of this article, contribution and the principles of allocating contribution responsibility, are distinct from response cost recovery under section 107.³⁵⁷

³⁵² See, e.g., *Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C.*, 382 F. Supp. 2d 1079, 1085 (S.D.Ill. 2005) (discussing an attempt by the plaintiff to use an Administrative Order by Consent as an administratively approved settlement in a contribution claim in order to overcome a motion to dismiss for failure to state a claim).

³⁵³ *Vine St., L.L.C. v. Keeling*, 362 F. Supp. 2d 754, 763 (E.D. Tex. 2005) (relying on *In re Hemingway Transp., Inc.*, 993 F.2d 915 (1st Cir 1993)).

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 764. Section 107 as now embodied was in the original 1980 CERCLA, while section 113 was added by the SARA amendments in 1986 to codify an implied right of common law contribution that the federal courts had recognized in CERCLA precedent in the interim. See *supra* Part III; see also Steven Ferrey, *Allocation and Uncertainty in the Age of Superfund*, 3 N.Y.U. ENV'T L.J. 35, 44-45, 49-50 (1994). Section 107 is a primary building block of CERCLA; section 113 is a collection of miscellaneous provisions added at different times. See *id.* at 45 n.52.

³⁵⁶ See Ferrey, *supra* note 355, at 44-45, 49-51.

³⁵⁷ See *supra* Part I.

In one instance, the Northern District of Illinois decided that there is an implied right of contribution in section 107(a), even though the private party-plaintiff was not an innocent landowner and could not avail itself of this exception in the section 107 circuit case law.³⁵⁸ However, as overwhelmingly interpreted by the federal courts, there is no contribution right embedded in section 107; the case precedent allowing private party section 107 actions since its enactment distinguished section 107 cost recovery from contribution actions.³⁵⁹ The opinion in *Aviall* set off other efforts to find the legal creases in inconsistent precedent.

2. Controlling the Past: Rehabilitating Retroactively Past Settlements to Comply with *Aviall*

Some states were willing to collude *post hoc* in an effort to create retrospective federal rights for some PRPs who previously settled with the state. This involved state agencies going back, months or years after a settlement was finalized, to rewrite old settlement documents for settled PRPs in order to make the settlement fit the newly articulated contours of *Aviall*.³⁶⁰ Long after the substance of the settlement was concluded and final, it is reworked cooperatively by the state and the PRP to recite purported federal elements of settlement that were not initially included.³⁶¹ What is the dispositive value of a settlement among adverse parties that is redrafted after-the-fact by the supposedly legally adverse state enforcement agency and the PRP target parties?

The desire to paper-over prior state settlements that do not even purport by their original written terms to address, let alone resolve, federal CERCLA liability sets off a new task center for attorneys 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. Indeed, some state environmental agencies will have to divert resources

³⁵⁸ *Metropolitan Water Reclamation Dist. v. Lake River Corp.*, 365 F. Supp. 2d 913, 916, 919 (N.D.Ill.) (denying defendant's motion to dismiss the complaint). It is important to note that *Aviall* did not affect the right of non-PRPs to utilize the innocent owner defense in CERCLA or to utilize section 107 actions to recover costs in those jurisdictions that allow "innocent" parties to utilize section 107. *See generally* *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

³⁵⁹ *See* discussion *infra*, Part III.

³⁶⁰ *See* *Pharmacia Corp. v. Clayton Chem. Acquisition, LLC*, 382 F. Supp. 2d 1079, 1084-85 (S.D.Ill. 2005).

³⁶¹ *Id.*

from dealing with existing polluted sites in order to rework existing settlements so that they recite purposes that were not evident at the time of settlement. Clearly, such *post-hoc* modifications are not part of the original bargain, not supported by either the original or 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). Some of these cases involved a single plaintiff pursuing a single PRP defendant.³⁶² In a Wisconsin case, it was tested whether a plaintiff could retroactively paper-over its settlement deficiencies post-*Aviall*.³⁶³ There, a city sued the successor to a corporation which disposed of hazardous substances at a city landfill.³⁶⁴ Even though the city had not been sued by either 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.³⁶⁵

After the *Aviall* decision, the defendants filed a motion to dismiss the prior ruling in conformance with *Aviall*.³⁶⁶ The city then went into motion to attempt to disguise the fact that it had no settlement with any environmental enforcement agency. The city filed an amended complaint adding a section 113(f)(3)(B) count, claimed that its clean-up cost-sharing pilot agreement with the state was the legal equivalent of a settlement, and, for good measure, submitted to the state environmental agency, after the fact, a settlement purporting to settle all possible CERCLA claims and state liability.³⁶⁷

Having initially allowed the section 113 action, the court after *Aviall* dismissed the section 113 contribution claim.³⁶⁸ It held that the cost-sharing agreement between the city and the state was not the requisite settlement that resolved the plaintiff's liability, and that the agreement expressly provided that it did not affect any statutory or common law

³⁶² See, e.g., *City of Waukesha v. Viacom Int'l*, 362 F. Supp. 2d 1025, 1027 (E.D. Wis. 2005).

³⁶³ *Id.*

³⁶⁴ *Id.* at 1028.

³⁶⁵ *Id.* at 1026.

³⁶⁶ *Id.* at 1027.

³⁶⁷ *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." *Waukesha*, 362 F. Supp. 2d at 1027.

³⁶⁸ *Id.* at 1026-27.

liability.³⁶⁹ The court held 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 the city knew that its original arrangement did not legally resolve its liability to the state.³⁷⁰

Other case law construed multi-party CERCLA contribution actions.³⁷¹ In *Pharmacia*, 19 PRPs entered an administrative order on consent with EPA pursuant to section 106 of CERCLA to perform the remedial investigation and feasibility study ("RI/FS") at a Superfund site.³⁷² The plaintiff PRP brought suit for contribution against a group of unsettled PRPs who were not party to any of the EPA orders.³⁷³ The 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.³⁷⁴ The court focused on the facts that the administrative order on consent entered by the parties did not qualify as a civil action,³⁷⁵ and that it contained standard language that the parties

³⁶⁹ *Id.* at 1027.

³⁷⁰ *Id.*

³⁷¹ See, e.g., *Pharmacia Corp. v. Clayton Chem. Acquisition, LLC*, 382 F. Supp. 2d 1079, 1081 (S.D.Ill. 2005).

³⁷² *Id.* The EPA also issued an administrative order unilaterally after the administrative order on consent. *Id.*

³⁷³ *Id.* at 1083.

³⁷⁴ *Id.* at 1085. In *Pharmacia*, despite the holding in *Aviall*, the plaintiffs asserted their contribution claim under section 113(f)(1) on the basis that its facts were distinguishable, since, unlike in *Aviall*, the plaintiffs incurred clean-up costs by responding to two separate orders issued by the EPA: an Administrative Order on Consent and a Unilateral Administrative Order pursuant to section 106. *Id.* at 1080. The court noted that CERCLA section 122 authorized EPA to enter into administrative settlements, but the administrative order on consent was issued pursuant to section 106 rather than section 122(d)(3). *Pharmacia*, 382 F. Supp. at 1085. 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. *Id.* at 1081. 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 do not provide for settlements and the term "settlement" does not appear in section 106. *Id.* at 1085. 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.* at 1086.

³⁷⁵ *Id.* at 1087. 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;" under Rule 3, "[a] civil action is commenced by filing a complaint with the court." *Pharmacia*, 382 F. Supp. at 1087 (quoting FED. R. CIV. P. 2(a)). Nowhere within the Federal Rules is an administrative order even discussed. *Id.*

did not admit to liability, which belied any argument that it was a settlement.³⁷⁶ Therefore, there was no ability for the responding PRPs to initiate a contribution action after they began clean-up in compliance with an AOC.

