Only "Innocent" Parties Need Apply: The Death of Private Party Cost Recovery Actions Under Superfund?

Mark A. Stach
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II. CONCLUSION

"No one likes to clean up a mess, much less pay the cost of it, and the parties to this action are no exception; their protracted and lengthy litigation proves it."

1. BACKGROUND

The goal of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund") is to foster the prompt cleanup of hazardous waste sites. The first step in accomplishing this goal is for the Environmental Protection Agency ("EPA") to place the hazardous waste site on the National Priorities List ("NPL") for cleanup.

When the EPA places a site on the NPL, it names one or more parties as respon...
potentially responsible parties ("PRPs") for the cost of cleaning up the site. The EPA does not usually name all PRPs when it initiates a Superfund cleanup action. Typically, the EPA names several entities as PRPs and leaves it to this "first tier" of PRPs to identify other parties who contributed waste to the site and to recover from such parties part of the costs that they have expended on the cleanup. Because of the enormous expense involved in cleaning up a hazardous waste site, EPA-designated PRP's have ample incentive to pursue fellow PRPs to recover some of their cleanup costs. There are two methods by which the first tier PRPs can recoup a portion of the costs that they expended to clean up the site: (1) a private party cost recovery action under section 107 of CERCLA, or (2) a contribution action, as authorized by section 113 of CERCLA.

The goal of CERCLA is simply stated and the mechanism for the EPA to initiate cleanups is fairly straight-forward. However, CERCLA has been described as a "complex piece of federal legislation" with "a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory,

6. See Hedeman et al., supra note 5, at 10,417 ("Theoretically, EPA should identify all potentially liable parties at the site. In practice, EPA often will identify only enough parties to commence an action."). The EPA has no real incentive to identify vast numbers of PRPs. The EPA may impose joint and several liability on those parties that are responsible for the cleanup. See infra note 14. Once the EPA identifies enough parties to fund the remedy, be it one party or several, the EPA has done all it needs to do in order to clean up the site. The parties that effect the remedy may recoup at least a portion of their costs, but they bear the responsibility for pursuing the recoupment. Thus, because of joint and several liability, the EPA need not expend the tremendous amount of time and resources necessary to identify and collect the cost of cleanup from all PRPs. Although possibly not fair to the first tier of PRPs, this is seen by some as consistent with CERCLA's goals.
7. In 1990, the EPA's former Assistant Administrator for Enforcement testified that the average cost for remediating a site was $29 million. See Hedeman et al., supra note 5, at 10,423 (citing Hearings Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking Finance and Urban Affairs, 101st Cong., 2d Sess. 5 (1990) (testimony of James M. Strock). More recently, a study by the Rand Institute for Civil Justice estimated that PRPs spent an average of $32 million to clean up a site. See DIXON ET AL., PRIVATE-SECTOR CLEANUP EXPENDITURES AND TRANSACTION COSTS AT 18 SUPERFUND SITES (1993). According to this study, 32% of this amount was attributable to legal and administrative costs. Id. Much of these legal costs are attributable to PRPs' attempts to recoup their cleanup costs from fellow PRPs.
Some of the confusion engendered by the statute revolves around its provisions for the recovery of costs by private parties who have expended funds to cleanup sites. Nowhere is this confusion more apparent than in court decisions dealing with CERCLA's two statutory mechanisms for the recoupment of cleanup costs, sections 107 and 113, and their relationship to CERCLA's ultimate goal—prompt and efficient cleanup of hazardous waste sites.

II. SECTION 107: COST RECOVERY

Section 107 of CERCLA defines who may be liable for cleanup costs and the prerequisites for liability. Arguably, section 107 applies to all actions pursuant to which one party attempts to impose liability for cleanup costs upon another party. Section 107 "authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation." Under section 107, the following parties may be liable for the costs of cleaning up a site: the owner(s) and operator(s) of the site, the persons who owned and operated the site at the time the waste was deposited at the site, waste generators and those who arranged for transportation of the waste to the site, and transporters of the waste. In order for liability under section 107 to attach: (1) there must have been a "release" or "threatened

11. Because there are typically multiple parties involved in the cleanup of a site, and various remediation options, the complexity associated with interpreting the statute is exacerbated. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989).
13. Id.
14. Section 107(a)(4)(B) states that liability extends to "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). "Person" as defined includes "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Id. § 9601(21). As will be discussed in greater detail throughout this article, liability under § 107 is joint and several. See infra text accompanying notes 42-47. See also United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116, 1122 (N.D. Fla. 1995) (citing several cases and noting that "[s]ection 107 imposes joint and several liability on PRPs regardless of fault").
15. 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990) (citations omitted). See also Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986) ("Section 107(a)(2)(B) expressly creates a private cause of action for damages."). While these cases did not limit the availability of private party cost recovery actions, recently decided cases question precisely what group of private parties may maintain § 107 actions. See infra Sections V and VI.
release" from a facility,17 (2) the release or threatened release must have caused response costs to have been incurred,18 and (3) the response costs must be consistent with the National Contingency Plan ("NCP").19

The existence of a private right of action under section 107 can be seen as consistent not only with the language of the statute, but also with the fundamental policy underlying CERCLA.20 The private right of action, with its potential for a party who cleans up a site to recover all expenses attributable to the cleanup might create an incentive for parties to commence and pursue cleanup. One court described this incentive as follows:

CERCLA was enacted to facilitate clean up of the tens of thousands of hazardous waste sites in this country. Section 107 permits the Government or a private party to go in, cleanup the mess, pay the bill, then collect all its costs not inconsistent with the NCP from other responsible parties—even if plaintiff was also responsible for the contamination. Any PRP is entitled under section 113 to bring a contribution action against other PRPs—including the PRP who previously cleaned up the mess and was paid for its trouble through a section 107 proceeding—to apportion costs equitably among all the PRPs. Practically speaking, section 107 permits a PRP, including the Government, to collect all its response costs, even those that that same PRP may be required to pay back to other PRPs as its equitable share in a section 113 proceeding.