The court applied the *Aviall* reasoning 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), and an administrative or judicially approved settlement, in section 113(f)(3).³⁷⁷ The decision in *Pharmacia* significantly narrowed the ability of a PRP to bring 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.³⁷⁸

The plaintiffs in *Boarhead Farm Agreement Group v. Advanced Environmental Technology Corp.*, 381 F. Supp. 2d 427 (E.D. Pa. 2005), 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.³⁷⁹ 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.”³⁸⁰ Of note, there was no civil action in *Boarhead*.³⁸¹

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.³⁸² Where a party

³⁷⁶ *Id.* at 1085-86. 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.* at 1087 (quoting BLACK’S LAW DICTIONARY 1123 (7th ed. 1999)).

³⁷⁷ *Id.* at 1087.

³⁷⁸ *Id.*

³⁷⁹ 381 F. Supp. 2d at 429-30 (E.D. Pa. 2005). 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.*

³⁸⁰ *Id.* at 427.

³⁸¹ *Id.* at 435-36. 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). *Id.* at 435-37.

³⁸² *W.R. Grace & Co. v. Zotos Int’l*, 61 Env’t Rep. Cases (BNA) 1474, 1482 (W.D.N.Y. May 3, 2005). The AOCs were entered with the state environmental agency during the

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 settlor, that settlement relieves only state liability of the settlor and does not qualify to enable a federal contribution action under CERCLA section 113.³⁸³ In this case, the settling party amended its complaint after the decision in *Aviall* to add the section 113(f)(3) contribution claim.³⁸⁴ 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 could bring a claim for contribution under §113(f)(3).³⁸⁵

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."³⁸⁶ Section 122 of CERCLA provides the EPA with 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.'"³⁸⁷ Section 104 of CERCLA provides that a state may seek to exercise CERCLA authority, including the EPA's authority to enter into settlement agreements, upon application to the EPA, and the EPA "enter[ing] into a contract or cooperative agreement with the State."³⁸⁸

In fact, states do not have direct enforcement power under CERCLA, other than those rights of which a private party can avail itself. The states, which shoulder the great majority of hazardous substance legal enforcement responsibility, resolve disputes subject to their state statutory authority. A Texas court held that state consent

1980s. *Id.* at 1479. The AOC purported only to resolve state liability, did not purport to release CERCLA liability, and did not indicate any EPA concurrence with the settlement. *Id.* at 1479-80. The liability was relieved only as to the state claims and not the CERCLA claims. *Id.* at 1480.

³⁸³ *Id.* at 1480.

³⁸⁴ *Id.* at 1475.

³⁸⁵ *Id.* at 1476.

³⁸⁶ *W.R. Grace & Co.*, 61 Env't Rep. Cases (BNA), at 1479.

³⁸⁷ *Id.* at 1477 (quoting 42 U.S.C. § 9622(d)(1)(A) (2000)).

³⁸⁸ *Id.* (quoting 42 U.S.C. § 9604(d)(1)(A)). In looking at the terms of the 1988 Consent Order issued by the state, the court found that nowhere did it "state that the DEC was exercising any authority under CERCLA, . . . indicate that the EPA concurred with the remedy selected and . . . provide a release as to any CERCLA claims." *Id.* at 1480. Moreover, nowhere within the order was the term "CERCLA" used. *Id.* Thus, the 1988 Consent Order only resolved Grace's liability to New York state and it could not bring a claim for contribution under section 113(f)(3). *Id.*

agreements do not constitute settlements resolving CERCLA liability.³⁸⁹ Where a state settlement is not subject to some form of public comment and agency response before it is finalized, as is required by CERCLA regulations,³⁹⁰ it is questionable whether it could qualify under section 113 of CERCLA as an administratively or judicially approved settlement. In *Ferguson v. Arcata Redwood Company, L.L.C.*, No. C 03-05632SI, 2005 WL 1869445 (N.D. Cal. Aug. 5, 2005), the court articulated these requirements, holding that the letters exchanged between the plaintiff and the 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, nor did the agency documents state that the state was acting pursuant to authority granted by the EPA.³⁹¹

State law bases for settlement do not satisfy the requisite for section 107 cost recovery. In *ASARCO v. Union Pacific Railroad Co.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662 (D. Ariz. Jan. 24, 2006), a memorandum agreement settling a dispute that had not evolved to litigation was not deemed a settlement satisfying the post-*Aviall* section 113 requirement.³⁹² In *Cadlerock Prop. Joint Venture v. Schilberg*, 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.³⁹³

While it may provide neither the “sword” to empower private party section 113 contribution rights, nor the “shield” of section 113(f) protection from suit for contribution, a settlement with a state authority at an eligible hazardous waste response site complying with a state program can create a bar on subsequent federal prosecution.³⁹⁴ This is similar to the “overfiling” bar that the court has imposed in certain instances

³⁸⁹ See *Vine St., L.L.C. v. Keeling*, 362 F. Supp. 2d 754, 761 (E.D. Tex. 2005). In this case, a settlement with the Texas environmental agency did not constitute an administratively-approved settlement for purposes of also having CERCLA liability. *Id.*

³⁹⁰ See 42 U.S.C. § 9622(d)(2) (2000).

³⁹¹ See *Ferguson v. Arcata Redwood Co.*, No. C03-05632SI, 2005 WL 1869445, at *5 (N.D. Cal. Aug. 5, 2005).

³⁹² See *Asarco v. Union Pac. R.R.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *1 (D. Ariz. Jan. 24, 2006). The court found 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 could fashion CERCLA clean-up outside the normal contours of section 111. *Id.* at *9. See also *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1084-86 (S.D. Ill. 2005); *W.R. Grace*, 61 Env't Rep. at, 1478-79 (discussing what rises to the meaning of “settlement” under CERCLA).

³⁹³ *Cadlerock Prop. Joint Venture, L.P. v. Schilberg*, No. 3:01CV896 (MRK), 2005 WL 1683494 at *5-6 (D. Conn. July 19, 2005).

³⁹⁴ 42 U.S.C. § 9628(b) (2000). The state program must qualify, and the site addressed must also qualify. 42 U.S.C. § 9628(b).

to protect private parties from both federal and state prosecution for the same offense.³⁹⁵ Courts can suspend the entry of judgment on state law claims until federal Superfund claims are resolved, so as to prevent double recovery.³⁹⁶ Alternatively, prospective purchaser agreements can be negotiated with the EPA as an alternative means of barring subsequent federal liability, but they do not provide a springboard for section 113 private party contribution claims.³⁹⁷ Thus, this could bar subsequent federal liability of a potential party defendant, but would not open an avenue under *Aviall* to initiate a section 113 action by a private settling party against other allegedly co-responsible private parties.

IV. RESOLVING INTERPRETIVE CRISIS: *ATLANTIC RESEARCH*

The 2007 decision of the Supreme Court in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (U.S. 2007), reopened one of the paths for private Superfund cost allocation by PRPs.³⁹⁸ Without this subsequent decision, the 2004 *Aviall* decision of the Supreme Court, coupled with the various decisions of eleven federal circuit courts, would have barred most of the means of allocating private Superfund liability among responsible parties. The interesting question is how this blockage was created. The answer is that it was the decision of the eleven federal circuit courts, not the Supreme Court, that created the blockage.