What might be called a windfall for a plaintiff PRP in a section 107 action serves as an incentive for private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a

17. Id. § 9607(a)(4). “Release” is defined in CERCLA to include “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” Id. § 9601(22).
18. Id. § 9607(a)(4).
19. Id. § 9607(a)(4)(A)-(B). The purpose of the NCP is to “provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.” 40 C.F.R. § 300.1 (1995). Among other things, the NCP sets forth the methods for investigating, listing, and choosing the remedy for sites. See 42 U.S.C. § 9605(a) (“The plan shall specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remediating releases of hazardous substances . . . .”).
20. See In re Dant & Russell, Inc., 951 F.2d 246, 248 (9th Cir. 1991) (“The CERCLA private right of action encourages voluntary private action to remedy environmental hazards. In this way, it furthers CERCLA’s goal of responding to hazardous situations quickly. EPA arm-twisting is not a prerequisite for filing a § 9607(a)(4)(B) claim.”).
Certain courts have seized upon the policy argument posited in *Kramer* as support for holding that a PRP can maintain a cost recovery action against its fellow PRPs, notwithstanding its role in contributing to the contamination of the site.22

21. *Kramer*, 757 F. Supp. at 416-17 (footnote omitted). This aspect of *Kramer* was recently criticized, however, by another district court as being “unpersuasive.” *T H Agric. & Nutrition Co. v. Aceto Chem. Co.*, 884 F. Supp. 357, 361 (E.D. Cal. 1995) (“All that the *Kramer* opinion actually accomplishes is another round of litigation—as defendant PRPs counterclaim against the plaintiff PRP to effectuate their recovery. Such an approach guarantees inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.”). For a discussion of *T H Agriculture*, see infra Section V.B.1. See *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1215 n.2 (N.D. Cal. 1994):

Under this theory [set forth in *Kramer*], a private liable party will be more likely to initiate a cleanup on its own if it knows it will have the opportunity to gain a windfall by recovering all of its costs—including the costs properly attributable to itself—under § 9607(a). The problem with this argument is that the “windfall” incentive is illusory. Although a party who had voluntarily cleaned up a site would initially be able to recoup all of his costs from other responsible parties under § 9607(a), the other liable parties could compel him to pay his ratable share by bringing contribution actions against him under § 9613. Any windfall would be ephemeral and provide no real incentive.

*But see infra* text accompanying notes 243-46 (criticizing judicial abdication of a methodology promoting responsible action).

The *Kramer* opinion does, however, fail to take into account a PRP’s recovery costs, the uncertainties associated with obtaining any recovery, the length of time required to receive a recovery, and the time value of money. One of the major costs that a PRP must incur in recovery is legal fees. *See supra* note 7. At the time *Kramer* was decided, there was a split among the circuits as to whether such costs were recoverable. The issue was resolved with the Supreme Court’s decision in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), in which the Court held that § 107 “does not provide for the award of private litigants’ attorney’s fees associated with bringing a cost recovery action.” *Id.* at 1967. The Court did, however, hold that “some lawyers’ work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B),” and thus would be recoverable, such as “work performed in identifying other potentially responsible parties.” *Id.*


Policies underlying CERCLA support the notion that claims between PRP’s are not always, and should not always be, in the nature of contribution. As noted earlier, CERCLA seeks the expeditious and safe clean up of hazardous waste sites. A blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing PRP from cleaning up on its own. This is especially true where one or more of the parties are insolvent and, thus, incapable of sharing the costs of cleanup. In this situation, a PRP which is otherwise amenable to cleaning up may be discouraged from doing so if it knows that, where the harm is indivisible, its only recourse for reimbursement is contribution from the solvent PRP’s. A prohibition against joint and several
Courts have also cited the language of section 107(a)(4)(B) in finding a cause of action for private parties under section 107. This language states that such persons “shall be liable” for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” Typical of such holdings is Companies for Fair Allocation v. Axil Corp., in which the court noted that:

The defendants contend that because the plaintiffs are themselves PRPs under CERCLA, the appropriate action is one for contribution under [section] 113, which provides for several, rather than joint and several, liability. However, the [section] 107 liability provision, with its use of the term “any other person” and its limited defenses to liability, implies that Congress intended the liability provision to sweep broadly. While CERCLA is silent as to whether “any other person” includes other PRPs, a number of courts have found that allowing PRPs to pursue [section] 107 actions is consistent with the broad scope of liability that Congress intended.

Of the arguments in favor of allowing PRPs to pursue private party cost recovery actions, this is perhaps the most convincing. The language of the statute clearly states that liable parties shall be liable for costs “incurred by any other person.” This language, standing alone, does not in any way limit the availability of private party cost recovery actions. When CERCLA is viewed in its entirety, however, the scope of the availability of private party cost recovery actions liability would leave the willing PRP holding the bag for the insolvent companies. On the other hand, a willing PRP would be encouraged to clean up where the law leaves open the possibility that the PRP could recover all costs as against unwilling, solvent PRP’s under a theory of joint and several liability.

23. 42 U.S.C. § 9607(a)(4)(B) (emphasis added). As the language indicates, there is nothing in this section limiting its availability to PRPs.
24. 853 F. Supp. 575, 579 (D. Conn. 1994) (footnote and citations omitted). While Axil is not discussed further in Section V, it should be kept in mind when considering recent cases. See also United States v. Conservation Chem. Co., 628 F. Supp. 391, 404 (W.D. Mo. 1985), modified, 681 F. Supp. 1394 (W.D. Mo. 1988) (“To give effect to the legislative intent [of CERCLA], the ‘any other person’ language in 42 U.S.C. § 9607(a)(1)-(4)(B) must be construed to refer to persons other than federal or state governments, and not to persons other than those made responsible under CERCLA.”) (citations omitted)).

The reference to limited defenses under § 107 refers to four enumerated defenses: (1) act of God, (2) act of war, (3) act or omission of an independent third party, or (4) any combination of the above. 42 U.S.C. § 9607(b). The third party defense has been interpreted narrowly and only rarely have defendants been released from liability on this basis. See generally JAMES T. O’REILLY ET AL., RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS, §§ 14.18, 14.49-.50 (1993).
becomes less clear. 26

III. SECTION 113: CONTRIBUTION 27

Originally, CERCLA did not provide for an express right of contribution from fellow PRPs for cleanup costs. However, section 107(e)(2) of CERCLA, which defines certain parameters of liability thereunder, states: "[n]othing in this subchapter . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person." 28 Moreover, sections 107(i) and (j) of CERCLA provide that common law rights shall not be affected thereby, and courts have construed these sections to provide PRPs with a right of contribution against fellow PRPs. 29 In 1986, the Superfund Amendments and Reauthorization Act ("SARA") amended CERCLA, 30 granting PRPs an express right to contribution:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607 of this title [section 107 of CERCLA], during or following any civil action under section 9606 of this title or under 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title. 31

Complementing this express right to contribution, section 113(f)(2) established a "contribution bar:"

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters

26. See infra Sections V and VI.
28. Id. § 9607(e).
29. Id. § 9607(i), (j).
addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.\footnote{Id. § 9613(f)(2). See also id. § 9622(g)(5) (providing that, when de minimis party enters into settlement with government pursuant to that section, de minimis party “shall not be liable for claims for contribution regarding matters addressed in the settlement”).}

The contribution provisions, specifically the contribution bar, were, like section 107, designed to encourage prompt cleanup of hazardous waste sites. According to the First Circuit, “CERCLA seeks to provide EPA with the necessary tools to achieve prompt cleanups . . . . One such tool is the ability to foster timely settlements.”\footnote{United Technologies, 33 F.3d at 102-03 (citing Cannons Engineering, 899 F.2d at 90-91).} Another court more explicitly described the rationale underlying the contribution bar as follows:

While CERCLA provided the EPA with clear authority to sue owners of and contributors to hazardous waste sites, the ability of those sued by the EPA to seek contribution costs from other potentially responsible contributors was in doubt. This was true despite the fact that Section 107 provided that PRPs can be liable to private parties that engage in clean-up operations. But by 1986, Congress realized that if cleanups are going to be effectuated quickly, it not only had to provide incentives for settlements with the government but also had to assure that liable parties could seek restitution from other potentially liable parties. Accordingly, Congress adopted a series of amendments to CERCLA, designed to further these two policy objectives. The first CERCLA amendment stated that “any person may seek contribution from any other person who is liable or potentially liable under section 107(a) . . . .” 42 U.S.C. § 9613(f)(1).

\footnote{Id. § 9613(f)(2). See also id. § 9622(g)(5) (providing that, when de minimis party enters into settlement with government pursuant to that section, de minimis party “shall not be liable for claims for contribution regarding matters addressed in the settlement”).}

\footnote{United Technologies, 33 F.3d at 102-03 (citing Cannons Engineering, 899 F.2d at 90-91).}
Allocation of costs are to be governed by "such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). By adding this provision, Congress clarified its intent to have the costs of hazardous waste cleanups shared by all responsible parties. The second provision provides that parties who have "resolved [their] liability to the United States . . . in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). The purpose here is to encourage parties to settle with the government, which, in turn, served to quickly effectuate urgent clean-up operations.34

The holding in Transtech Industries touches upon the interplay between the policies underlying sections 107 and 113 in terms of achieving CERCLA’s ultimate goal of prompt cleanups. When considering the interplay of the policies underpinning sections 107 and 113, four possible scenarios in which a PRP might seek to maintain a cost recovery action must be considered: (1) a non-settling PRP seeks to maintain a section 107 action against another non-settling PRP, (2) a settling PRP seeks to maintain a section 107 action against a non-settling PRP, (3) a non-settling PRP seeks to maintain a section 107 action against a settling PRP, and (4) a settling PRP seeks to maintain a section 107 action against another settling PRP.35 In the first two scenarios, the contribution bar has no impact because there has been no settlement, which is a prerequisite to the barring of other claims.36 In the third and fourth scenarios, a PRP has settled its liability with the government, thus foreclosing the possibility of contribution suits.37

Section 113(f)(2), however, does not explicitly protect these parties from private party cost recovery actions under section 107.38 Thus, a party who settles with the government could be subject to a later cost recovery suit. This decreases the incentive to settle with the government and is therefore contrary to the policy underlying the contribution bar. On the other hand, if the contribution bar were interpreted so as to preclude not only contribution suits but also private party cost recovery actions, then the policy rationale supporting the maintenance of cost