³⁹⁵ Some courts have ruled that principles of *res judicata* bar the EPA from pursuing an enforcement case against a company that is settling the same charges with the state regarding the same violation. See *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 902-4 (8th Cir. 1999). The principle of *res judicata* comes from the Full Faith and Credit Act, 28 U.S.C. §1738 (2000). Most federal courts, however, have not found a bar to overfiling. *United States v. Elias*, 269 F.3d 1003, 1011-12 (9th Cir. 2001) (RCRA supplants only the permitting, and not the enforcement, authority of RCRA via an authorized state RCRA program). See also *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1285-86, 89 (C.D. Ca. 2000); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1088-92 (W.D. Wisc. 2001) (despite prior and ongoing state actions alleging identical issues, EPA allowed to proceed on Clean Air, Clean Water and RCRA violations because lack of *res judicata*). Amendments to CERCLA in 2001 attempted to prevent federal overfiling, where both the state and federal government pursue simultaneous, and perhaps duplicative, enforcement actions. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 9628 (2002). Excepting limited circumstances, under Title 42 § 9614 of the U.S. Code, the EPA may not bring an administrative or judicial enforcement action to recover response costs at sites that have been addressed under a state program. 42 U.S.C. § 9614(b).

³⁹⁶ *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1338-39 (4th Cir. 1993).

³⁹⁷ 42 U.S.C. § 9607(a)(4)(B).

³⁹⁸ *Atlantic Research*, 127 S. Ct. at 2335.

There is no logical reason why all of the circuit courts should have gone where they did in blocking access to CERCLA section 107 actions for private hazardous substance liability prior to 1994. It appears that this is a deviation from all other CERCLA judicial precedent. The rich palette of CERCLA precedent has *always* applied a consistent and expressly liberal construction of CERCLA—with only one exception: the restrictive section 107 limitations of eleven federal circuits, discussed in this article.³⁹⁹ These section 107-denying circuit decisions are notably contrary to the rest of the CERCLA precedent.

The statutory text itself, its legislative history, and the remedial purpose of CERCLA compel liberal construction of the statute, which would create a different interpretation of section 107's reach than that reached by the circuit courts. In fact, courts interpreting CERCLA have invoked the remedial purpose canon of statutory construction to liberally interpret CERCLA, doing so more often than in the interpretation of any other environmental statute.⁴⁰⁰ The purpose of liberal interpretation of CERCLA, as articulated by the federal courts, is: (1) to protect public health and the environment, (2) to promote prompt and efficient clean-ups of hazardous substance problems, and (3) to shift the costs of site remediation from taxpayers to those dealing in hazardous substances.⁴⁰¹

A. *Key Superfund Interpretive Precedent*

1. Liberal Statutory Construction to Protect Public Health & Environment

CERCLA, with the notable exception of the circuit courts' section 107 private-party cost recovery rights that are discussed in this article, is always liberally construed to protect public health and the environment as its remedial purpose. CERCLA was enacted by Congress to "address the increasing environmental and health problems associated with inactive hazardous waste sites."⁴⁰² Specifically, "CERCLA is a 'broad

³⁹⁹ See *infra* Part IV.A.1.

⁴⁰⁰ See 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, 238, 241, 261-63, 271, 280, 286 (1996).

⁴⁰¹ *Id.* at 272-73. (citing *United States v. Witco Corp.*, 865 F. Supp. 245, 247 (E.D. Pa. 1994)).

⁴⁰² *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992). See also *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 416 (4th Cir. 1999) (quoting *Westfarm Assocs. v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 677 (4th Cir.

remedial statute' . . . enacted to assure that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions."⁴⁰³

In fact, "courts generally resolve ambiguities in CERCLA's language in favor of imposing the most expansive interpretation, citing the statute's remedial purpose."⁴⁰⁴ The federal courts have held that "statutes which are enacted for the protection and preservation of public health' are to be given 'an extremely liberal construction for the accomplishment

1995)) ("Congress enacted CERCLA 'to protect public health and the environment from inactive hazardous waste sites."); *Westfarm Assocs. v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 677 (4th Cir. 1995) ("Congress enacted CERCLA to protect public health and the environment from inactive hazardous waste sites."); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990) ("It [CERCLA] is a remedial statute designed to protect and preserve public health and the environment. . . . [We] construe its provisions liberally to avoid frustration of the beneficial legislative purpose."); *Dedham Water Co., v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment.").

⁴⁰³ *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 602 (2d Cir. 1999) (CERCLA is a broad remedial statute that should be liberally construed to carry out its purposes.). *See also* *Uniroyal Chem. Co., v. Deltech Corp.*, 160 F.3d 238, 242 (5th Cir. 1999).

CERCLA was enacted in 1980 as a broad remedial measure aimed at assuring that "those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." . . . In light of that purpose we are obligated to construe its provisions liberally in order to avoid frustrating Congress' intent.

Id. (quoting S. REP. NO. 848, at 13 (1980)) (citations omitted); *United States v. Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998) ("CERCLA is remedial legislation that should be construed liberally to carry out its purpose."); *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996). *Schiavone* held that Congress enacted CERCLA with the expansive, remedial purpose of ensuring

"that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." . . . One of CERCLA's primary goals is to extend liability to all those involved in creating harmful environmental conditions. . . . Courts should construe the statute liberally in order to effect these congressional concerns.

Id. (quoting S. REP. NO. 848, at 13 (1980)) (citations omitted); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) ("[S]ince CERCLA is a remedial statute, its provisions should be construed broadly to avoid frustrating the legislative purpose."); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992) ("As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals."); *United States v. Parsons*, 936 F.2d 526, 528-29 (11th Cir. 1991) (holding that CERCLA should not be interpreted "in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise.").

⁴⁰⁴ *United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1331 (S.D.N.Y. 1992).

and maximization of their beneficent objectives.”⁴⁰⁵ Several courts have also stated that CERCLA was designed to “enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten the environment and human health,” and as such should be construed liberally in order to effectuate this purpose.⁴⁰⁶ There is a consistent pattern of liberal CERCLA construction to protect public health and the environment.⁴⁰⁷

2. Liberally Interpret CERCLA to Effectuate Legislative Purpose of Facilitating Prompt Voluntary Clean-Ups

A “fundamental purpose of CERCLA,” as structured with two avenues for allocation of private party remediation costs, is the “prompt and efficient clean-up of hazardous waste sites.”⁴⁰⁸ A second goal is to encourage voluntary clean-ups.⁴⁰⁹ A number of courts found these policy

⁴⁰⁵ *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 192 (D.C.Mo. 1985) (quoting 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §71.02 at 313). *See also* *Westfarm Assocs. v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 677 (4th Cir. 1995) (“CERCLA is a comprehensive remedial statutory scheme, and as such, the courts must construe its provisions liberally to avoid frustrating the legislature’s purpose.”); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 867 (4th Cir. 1989) (“... CERCLA, as all remedial statutes, must be given a broad interpretation to effect its ameliorative goals.”).

⁴⁰⁶ *Mainline Contracting Corp. v. Chopra-Lee, Inc.*, 109 F. Supp. 2d 110, 117 (W.D.N.Y. 2000) (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992)).

⁴⁰⁷ *See, e.g.*, *Hanford Downwinders Coal, Inc. v. Dowdle*, 71 F.3d 1469, 1473-74 (9th Cir. 1995) (holding that CERCLA was enacted to preserve and protect the environment and public health by facilitating prompt, efficient cleanups); *Westfarm*, 66 F.3d at 677; *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 285 (2d Cir. 1992)

CERCLA is a broad, remedial statute enacted by Congress in order to enable the Environmental Protection Agency... to respond quickly and effectively to hazardous waste spills that threaten the environment, and to ensure “that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.”