34. Transtech, 798 F. Supp. at 1085.
35. In order for the contribution bar to have effect, the party seeking to invoke it must have resolved its liability to the government. 42 U.S.C. § 9613(f)(2).
36. Id.
37. Id.
38. Id. ("A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution . . . ") (emphasis added)).
recovery actions by private parties would be thwarted. Both courts\(^\text{39}\) and commentators\(^\text{40}\) have recognized and attempted to deal with this conflict. However, because the two sections attempt to reach the same ultimate result through different and sometimes competing mechanisms, the resulting decisions are inconsistent.\(^\text{41}\)

IV. DIFFERENCES BETWEEN THE TWO SECTIONS

Although these two sections have seemingly been the subject of some confusion in the minds of courts which have dealt with them, differences between the two causes of action do, in fact, exist. Based upon earlier discussion, the following chart sets forth these differences:

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>SECTION 107: PRIVATE PARTY COST RECOVERY</th>
<th>SECTION 113: CONTRIBUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who May Bring?</td>
<td>Government entities; private parties who have incurred response costs.</td>
<td>Private parties.</td>
</tr>
<tr>
<td>Establishment and Nature of Third Party's Liability</td>
<td>Strict liability; joint and several</td>
<td>Causation is required. The party from whom contribution is sought must prove: (1) a divisible harm, and (2) that its waste did not contribute to the harm. Liability is joint and several.</td>
</tr>
</tbody>
</table>


Thus, to determine the viability of such a claim [where a non-settling PRP attempts to recover response costs under § 107 from a settling PRP], courts must balance the competing goals of protecting settling parties from contribution and encouraging parties to initiate cleanup activities promptly and voluntarily.

40. *See, e.g.*, Daniel R. Avery, *Statutory Right or Statutory Prohibition? Reconciling CERCLA's Contribution Protection with the Private Response Cost Recovery Action*, 12 VA. ENVTL. L.J. 367 (1993) (asserting that non-settling PRP could maintain § 107 cost recovery action against party who has entered into settlement with EPA as to those costs which non-settling PRP voluntarily incurred, i.e., those costs incurred prior to time non-settling PRP received notice from government of its intent to exercise enforcement authority).

41. *See, e.g.*, *SCA Services I*, 849 F. Supp. at 1270-76 (discussing cases).
<table>
<thead>
<tr>
<th>Recoverable Costs</th>
<th>All costs expended as of the date of the commencement of the action.</th>
<th>Portion of the costs attributable to third party defendant’s actions, including prospective expenditures, as well as previously expended amounts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute of Limitations</td>
<td>Within six years “after initiation of the remedial action.”</td>
<td>Within three years of the “entry of any judicially approved settlement.”</td>
</tr>
<tr>
<td>Basis for Allocating Liability</td>
<td>None set forth in statute. As liability is joint and several, allocation need not necessarily occur. Some courts, however, have allocated liability in § 107 cases, typically using equitable factors.</td>
<td>Equitable factors.</td>
</tr>
<tr>
<td>Defenses Available and Factors Considered in Allocating Liability</td>
<td>Per § 107(b): (1) an act of God, (2) an act of war, or (3) an act or omission of a third party.</td>
<td>Contribution is sought from liable parties, so “defenses” to liability are not an issue. However, when allocating liability among liable parties, equitable factors are considered.</td>
</tr>
</tbody>
</table>

As these divergent characteristics indicate, the two causes of action are separate and distinct. Courts have recognized as much. Those seeking

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42. See, e.g., Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966 (1994) ("[CERCLA] now expressly authorizes a cause of action for contribution in § 113 and implicitly authorizes a similar and somewhat overlapping remedy in § 107."); Burlington N.R.R. v. Time Oil Co., 738 F. Supp 1339, 1342 (W.D. Wash. 1990) ("The language of CERCLA includes other distinctions between contribution actions and cost recovery actions that lend weight to the interpretation that Congress..."
recovery of their costs routinely plead a claim under both sections. One reason for proceeding in this fashion is to obtain the benefits of both provisions. Section 107 allows the party seeking to recover its costs to impose joint and several liability on its fellow PRPs. For example, suppose Company A initiated the cleanup of a site, and Company B and other unknown companies (if Company A is viewed as a first-tier PRP and Company B is viewed as a second-tier PRP, these unknown companies can be viewed as third-tier PRPs) had contributed waste to the site. The section 107 action would theoretically allow Company A to recoup the entire cost of the cleanup from Company B, leaving Company B with the daunting prospect of recovering, via contribution actions, the portions of cleanup attributable to the actions of Company A and the unknown parties. The costs of locating these unknown companies and the legal costs associated with imposing liability upon them would be borne by Company B. These “transactional costs” are by no means insignificant, and they represent a major force in driving up the costs of cleaning up hazardous waste sites. Some of these unknown parties may never be located or may be financially unable to participate in paying for the cleanup. The share of liability that would have otherwise been absorbed by these parties (this share is sometimes referred to as the “orphan share”) may rest with the party who is jointly and severally liable for the cleanup.

While the PRP seeking to maintain a section 107 action may gain some benefit in terms of negotiating leverage via the threat of the imposition of joint and several liability, the case law indicates that the courts are hesitant, because of the inequities involved, to allow a private PRP to impose true joint and several liability on a fellow PRP. Until recently, many courts either did not

intended to maintain the separate avenues of recovery.”).

43. See Key Tronic, 114 S.Ct. 1960 (1994).

44. This assumes that Company A had not entered into a consent decree or other arrangement that barred contribution actions against it. This is an unlikely scenario, as part of the motivation for entering into a consent decree is to obtain the protection against contribution actions afforded by § 113(f)(2). See supra notes 32-34 and accompanying text. In only two of the cases dealt with at length in this article did the party initiating cleanup do so in a truly voluntary fashion and without the protection of the contribution bar. See infra Section VI.B.4.

45. See discussion of Kramer, supra note 21, (a PRP who recoups all of its cleanup costs will itself be subject to later contribution actions). See also Amoco Oil Co., 889 F.2d at 672-73 (citations omitted, emphasis added):

As an owner of a facility that continues to release a hazardous substance, Amoco [plaintiff bringing the cost recovery action] shares joint and several liability for remedial actions with Borden [defendant and former owner of site]. When one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA.

Under that provision a court has considerable latitude in determining each party’s equitable share. After deciding the appropriate remedial action, the court will have to determine each party’s share of the costs. Possible relevant
differentiate between the two types of actions or created a hybrid of the two for purposes of determining how a first-tier PRP would be able to pursue recovery of its costs. Some courts have adopted a "two-step" approach to deal with the differences between the two sections, while giving effect to both. First, the court establishes liability, governed by section 107. In the second step, the court allocates liability under section 113. This approach attempts to reconcile the two sections by giving some effect to each but does not give full effect to either. It adopts the expansive language of section 107 for defining who will be liable to whom but does not require such parties to be held jointly and severally liable for the costs of cleanup, thus abrogating the language in this section that extends liability to "any other necessary costs of remediation incurred by any other person consistent with the national contingency plan." Similarly, this approach retains elements of the traditional notion of contribution (i.e., that the parties will be only severally liable for their equitable share of liability), but it

factors include: "the amount of the hazardous substances involved; the degree of toxicity or hazard of the materials involved; the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; the degree of care exercised by the parties with respect to the substances involved; and the degree of cooperation with the government officials to prevent any harm to public health or the environment."


47. See, e.g., Transtech, 798 F. Supp. at 1086:
In other words, plaintiff's 107(a) action against defendants is authorized by section 113(f)(1)'s contribution provisions, for precisely the reasons that plaintiffs articulate the need for this action. In fact, when properly construed, the two sections work together, one governing liability and the other governing contribution from those found liable. First, the plaintiff must show that the defendant has incurred section 107(a) liability. Then, it can sue for contribution under section 113(f)(1).

See also Town of Munster v. Sherwin-Williams Co., 27 F.3d 1268, 1270 (7th Cir. 1994) ("Under the CERCLA statutory scheme, § 107 (codified at 42 U.S.C. § 9607) governs liability, while § 113(f) creates a mechanism for apportioning that liability among responsible parties."); United States v. Asarco, Inc., 814 F. Supp. 951, 956 (D. Colo. 1993) ("Section 113(f), however, does not create the right of contribution—rather the source of a contribution claim is section 107(a). Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.") (citations omitted)).

49. Id. § 9613(f)(1).
50. Id. § 9607.
may ignore the customary reading of the term "contribution" to encompass only claims among liable parties.\footnote{51}

This approach is illustrative of the point set forth earlier that courts are willing to impose joint and several liability on one PRP for the purpose of enriching another.\footnote{52} In *Transtech Industries*, the court pointed to the principle underlying contribution\footnote{53} and the somewhat questionable nature of the plaintiff's claim that it should benefit from having "voluntarily" initiated cleanup,\footnote{54} in denying the plaintiffs' claim that the contribution bar should be unavailable because the plaintiffs had proceeded under section 107.

Courts, however, have begun to focus on the differences between the two types of actions.\footnote{55} A majority of recent cases have limited the use of section 107

\footnote{51} "Contribution" is defined as the "[r]ight 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). See also, RESTATEMENT (SECOND) TORTS § 875 cmt. a (1979) ("The rule stated in this Section [setting forth joint and several liability] . . . includes only situations in which the defendant has been personally guilty of tortious conduct."); id. § 886A ("[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.") (emphasis added)).

\footnote{52} See supra note 45.

\footnote{53} *Transtech Industries*, 798 F. Supp. at 1086 n.10 (quoting *Huggins v. Graves*, 337 F.2d 486, 489 (6th Cir. 1964):

The principle of contribution is founded . . . upon the principles of equity and natural justice, which require that those who are under a common obligation or burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligor.

\footnote{54} Id. at 1086-87.

Moreover, even if I accepted the plaintiff's distinction between response costs and contribution costs, I find that plaintiffs are being facetious at best in their argument that it acted voluntarily, privately, and in keeping with the goals of CERCLA, and not as a result of government threats. Their argument, if accepted, would drain the words "voluntary" and "contribution" of any meaning whatsoever. In 1983, the EPA issued a unilateral administrative order pursuant to CERCLA section 106 directing plaintiffs and others to continue remedial measures to clean up the Site and ordering them to design, implement, maintain and monitor for thirty years the final long-term remedial action selected by the EPA for the landfill. These actions by plaintiffs clearly are the result of civil actions by the government. If plaintiff failed to comply with the agreements it made with the government, they would be directly liable in the form of civil fines or additional injunctive orders. Action under such threats is hardly "voluntary."

\footnote{55} See infra Sections V and VI.
private party cost recovery actions by holding that any claim by a PRP is necessarily a claim by a liable person and, therefore, is one for contribution.\textsuperscript{56} These decisions may have considerable impact on the continued viability of private party cost recovery actions for recovering cleanup costs.