Id. (quoting S. REP. NO. 848, at 13 (1980)); *Prisco v. New York*, 902 F. Supp. 374, 382 (S.D.N.Y. 1995) (“CERCLA should be interpreted liberally, as Congress intended.”); *Verticare*, 1993 U.S. Dist. LEXIS 3062, at *4; *United States v. Velsicol Chem. Corp.*, No. 86-2862-4B, 1988 U.S. Dist. LEXIS 17123, at *3 (W.D. Tenn. Apr. 6, 1988) (“CERCLA is... essentially a remedial statute, the provisions of which must be construed liberally in order to avoid frustration of the beneficial legislative purpose.”); *Moore*, 698 F. Supp. at 626.

⁴⁰⁸ *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985); *United States v. Kramer*, 770 F. Supp. 954, 958 (D.N.J. 1991).

⁴⁰⁹ *See, e.g.*, *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 349 (D.N.J. 1991):

goals to be driving rationales in upholding the incentives for voluntary clean-up embedded in private party access to section 107 cost recovery.⁴¹⁰ Other courts have kept section 107 open so as to promote PRP settlement.⁴¹¹ These dual policy goals are consistent with the plain meaning of section 107's broad language.

In the first two decades of the statute, this policy was a luxury, as the EPA had the Superfund and its Superfund tax base to fund clean-ups.⁴¹² However, in recent years, with the demise of the Superfund tax and increasingly smaller real levels of annual congressional appropriation for clean-up, policy goals to motivate voluntary clean-ups are paramount.⁴¹³

Although Congress enacted the Superfund as a last resort to pay for the clean-up of hazardous waste sites, CERCLA places the ultimate financial burden for toxic waste clean-up on those parties deemed responsible for creating the harmful conditions.⁴¹⁴ Specifically, Congress intended that liability under CERCLA apply retroactively.⁴¹⁵ The Second Circuit Court of Appeals explained, "[a]s a remedial statute, CERCLA

A fundamental policy underlying CERCLA is to accomplish this objective at the primary expense of private responsible parties rather than taxpayers. The House Report explained that the purpose of § 107 of CERCLA is "to provide a mechanism for prompt recovery of monies expended for the costs of [remedial actions] . . . from persons responsible therefore and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily."

Id. (quoting H.R. REP. NO. 1016, at 33 (1980), reprinted in 1980 U.S.C.A.N. 6119, 6136).

⁴¹⁰ *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993); *General Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1417-18 (8th Cir. 1990); *Charter Twp. Of Oshtemo v. American Cyanamid Co.*, No. 1:92-CV:843, 1993 WL 561814, at *1-2 (W.D. Mich. Aug. 19, 1993); *Kelly v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990); *United States v. Hardage*, 733 F. Supp. 1424, 1431-32, 39 (W.D. Okla. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706, 725-26 (D.R.I. 1988); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

⁴¹¹ *See, e.g.*, *B.F. Goodrich Co. v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992).

⁴¹² *See Roeder, supra* note 8, at S-16.

⁴¹³ *Id.* at S-14, S-15.

⁴¹⁴ *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1495 (D. Utah 1987). *See also Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1276 (D.Del. 1987).

⁴¹⁵ *Ninth Ave. Remedial Group v. Fiberbond Corp.*, 946 F. Supp. 651, 656-57 (N.D. Ind. 1996). This court, however, rejected the argument that the general remedial purpose of CERCLA should encourage a "liberal" construction on the retroactivity issue: "That the statute was enacted to remedy a hazardous waste problem does not make the statute 'remedial' for the purpose of retroactive application." *Id.* at 657.

should be construed liberally to give effect to its purposes. . . . These include facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup, . . . and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation.⁴¹⁶

In implementing this concept, a district court stated that CERCLA

must be construed broadly and liberally to effect its purposes, namely, to allow the federal government to respond effectively to 'problems of national magnitude resulting from hazardous waste disposal' and to assure that those who profit from hazardous activities 'bear the costs and responsibility for remedying the harmful conditions they created.'⁴¹⁷

This court found that a narrow interpretation of CERCLA would be detrimental because it would "limit the liability of those responsible for cleanup costs beyond the limits expressly provided."⁴¹⁸ There is a consistent pattern of liberal construction of CERCLA language to promote prompt remediation of contaminated sites.⁴¹⁹

⁴¹⁶ B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (internal citations omitted); see also United States v. U.S.X. Corp., 68 F.3d 811, 822 (3d Cir. 1995) (quoting United States v. Cordova Chem. Co. of Mich., 59 F.3d 584, 588 (6th Cir. 1995) (holding that CERCLA is "to be construed liberally in order to effectuate its goals. . . . 'Liberal construction,' however, may not be employed 'as a means for filling in the blanks so as to discern congressional intent to impose liability under nearly every conceivable scenario.'").

⁴¹⁷ United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1495 (D. Utah 1987) (quoting United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)). Accord Prisco v. New York, 902 F. Supp. 400, 405 (S.D.N.Y. 1995) ("The statute is to be construed broadly in order to accomplish Congressional intent."); State of New York v. Lashins Arcade Co., 856 F. Supp. 153, 158 (S.D.N.Y. 1994) ("A broadly phrased statute, like CERCLA must be interpreted to promote its objectives."); CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432 (D.N.H. 1991) (CERCLA is remedial and must be construed liberally to achieve its purposes); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986)

Congress intended broad judicial interpretation of CERCLA in order to give full effect to two important legislative purposes: to give the federal government the tools necessary for a prompt and effective response to hazardous waste problems and to force those responsible for creating hazardous waste problems to bear the cost of their actions.

Id.

⁴¹⁸ Sharon Steel Corp., 681 F. Supp. 1495.

⁴¹⁹ One Wheeler Road Associates v. Foxboro Co., 843 F. Supp. 792, 795 (D. Mass. 1994) ("CERCLA should be given a broad and liberal construction, and should not be narrowly

3. Congressional Purpose and Responsibility To Pay

According to many courts, the statutory language of CERCLA should also be interpreted liberally so that taxpayers do not have to pay for the clean-up of hazardous materials.⁴²⁰ Specifically, many courts have stated that "[b]ecause it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties [potentially] responsible for the releases liable for the costs of the cleanup."⁴²¹ In order to accomplish those goals, "Congress created a broad scheme of liability which provided that responsible 'persons' should be held liable for the costs of environmental cleanup, subject only to the

interpreted to frustrate the government's ability to respond promptly, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided."); *Freudenberg-NOK Gen. P'ship v. Thomopoulos*, No. C91-2976, 1991 WL325290, at 3 (D.N.H. Dec. 9, 1991) ("CERCLA should be given a broad and liberal construction," so as not "to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.").

⁴²⁰ *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000); *Burlington N. and Santa Fe Ry. Co. v. Consolidated Fibers, Inc.*, 7 F. Supp. 2d 822, 826 (N.D. Tex. 1998)

CERCLA is a federal statute which provides for the cleanup of sites contaminated by the disposal of hazardous substances. Its "broad, remedial purpose is to facilitate the prompt cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefited from the wastes that caused the harm."

Id. (quoting *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997)); *Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1266, 1269 (E.D. Va. 1992) ("The broad remedial purposes behind the enactment of CERCLA seek to attempt to hold responsible parties liable for cleaning up hazardous waste sites . . . in lieu of imposing that duty upon taxpayers with absolutely no connection to the pollution at issue.").

⁴²¹ *Commander Oil*, 215 F.3d at 327 (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992)); *Nestle USA Beverage Div., Inc. v. D.H. Overmyer Co., Inc.*, No. C-96-1207 VRW, 1998 WL 321450, at 4 (N.D. Cal. Mar. 27, 1998) ("This view is consistent with the notion that CERCLA is to be liberally construed to accomplish the goal of allocating the ultimate cost of cleaning up disposal sites to the parties responsible for their contamination."); *California v. Verticare, Inc.*, No. C-92-1006 MHP, 1993 WL 245544, at *2 (N.D. Cal. Mar. 1, 1993) ("Congress intended that those who are responsible for the release of hazardous substances, rather than the taxpayers, shall be liable for the financial burden of remedying the harmful conditions they created."); *CPC Int'l v. Aerojet-General Corp.*, 777 F. Supp. 549, 571 (W.D. Mich. 1991) ("CERCLA is a broad remedial statute" and must be construed "broadly to avoid frustrating its legislative purpose" of facilitating prompt cleanups by placing financial responsibility "on those responsible for the pollution.").

enumerated defenses laid out in §[sic] 107(b), and '[n]otwithstanding any other provisions or rule of law[.]'"⁴²²

This legislative purpose is illustrated with the creation of the Superfund, coupled with the private right of action created under section 107 of CERCLA that holds responsible parties liable for clean-up cost recovery: "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."⁴²³

In order to avoid frustrating these legislative purposes and effectuate prompt clean-ups by private parties under section 107, the First Circuit Court of Appeals in *Dedham Water* held that it was obligated to

⁴²² Burlington N., 7 F. Supp. 2d at 826 (quoting 42 U.S.C. § 9607(a) (2000)); see also 42 U.S.C. § 9607(b) (2000)

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (1) an act of God;
- (2) an act of war;
- (3) an act of omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant

Id.

⁴²³ *Dedham Water Co. v. Cumberland Dairy Farms, Inc.*, 805 F.2d 1074, 1081 (1986); see also *Olin Corp. v. Yeargin Inc.*, 31 C.W.L.R. 1, 45-46 (E.D. Tenn. 1998) (quoting *United States v. Cordova Chem. Co. of Mich.*, 59 F.3d 584, 588 (6th Cir. 1995)) (holding that courts should not rely "on the principle of liberally constructing remedial legislation as a means for filling in the blanks of CERCLA 'so as to discern a congressional intent to impose liability under nearly every conceivable scenario' . . . CERCLA liability 'attaches only to those parties who . . . helped create the harmful conditions.'""); *Verticare*, 1993 WL 245544, at *2 ("Congress created the Superfund, which empowers the federal government to respond to hazardous waste disposal."); *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063, 1068-67 (M.D. Pa. 1988); *Pinole Point Prop., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 287 (1984)

A review of the statute and the Committee Reports reveals at least two Congressional concerns that survived the final amendments to the Act. First, Congress intended that the federal government be immediately given the tools necessary for prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost [sic] and responsibility for remedying the harmful conditions they created.

Id. (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D.C. Minn. 1982)).

interpret the terms of CERCLA liberally: "[w]e will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise."⁴²⁴ Specifically, the court held that "[t]his reading of the statute serves both congressional purposes by preserving the limited resources of the Fund and by ensuring that liability will be apportioned among parties responsible for the release of hazardous substances whenever possible."⁴²⁵ The Ninth Circuit held that since CERCLA should be "given a broad, liberal construction. . . . exceptions to CERCLA liability should . . . be narrowly construed."⁴²⁶

B. Applying the Correct Judicial Principles of Statutory Construction

1. Canons of Statutory Construction

The canons of statutory construction are a set of prudential rules that guide judges in interpreting the meanings of statutes.⁴²⁷ They have also been called "the collective folk wisdom of statutory interpretation."⁴²⁸ There are two general types of canons: text-oriented and substantive.⁴²⁹ The text-oriented canons are aimed at ascertaining the legislature's intent.⁴³⁰ Conversely, the substantive canons "do *not* purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective."⁴³¹ There are canons that

⁴²⁴ *Dedham Water*, 759 F.2d at 1081 (quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985). See also *Cordova Chem.*, 59 F.3d at 588 (quoting *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990)) (internal citations omitted) ("Congress did enact CERCLA as a 'remedial statute designed to protect and preserve public health and the environment.' . . . Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent otherwise.").

⁴²⁵ *Dedham Water*, 759 F.2d at 1081.

⁴²⁶ *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989) (internal citations omitted).

⁴²⁷ *Watson*, *supra* note 400, at 208 (citing Tucker, *The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's*, 35 U. TORONTO L.J. 113, 114 (1985)).

⁴²⁸ *Id.* (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 280 (1990)).

⁴²⁹ *Id.* at 223.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 225 (quoting Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (emphasis added)).

can be contradictory and can be used as *post-hoc* justifications.⁴³² Canons applicable to the section 107 versus section 113 cost recovery debate in the circuit courts are summarized below.

a. The Plain Meaning Rule

This canon was a foundation of the 2007 Supreme Court opinion in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (U.S. 2007). The circuit courts had more difficulty determining what the “plain meaning” of the section 107 CERCLA phrase “any other person” meant.⁴³³

This canon asserts that the actual words of the statute are “the most important evidence of its meaning,”⁴³⁴ “the final expression of the meaning intended,”⁴³⁵ and “the most authoritative interpretive criterion.”⁴³⁶ Under the Plain Meaning Rule, the language used in the statute can be objectively determined without recourse to, for example, legislative history.⁴³⁷ Where there is no significant or substantive legislative history, as with section 107 of CERCLA, this canon becomes more applicable. This canon restricts statutory interpretation to those circumstances unambiguously addressed in the legislative process, as evidenced by the specific terms of the law.⁴³⁸ The key operative language of section 107 is “any other person,” stated after just having discussed EPA rights of cost recovery and including others eligible for such cost recovery.⁴³⁹

⁴³² See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

⁴³³ See *United States v. Atl. Research Corp.*, 127 S.Ct. 2331 (2007).

⁴³⁴ 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).

⁴³⁵ *Watson*, *supra* note 400, at 212-13 (quoting *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929)).

⁴³⁶ *Id.* at 243 (quoting William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990)).

⁴³⁷ *Id.* at 219-20. Adherents to the Plain Meaning Rule are also known as textualists, the most well-known modern textualist being U.S. Supreme Court Justice Antonin Scalia. See *id.*

⁴³⁸ See *id.* at 219.

⁴³⁹ CERCLA § 107, 42 U.S.C. § 9607 (2000).

b. The Ordinary Meaning Rule

The ordinary meaning canon is ancillary to the plain meaning rule.⁴⁴⁰ It directs the judiciary to interpret terms in accordance with their ordinary "everyday" meaning unless otherwise defined by the statute.⁴⁴¹ Similarly, legal terms are to be given their ordinary legal meaning.⁴⁴² The section 107 CERCLA language of "any other person" in ordinary meaning is an inclusion of all other persons not discussed in the prior section 107 reference to the government and tribes. "Person" is defined in CERCLA and its case law to include all natural and legal persons.⁴⁴³

c. Give Meaning to Every Term

This canon derives from the precept that Congress, in drafting laws, deliberately and specifically chooses the words in each statute.⁴⁴⁴ Terms in a statute should neither be ignored, nor have their meanings diminished when a court construes the law.⁴⁴⁵ As one court held: "[e]very word should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible."⁴⁴⁶ Here, there are three key words to interpret in section 107 of CERCLA: "any other person." Related to this canon is the legal concept that a law "means as much as it says, not less."⁴⁴⁷ It is presumed that Congress would delete any terms that are unnecessary to give the law its full meaning and effect.⁴⁴⁸ If Congress did not want to include all persons as potential party-plaintiffs under section 107, it could easily have employed less broad or more restrictive language.

d. Purposivism

If the meaning of a statute is unclear, this canon counsels the judiciary to look to the legislative purpose in drafting the law as an aid to

⁴⁴⁰ See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 931-34 (1992).