V. 1994 Case Law

For the most part, prior to 1994, courts accepted actions pleaded as section 107 actions as such without considering whether such actions were, in effect, claims for contribution. Most likely, the primary reason for this acceptance was the courts' view that by accepting this type of hybrid claim for cost recovery as pleaded, they were furthering CERCLA's ultimate goal of cleaning up polluted sites.\textsuperscript{57} The law, however, has evolved. In light of recently decided cases, those being sued for recoupment of costs will likely contest any section 107 claim brought by a private party that is itself liable for a portion of the cleanup. If successful, such a contest will result in the claim being classified as a contribution claim. This could result in the claim being barred either because of the contribution bar or the shorter statute of limitations period for such claims, or the court may issue a judicial decree that the defendant's liability is several rather than joint and several. Such a declaration can have a profound impact on how the affected entity deals with its potential remediation obligation.\textsuperscript{58}

A. Appellate Court Opinions

1. Akzo Coatings, Inc. v. Aigner Corp.\textsuperscript{59}

In \textit{Akzo Coatings}, the defendants, including Aigner Corp., entered into a consent decree with the EPA for the cleanup of a Superfund site.\textsuperscript{60} Akzo, which

\textsuperscript{56} See infra Sections V and VI.
\textsuperscript{57} See supra notes 20-22, 33-34 and accompanying text.
\textsuperscript{58} See e.g., Town of Wallkill v. Tesa Tape, Inc., 891 F. Supp. 955, 957 (S.D.N.Y. 1995): In turn, the defendants state that they are seeking declaratory relief [that the Town of Wallkill may seek only contribution from the defendants pursuant to § 113 of CERCLA and may not seek to impose joint and several liability pursuant to § 107 of CERCLA because the Town itself is a liable party] at this early stage of the litigation because a ruling in their favor would reduce an alleged $7 million case to "the minimal level of damages that are shown by the Town to be causally related to each defendant", making settlement potential "highly likely"; at the very least, the extent of discovery and the breadth of the case would be "considerably narrowed."
\textsuperscript{59} 30 F.3d 761 (7th Cir. 1994).
\textsuperscript{60} Id. at 763.
had incurred costs in connection with an earlier cleanup of a portion of the site, brought suit against Aigner and the other defendants for recoupment of the costs it had incurred in the earlier cleanup. The defendants moved to dismiss, contending that: (1) Akzo’s claim was one for contribution, notwithstanding that it was pleaded as a section 107 claim, and (2) Akzo’s contribution claim was for “matters addressed” under their settlement with the EPA and was thus barred by the contribution bar. The United States Court of Appeals for the Seventh Circuit agreed with the former contention but not the latter. As to Akzo’s position that the claim was one for cost recovery, the court found:

That Akzo’s claim is one for contribution we have no doubt. Akzo argues that its suit is really a direct cost recovery action brought under section 107(a) rather than a suit for contribution under section 113(f)(1) . . . . Akzo has experienced no injury of the kind that typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands. Instead, Akzo itself is a party liable in some measure for the contamination at the [ ] site, and the gist of Akzo’s claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible . . . . That is a quintessential claim for contribution. . . . Whatever label Akzo may wish to use, its 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. Akzo’s suit accordingly is governed by section 113(f).

The court in Akzo Coatings found that Akzo did not experience any “injury” of the type necessary to maintain a section 107 action and cited, as an example of a party who suffered the type of injury which would allow it to maintain a section 107 action, a landowner forced to clean up hazardous materials which a third party spilled onto its property or which migrated there from adjacent lands. Under this rationale, parties who pay to clean up a site to which they contributed waste are not “injured,” even though they pay out-of-pocket for their cleanup costs. Such parties are in effect paying the price for their waste disposal, even though they may well have previously paid a site owner or

61. Id.
62. See supra text accompanying notes 32-41.
63. Akzo Coatings, 30 F.3d at 764.
64. Id.
contractor for dumping or hauling the waste and their activities may have been perfectly legal at the time they were undertaken. Thus, when the court referred to an "injury of the kind that would typically give rise to a claim under Section 107," it was referring to an injury suffered by an innocent party, be it to his or her land or pocketbook.65

2. United Technologies Corp. v. Browning-Ferris Industries66

United Technologies was decided little more than a month after Akzo Coatings in the summer of 1994. In this case, the First Circuit, citing principles of statutory construction, likewise concluded that section 107 was not available to blameworthy PRPs.67 United Technologies had acquired Inmont, a company which was a PRP at a site in Maine.68 Inmont and other PRPs entered into a consent decree with the EPA.69 United Technologies and the other settlers then brought suit against Browning-Ferris and a number of other defendants.70 Browning-Ferris moved for summary judgment, asserting that CERCLA's statute of limitations barred the contribution action.71 United Technologies countered by asserting that the claim was one for cost recovery, not contribution, and was thus governed by the longer statute of limitations afforded such actions.72

The court began its analysis of United Technologies' position by defining the word "contribution." It stated: "Contribution is a standard legal term that enjoys a stable well-known denotation. It refers to 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.'"73 For the purposes of assessing Browning-Ferris' claim, it decided to give the word its generally accepted legal meaning.74 The court also cited to the statute itself,75 case law preceding the