⁴⁴¹ See Watson, *supra* note 400, at 224 n.109.

⁴⁴² See *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1994).

⁴⁴³ 42 U.S.C. § 9601.

⁴⁴⁴ MICHAEL SINCLAIR, *A GUIDE TO STATUTORY INTERPRETATION* 146-47 (2000).

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 146 (quoting *Stowers v. Wolodsko*, 386 Mich. 119, 133 (1971)).

⁴⁴⁷ *Id.* at 147.

⁴⁴⁸ See *id.* at 146.

interpreting its meaning.⁴⁴⁹ The canon is premised on the idea that a statute should be construed to effectuate the purpose or intent of Congress in drafting it.⁴⁵⁰ The uniform liberal construction of CERCLA to effect its remedial and private clean-up incentive purposes, would be consistent with the purposivism canon to interpret the Congress's use of the clause "any other person" to include a broadest group of persons including other PRPs.⁴⁵¹

e. The Remedial Purpose Canon

The remedial purpose canon provides that public welfare statutes are to be construed broadly.⁴⁵² It was first postulated as the "mischief rule" by Sir Edward Coke in *Heydon's Case*.⁴⁵³ This canon is further undergirded by the conception that "if the legislature is trying to remedy some ill, it would want the courts to construe the legislation to make it a more rather than a less effective remedy for that ill."⁴⁵⁴ Statutes that protect public health and safety, or that are otherwise beneficial to the public, are generally considered to be "remedial."⁴⁵⁵ As highlighted in Section (A) above, the CERCLA case law interprets CERCLA as remedial in purpose and broadly construes its terms.⁴⁵⁶

f. Repeals by Implication are Disfavored

This canon rests on the idea that Congress is aware of all statutes drafted prior to the statute being construed, and would have explicitly repealed any prior conflicting statutes, if that was its intent.⁴⁵⁷ By leaving

⁴⁴⁹ Donna D. Adler, *A Conversational Approach to Statutory Analysis: Say What You Mean & Mean What You Say*, 66 MISS. L.J. 37, 56-58 (1996).

⁴⁵⁰ See *id.* at 56-59. Most commonly, the legislative history is reviewed by the judiciary if it resorts to purposivism as an aid in interpreting a statute. See *id.* at 59-60.

⁴⁵¹ See *supra* Part III.

⁴⁵² Joel Mintz, *Can You Reach New "Greens" if You Swing Old "Clubs"? Underutilized Principles of Statutory Interpretation and Their Potential Applicability in Environmental Cases*, 7 ENVTL. LAWYER 295, 302 (2001).

⁴⁵³ Watson, *supra* note 400, at 229. At that time in England there were few statutes; most law was common law. See *id.* Coke stated that in interpreting a statute the court should "suppress the mischief, and advance the remedy." *Id.* (quoting *Heydon's Case*, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584)).

⁴⁵⁴ Posner, *supra* note 434, at 809. Posner argues that because statutes are the result of compromise within the legislature, it is difficult to find a common remedial objective. *Id.*

⁴⁵⁵ Watson, *supra* note 400, at 236-38.

⁴⁵⁶ See *supra* Part III.A.

⁴⁵⁷ See Posner, *supra* note 434, at 812-813. See also Watson, *supra* note 400, at 225.

the prior statutes intact, the legislature implies that they do not conflict with the provisions of new statutes. Here, when SARA added section 113(f) in 1986, section 107 as it currently stands—and more importantly as it had been interpreted broadly by the courts to that point—had existed since the original 1980 version of CERCLA.⁴⁵⁸ Congress did not repeal or alter section 107 to accommodate the new section 113.⁴⁵⁹ It was the circuits' decisions that "repealed" effective private party access to section 107, merely because section 113 is the primary vehicle favored by many of the circuits.⁴⁶⁰ There should be no implied repeal where there is no explicit repeal.

2. The Circuits' Misapplication of the Core Canons Construing CERCLA Sections 107 and 113

The eleven federal circuits did not apply the canons of statutory construction as the Supreme Court did in *Atlantic Research*.⁴⁶¹ The federal circuit courts took two basic steps to arrive at their blockage of section 107. First, several of the later-to-decide circuits followed the lead of earlier circuits.⁴⁶² Second, many construed the language of section 113, rather than the language of section 107, to determine the meaning of section 107.⁴⁶³ However, there is no such interpretive preference in the

⁴⁵⁸ See CERCLA § 107, 42 U.S.C. § 9607 (1980).

⁴⁵⁹ See CERCLA, § 107 (1980).

⁴⁶⁰ See *infra* Part IV.B.2.a.

⁴⁶¹ See 127 S. Ct. 2331 (2007).

⁴⁶² See discussion of the Sixth, Eighth, and Eleventh Circuit decisions, *infra* Part IV.B.2.a.

⁴⁶³ See discussions of the First, Second, Third, Fourth, Seventh, and Ninth Circuit Court decisions *infra* Part IV.B.2.a. These circuits decided that section 113 is available to private party-plaintiffs for cost contribution and that there needs to be no other path, without ever construing the meaning of the express language of section 107 itself. They then eliminated section 107 as interfering with or superfluous to section 113. This typical judicial rationale proceeds that (1) the ordinary meaning of the term "contribution" encompasses claims between liable parties, (2) the legislative history of the 1986 SARA amendments makes clear that Congress's intent in drafting section 113(f) was to codify the contribution action for liable parties that have paid more than their pro rata share of remediation costs, (3) allowing a PRP to pursue the section 107 cost recovery cause of action would render section 113 superfluous because few plaintiffs would choose that more burdensome section 113 cause of action, and (4) the earlier decisions of the other circuits limited PRPs to only the section 113(f) claim for contribution. See, e.g., discussions of the First, Sixth, Ninth, and Tenth Circuit Courts *infra* Part IV.B.2.a. Thus, the federal courts of appeal identified section 113(f) as a cause of action for PRPs and extrapolated that interpretation to negatively imply that section 107 cost recovery claims cannot also be available to PRPs. See for example the discussion of *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, *infra* Part IV.B.2.a.

statute or the legislative history.⁴⁶⁴ It is suspect to determine the intent of section 107 without interpreting the language of section 107.

Some of the circuit courts that held that section 107 was not available to private parties inferred a congressional purpose, in enacting section 113(f) in the 1986 SARA amendments, of impliedly correcting and preempting the use of the previously enacted section 107.⁴⁶⁵ 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 1986.⁴⁶⁶ 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 indicates 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.⁴⁶⁷

a. The Individual Circuit Decisions

The First Circuit in *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96 (1st Cir. 1994), looked to the traditional section 113 meaning of the term “contribution” and followed the “ordinary meaning” canon of construction, stating that actions between potentially liable parties to recover an over-payment of a party’s fair share is by definition a contribution claim.⁴⁶⁸ But this approach interpreted section 113 rather than section 107. By negative implication, it is not appropriate to interpret and endorse section 113, and without direct interpretation thereafter backhandedly preclude section 107 cost recovery claims by PRPs.⁴⁶⁹

⁴⁶⁴ See CERCLA §§ 107, 113, 42 U.S.C. §§ 9607, 9613 (2000); H.R. REP. NO. 99-253, pt. 1, at 59 (1985) (demonstrating no intention to substitute the meaning of section 113 for that of section 107).