65. Id.
66. 33 F.3d 96 (1st Cir. 1994).
67. Id.
68. Id. at 97.
69. Id.
70. Id. at 97-98.
71. Id. at 98.
72. Id. Cost recovery actions must be brought within 6 years of the "initiation of physical on-site construction of the remedial action," while contribution actions must be brought within 3 years from the time a "judicially approved settlement" is entered. 42 U.S.C. § 9613(g)(3), (2).
73. United Technologies, 33 F.3d at 99 (citations omitted).
74. Id.
75. The heading of the subsection setting the statute of limitations for bringing a cost recovery action reads: "Actions for recovery of costs." Id. at 100. According to the court, this heading "suggests full recovery," which can never be had by a party which is itself partly liable. Id. The court contrasted this provision with the statute of limitations for the contribution actions, which provides for only partial recovery, to find that the two causes of action "are distinct and do not overlap." Id. Additionally, were the term "contribution" not given its traditional meaning, there
adoption of SARA which added section 113, and SARA’s legislative history in support of its finding that United Technologies’ claim was one for contribution.

The decision in United Technologies indicates that the court believed that non-innocent private parties had a cause of action under section 107 prior to the adoption of section 113. Thereafter, section 113 became the sole avenue by which such claims could be pursued. The appellants in United Technologies pointed out that section 107 states that “responsible parties” shall be liable for response costs incurred by “any other person.” While section 107 does not explicitly limit the liability of PRPs only to innocent parties, according to the court in United Technologies, allowing non-innocent parties to maintain a cost recovery action under section 107 would effectively write the contribution provisions out of the statute.

United Technologies next pointed to the different ways in which a PRP may incur costs, namely, by either: (1) performing cleanup or related activities themselves, or (2) reimbursing the government for the performance of such activities. The appellants contended that section 107 governed the recovery of all directly incurred costs regardless of whether the PRP that incurred them was innocent. Contribution claims under section 113 would be limited to claims by

would be no need for two different statutes of limitations. Id. at 99.
76. The court’s analysis of pre-SARA case law noted that most courts ultimately resolved the uncertainty which existed with respect to the availability of contribution prior to the addition of § 113 in 1986 by implying a right of action for contribution under § 107. Id. at 100 (citing cases).
77. The court, citing SARA’s legislative history, stated that a “principal goal” of the addition § 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.” Id. (quoting S. REP. No. 11, 99th Cong., 1st Sess. 44 (1985)).
78. Id.

Despite this array of weapons, however, CERCLA was—and still is—silent as to the extent of a particular PRP’s liability. Judges abhor vacuums; and the courts filled this lacuna in the statute, reading CERCLA as imposing joint and several liability on the part of all responsible parties to reimburse the government for cleanup expenses and to pay response costs.

... Although most courts ultimately ruled that section 9607 conferred an implied right of action for contribution in favor of a PRP that paid more than its ratable share . . . .

Id. (citations omitted) (emphasis added).
79. Id.
80. Id. at 101.
81. Id. The appellants contended that their claim was governed by § 107 and by the six-year statute of limitations applying to cost recovery issues. The court found that this reading “would completely swallow section 9613(g)(3)’s three-year statute of limitations associated with actions for contribution.” Id.
82. Id.
83. Id.
a PRP who paid more than its fair share of the cost to the government for a cleanup and then sought to recoup such excess costs from its fellow PRPs. The court also rejected this reading of CERCLA, finding that: (1) the language of section 107 ("any other necessary cost of response incurred by any other person") does not limit possible recovery thereunder to directly incurred costs, and (2) contribution is not limited to only "overpayments" to the government.

In ruling that this section was available for the recoupment of all types of costs, the court refused to look beyond the wording of the section to imply a limitation on section 107 actions. By acting in this manner, the court implied a limitation on the use of this section by certain types of PRPs. Section 107(b)(4)(B) states that "any person" shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." The court's holding is to the effect that "any other necessary costs" means precisely what it says and that there is no reason to delve beyond the parameters of this provision, while "any other person" does not, in light of the other parts of the statute and the statutory history, include persons who were liable in part for the contamination of the site.

B. Federal District Court Holdings

1. United States v. SCA Services of Indiana, Inc.

a. SCA Services I

In April of 1994, prior to the Seventh Circuit's decision in Akzo Coatings, the United States District Court for the Northern District of Indiana ruled that SCA, a third-party plaintiff bringing an action for the recoupment of its costs, could proceed under section 107. In its order, the court carefully examined the then-existing case law relative to the interplay of sections 107 and 113 and divided the cases into two types: (1) those cases in which a non-settling PRP sought to maintain a section 107 action against PRPs who had settled with the EPA and were thus afforded the protection of the contribution bar, and (2) those cases in which a settling PRP sought contribution from fellow PRPs who had not

84. Id.
85. Id. at 102. In rejecting the United Technologies' claim that contribution was available only for overpayments to the government, the court stated that to find otherwise would be contrary to the language of the contribution provision and would curtail the effectiveness of the contribution bar. Id. at 102-03.
88. Id. at 1272 (referring to these cases as "contribution protection" cases).
entered into a settlement with the EPA.\textsuperscript{89} The case law indicated that section 107 actions could not be maintained against PRPs who had settled their liability, and the holdings pointed to the policy considerations underlying CERCLA's contribution bar.\textsuperscript{90} The court found that under these cases, when PRPs settled with the government, the contribution bar of section 113(g) precluded other actions for the recovery of costs from such PRPs.\textsuperscript{91} This holding was logical because the contribution bar was enacted to encourage settlements and the prompt cleanups fostered thereby.\textsuperscript{92} If a court allowed a non-settling PRP to circumvent the contribution bar by maintaining a section 107 action against a party who had resolved its cleanup liability with the EPA, the incentive for settling and the pace of cleanups would be greatly diminished. In contrast, these policy considerations do not exist when the party from whom recovery is sought has not resolved its liability with the EPA.