⁴⁶⁵ See, e.g., *Centerior Servs. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 (6th Cir. 1998).

⁴⁶⁶ *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (holding that there is implied right to contribution where PRP brought and was allowed to maintain section 107 cost recovery action against other PRPs).

⁴⁶⁷ See H.R. REP. NO. 99-253, pt. 1 (1985), *reprinted in* 1986 U.S.C.A.N. 2835, 2863; S. REP. NO. 99-11, at 44 (1985).

⁴⁶⁸ *United Techs.*, 33 F.3d at 98-101, 103.

⁴⁶⁹ See *id.* at 98-103.

The issue is not to clear an unobstructed path for section 113, but to interpret the express words and meaning of section 107, which the court avoids.

The Second Circuit first looked at this issue in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), and similarly held that section 107 was "not available . . . for a potentially responsible party."⁴⁷⁰ It did so by finding that section 113 was "added . . . as an express authorization of claims for contribution" and then eliminating by negative implication the alternative competitive route of section 107 cost recovery.⁴⁷¹ Like the First Circuit, this court also held that allowing PRPs to pursue cost recovery actions would render section 113 a nullity.⁴⁷²

Similarly, the Third Circuit also held that a PRP may not bring a claim for recovery of costs against another PRP, relying on the ordinary meaning of the legal term "contribution," as well as equitable concerns.⁴⁷³ However, the court again assiduously avoided construing the meaning of section 107's language, preferring instead to endorse section 113 and then eliminate the alternative of section 107, so as not to crowd section 113.⁴⁷⁴

The Fifth Circuit did not immediately join the elimination of recourse to section 107 cost recovery, instead interpreting the "any other person" language broadly under plain meaning.⁴⁷⁵ In 1989, when the Fifth Circuit first addressed the issue of response costs in *Amoco Oil Co. v.*

⁴⁷⁰ *Bedford Affiliates*, 156 F.3d at 423.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 424.

⁴⁷³ *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119, 21 (3d Cir. 1997). The Third Circuit defined contribution as "a claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Id.* at 1121 (quoting *United Technologies Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 99 (1st Cir. 1994)). See also *In re Reading Co.*, 115 F.3d 1111, 1117-19 (3d Cir. 1997) (holding that the plain language of section 113 provided for contribution to be the cause of action between PRPs); *New Jersey Tpk. Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999) (Following precedent by holding that "[s]ection 113 of SARA provides for recovery by way of contribution by one PRP from another PRP.").

⁴⁷⁴ *New Castle County*, 111 F.3d at 1123-24, n.8. The Third Circuit cited the arguments of other circuits in holding that PRPs may not bring section 107 cost recovery actions. *Id.* at 1124 (citing the First, Seventh and Tenth Circuits). The Fourth Circuit also chose to disregard the canons of construction. See, e.g., *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999); *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998). By the time of the *Axel Johnson* decision, the Sixth and Ninth Circuits had ruled on this issue. See, e.g., *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997).

⁴⁷⁵ See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1579 (5th Cir. 1997).

Borden, Inc., 889 F.2d 664 (5th Cir. 1989), it did not require that only a contribution claim is available to such PRPs.⁴⁷⁶ Later, in *OHM Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997), the Fifth Circuit addressed whether a section 107 action “is restricted to persons with a ‘protectable interest’ in the cleanup site.”⁴⁷⁷ The court held that there was no such requirement in CERCLA, and further stated that “section 107 does not limit the class of plaintiffs who may recover response costs [The construction of] section 107 evidences congressional intent that anyone is eligible to recover response costs.”⁴⁷⁸

In confronting the issue of standing to sue under section 107, the Sixth Circuit cascaded behind the other circuits that had previously ruled on the issue.⁴⁷⁹ Without dealing with the meaning of section 107, the court determined that the ordinary meaning of the term “contribution” in section 113 encompasses actions by one liable party that has paid more than its *pro rata* share against another liable party.⁴⁸⁰ The court construed only section 113’s plain language, not that of section 107.⁴⁸¹ The court ruled that the legislative purpose of the statute supported this conclusion.⁴⁸² It also stated that construing the statute so that PRPs are limited to section 113 contribution actions “gives meaning” to both section 107 and section 113.⁴⁸³ In reality, the meaning it gives section 107 is so restrictive as to be non-operative in most cases and to bludgeon the remedial incentives and purposes of CERCLA. Post-*Aviall*, it leaves no significant avenue for cost recovery.

⁴⁷⁶ *Amoco Oil*, 889 F.2d at 672 (“[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution”) The *Amoco Oil* court discussed response costs without requiring a showing that the plaintiff is not a PRP. *Id.* at 669-70.

⁴⁷⁷ *OHM Remediation Servs.*, 116 F.3d at 1579.

⁴⁷⁸ *Id.* In the same decision, however, the court expressly agrees with the First Circuit’s holding in *United Technologies* that an action for contribution should be understood in its ordinary legal context to mean an action by one liable party against another liable party to recover expenses incurred, “in excess of its *pro rata* share.” *Id.* at 1582 (quoting *United Technologies Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 103 (1st Cir. 1994)).

⁴⁷⁹ *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349, 53 (6th Cir. 1998).

⁴⁸⁰ *Id.* at 350-51.

⁴⁸¹ *Id.* In interpreting the “any other person” language of section 107, the court held that “any person may seek to recover costs under § 107(a) [sic], 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.

⁴⁸² *Id.* at 352.

⁴⁸³ *Id.* See also *id.* at 352 n.11 (noting concern that section 113(f) not be rendered meaningless).

The Seventh Circuit, while leaving section 107 available for "innocent" parties, implicitly relied on the ordinary meaning of the section 113 term, "contribution" as the basis for its ruling.⁴⁸⁴ In attempting to define section 113 broadly, the court backhandedly restricted section 107, due to the absence of a straightforward interpretation of section 107's language. A 2003 Eighth Circuit ruling followed the cascade of circuit precedents and held that a PRP's claim for recovery of cleanup costs is a claim for contribution.⁴⁸⁵ The court cited the decisions of the other circuits as support for its holding.⁴⁸⁶

The Ninth Circuit, in ruling that a PRP may not jointly and severally recover its cleanup costs from another liable party, purported to rely on precedent and on "the text, structure, and legislative history of §§ 107 and 113."⁴⁸⁷ Again, the court focused only on the ordinary meaning of the term "contribution" in section 113.⁴⁸⁸ Here, the court at least made some attempt to dispose of the purpose of section 107.⁴⁸⁹ The court stated that section 107 implicitly contains a right for PRPs to bring contribution

⁴⁸⁴ *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764-65 (7th Cir. 1997). This was one of the first of many times when a circuit court of appeals called this type of claim "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.,* *NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 784 (7th Cir. 2000); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1347 (7th Cir. 1997). *But see* *W. Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 689-90 (9th Cir. 2004) (declining to adopt the innocent landowner defense); *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1134-35 (10th Cir. 2002) (ruling innocent landowner defense "does not square with the underlying purposes of CERCLA"). In *Akzo Coatings*, the court asserted that the plaintiff's claim was, by definition, for contribution regardless of how the plaintiff pled it. *Akzo Coatings*, 30 F.3d at 764. The court stated Akzo's claim "remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Id.*

⁴⁸⁵ *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530-31 (8th Cir. 2003).

⁴⁸⁶ *Id.* at 530 (citing *New Jersey Tpk. Auth. v. PPG Indus.*, 197 F.3d 96, 104 (3d Cir. 1999); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999); *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998); *Centerior Serv.*, 153 F.3d at 350; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101 (1st Cir. 1994); *Akzo Coatings*, 30 F.3d at 764; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989)).

⁴⁸⁷ *Pinal Creek*, 118 F.3d at 1299-1301.

⁴⁸⁸ *Id.* at 1301-02.

⁴⁸⁹ *Id.* at 1301.

claims, codified by the SARA amendments in 1986, so that sections 107 and 113 are to be read together as one cause of action for a PRP.⁴⁹⁰ There is no such legislative history in the SARA amendments.⁴⁹¹ The court did not construe the specific “any other person” text of section 107.⁴⁹²

The Tenth Circuit looked to the purpose of the SARA amendments, rather than the exact language of the statute, to find that the ordinary legal meaning of the term “contribution” is a claim to reapportion costs between responsible parties.⁴⁹³ No controversy there. However, the court proceeded, without fully discussing why, to hold that by allowing PRPs to recover costs under section 107, “§ 113(f) would be rendered meaningless.”⁴⁹⁴ The court explained its preference for section 113 to the exclusion of section 107, and then eliminated access to section 107.⁴⁹⁵ The fact that some private plaintiffs prefer the original and unchanged section 107 avenue of cost recovery to the newer section 113, does not make the latter “meaningless.”⁴⁹⁶

Relying on decisions of the Tenth and Fifth Circuits, the Eleventh Circuit held that PRPs may not assert claims for recovery of costs under section 107 in lieu of a contribution claim under section 113.⁴⁹⁷ Rather than work through the applicable canons of statutory construction, the

⁴⁹⁰ *Id.* at 1301-02. The court goes on to state, “[s]ection 113(f), however, does not create the right of contribution—rather the source of a contribution claim is section 107(a). Under CERCLA’s [liability] scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.” *Id.* at 1302 (quoting *United States v. Asarco, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993) (citations omitted)). The court also noted dictum from *In re Dant & Russell*, specifically, that section 113 applies to cost recovery actions brought by responsible parties, as support for its holding. *Id.* The court found persuasive the decisions of the other circuits that had previously ruled on this issue. *Id.* at 1301-04 (citing decisions of the First, Third, Seventh and Tenth Circuits).

⁴⁹¹ See H.R. REP. NO. 99-962, at 221 (1986).

⁴⁹² See *Pinal Creek*, 118 F.3d at 1301-02.

⁴⁹³ *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535-36 (10th Cir. 1995). See also *Morrison Enters., v. McShares, Inc.*, 302 F.3d 1127, 1133 (10th Cir. 2002); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1190 (10th Cir. 1997); *Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 100 F.3d 792, 800 (10th Cir. 1996).

⁴⁹⁴ See *Colorado & E. R.R.*, 50 F.3d at 1536.

⁴⁹⁵ *Id.* at 1535-36.

⁴⁹⁶ See *id.* at 1536.

⁴⁹⁷ *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1995) (citing *Colorado & E. R.R.*, 50 F.3d at 1535-36; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989)). The court also cited decisions of the First and Seventh Circuits. *Id.* at 1513 (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1997); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 99-100 (1st Cir. 1994)).

court impliedly rested its decision on what it viewed as the underlying goal of CERCLA: placing the responsibility for cleaning up releases of hazardous substances on the parties responsible for those releases.⁴⁹⁸ However, where there is no effective or manageable redress under section 113 at complex multi-party sites, that responsibility is not well placed by this reasoning.

CONCLUSION: THE IMPLICATIONS FOR "PLAIN MEANING" STATUTORY CONSTRUCTION IN THE FUTURE JUDICIAL FIRMAMENT

The 2007 Supreme Court decision in *Atlantic Research*, although very important in the constellation for interpretation of hazardous substance liability, is at least equally important in articulating the emergence of the judicial canon of "plain meaning" interpretation of legislative statutes. This emerging canon signals a new decision rule for the Roberts Court, which builds on two years of interpretive precedent.

In 2005, the Supreme Court announced that courts should interpret statutes by a reading "that makes sense of each phrase" and that is "the one favored by our canons of interpretation."⁴⁹⁹ In addition, the Supreme Court has held that it is the duty of the courts to regard separate statutes—or in this case, by analogy, separate provisions of the section 107 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.'"⁵⁰⁰

In rendering its 2007 decision on carbon dioxide regulation in *Massachusetts v. EPA*, the Supreme Court resorted to plain meaning interpretation of the Clean Air Act.⁵⁰¹ The Court's slightly later opinion on section 107 hazardous substance liability in *United States v. Atlantic Research Corp.*, again relied on the "plain meaning" canon of statutory interpretation.⁵⁰² Thus, the lasting precedential imprint of the 2007 *Atlantic Research* decision is fourfold:

⁴⁹⁸ *Redwing Carriers*, 94 F.3d at 1514.

⁴⁹⁹ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

⁵⁰⁰ *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992).

⁵⁰¹ 127 S. Ct. 1438, 1462 (2007).

⁵⁰² 127 S. Ct. 2331, 2336 (2007).

- It unknots an entire paralysis in the Superfund program created by the confluence of decisions of eleven circuit courts barring access to section 107, and the Supreme Court in 2004 in *Aviall* barring access to section 113 for private hazardous substance remediation.⁵⁰³
- It injects new flexibility and vitality into judicial supervision of the nation's hazardous waste program.
- It warns lower federal courts about the possibility of cascades of judicial decisions, especially when application of the canons of statutory construction would lead to an opposite result.
- It cements the foundation and preeminence of the "plain meaning" canon in the interpretation of the federal statutes.

While all of these lasting impacts of the precedent are significant, there is possible transcendent lasting impact beyond the interpretation of the hazardous waste laws. The emergence of "plain meaning" as the canon of construction decision rule for statutory interpretation will bear on a wide variety of future cases before the Supreme Court. *Atlantic Research* is precedent in which the "plain meaning" canon enjoys almost a classic textbook application.⁵⁰⁴

The practical and policy impacts accompanying this decision are very significant in terms of both the allocation of financial responsibility and the number of contaminated sites affected. It sets a fundamentally different legal course for the future. The avenues of the statutory provisions, sections 107 and 113 of CERCLA, are distinct, unique, and interpreted by their plain meanings.⁵⁰⁵

⁵⁰³ See *supra* Part II.

⁵⁰⁴ See *Atl. Research*, 127 S. Ct. at 2336.

⁵⁰⁵ The language in section 107, creating a cost recovery action for "any other person," employs relatively common language, and actually repeats language that is used previously in section 107 to impose liability on "any person" who meets specified criteria. See CERCLA § 107, 42 U.S.C. § 9607 (2000). There also was a history of liberal interpretation of both this and other sections of section 107 of the statute. See *supra* Part IV. The interpretation of the Supreme Court that the "plain meaning" of "any other person" in section 107, appears straightforward. See *Atl. Research*, 127 S. Ct. at 2336. It provides a platform for the application of this canon.

This fundamentally alters the allocation of, and responsibility for, hazardous substance liability in the United States as previously articulated and decided by the federal circuit courts. It has resolved the chaos created by eleven circuits' unusual, but consistent, interpretations of CERCLA liability allocation.⁵⁰⁶ The Supreme Court has created the only cost allocation system that makes fundamental sense. When the Supreme Court finally found the case vehicle to express the opinion that it could not reach in *Aviall*, it resolved major crisis in the United States' misinterpretation of the Superfund law.

⁵⁰⁶ See *supra* Parts II.A, II.B.