In entering its order, the court applied its analysis of the case law, policy considerations, and other factors and found that SCA could maintain a cause of action under section 107.\textsuperscript{93} In support of its holding, the court noted that SCA had voluntarily entered into the consent decree with the EPA and had not admitted liability for the cleanup of the site.\textsuperscript{94} Because SCA never admitted liability, the court found that its claim was not necessarily one for contribution.\textsuperscript{95} The court was also persuaded to adopt SCA's interpretation of the different statutes of limitations under CERCLA.\textsuperscript{96} According to SCA, the three-year period for maintaining contribution actions was appropriate because liability would be fixed at the time the judgment or settlement was entered.\textsuperscript{97} Conversely, the longer six-year period is a more appropriate time frame in which to initiate cost recovery actions because the extent of liability is not known until the cleanup is underway, and the cleanup is often delayed pending EPA approval of remediation plans.\textsuperscript{98} Because of delays in approval of the cleanup plan, SCA did not begin removing drums at the site until more than three years after the consent decree had been entered.\textsuperscript{99} Moreover, SCA was not able to uncover evidence of the involvement of certain third-party defendants until drums bearing the labels of third party

\textsuperscript{89.} Id. at 1277 (stating that § 107 claim was allowed to proceed in majority of these cases).
\textsuperscript{90.} Id. at 1275.
\textsuperscript{91.} Id.
\textsuperscript{92.} Id. ("Obviously, the broad policy concern being fostered in all of the above cases was the encouragement of settlements and resultant promotion of one of CERCLA's primary purposes: achieving the prompt cleanup of hazardous waste sites.").
\textsuperscript{93.} Id. at 1282.
\textsuperscript{94.} Id.
\textsuperscript{95.} Id. at 1283.
\textsuperscript{96.} Id.
\textsuperscript{97.} Id.
\textsuperscript{98.} Id.
\textsuperscript{99.} Id.
defendants were unearthed and tests were performed. According to SCA, prohibiting it from recouping its costs in a situation such as this would be inconsistent with congressional intent.

In addition, SCA's consent decree stated that it could pursue cost recovery claims. SCA said this provision of the consent decree was consistent with CERCLA's goal of encouraging the cleanup of hazardous waste sites. The defendants, joined by the government as amicus, argued that, by allowing the maintenance of section 107 actions against potentially liable parties, the court would "harm the overall public interest by impairing the government's ability to grant effective contribution protection to settling parties." The court sided with SCA, finding that liable parties could settle with the government and take advantage of section 113(f)'s contribution protection.

b. SCA Services II

In SCA Services II, decided in October of 1994, the court revisited its decision in SCA Services I in light of the holdings in Akzo Coatings, United Technologies, and another Seventh Circuit decision, Town of Munster v. Sherwin-Williams Co. The third-party defendants, pointing to Akzo Coatings and United Technologies, filed a motion for reconsideration, claiming that SCA's cause of action was governed by section 113 and that, because it was brought more than

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100. Id.
101. Id. at 1283-84.
102. Id. at 1284. The court quoted the provision of the consent decree that stated: "It is understood that the Settling Defendant may pursue cost recovery and contribution claims against certain non-parties, and that non-parties may become parties to this decree only upon the mutual agreement of all other parties." Id. (emphasis omitted).
103. Id.
104. Id.
105. Id.
106. 865 F. Supp. 533 (N.D. Ind. 1994) [hereinafter SCA Services II].
107. 27 F.3d 1268 (7th Cir. 1994). Sherwin-Williams, which was decided by the Seventh Circuit two and a half months after its decision in Akzo Coatings, is not a § 107/§ 113 case in the same sense that Akzo and United Technologies are. There is no discussion of the validity of the plaintiff's § 107 claim. Rather, the primary thrust of the case is whether equitable defenses are available in a § 107 action. The Seventh Circuit in Sherwin-Williams did state: "Under the CERCLA statutory scheme, § 107 (codified at 42 U.S.C. § 9607) governs liability, while § 113(f) creates a mechanism for apportioning that liability among responsible parties." Id. at 1270. The court also stated: "Under § 113(f), any party found liable for clean-up costs may seek contribution from other liable or potentially liable parties." Id. at 1270. The plaintiffs in SCA Services apparently latched on to this statement in support of their position that SCA Services could not maintain a § 107 action against them. The court in SCA Services II said that it did not see how the Sherwin-Williams holding supported the defendants' position vis-à-vis the nonapplicability of § 107. SCA Services II, 865 F. Supp. at 546.
three years after the court had entered the consent decree between SCA and the EPA, the claim was barred by section 113’s statute of limitations. The court, after examining the decisions in these cases, refused to reconsider its SCA Services I holding.

As a court within the Seventh Circuit, the court paid particular attention to the Akzo Coatings holding. According to the court, the thrust of Akzo Coatings was that claims between liable parties were claims for contribution. However, as the district court noted, the Seventh Circuit in Akzo Coatings envisioned situations in which private parties could pursue claims for cost recovery under section 107. The court, citing the language of the consent decree, found that SCA had never admitted liability and contrasted this finding with language in Akzo Coatings which implied that Akzo had admitted liability. The court rejected the defendant’s contention that CERCLA’s strict liability standard did not require an admission or adjudication of liability for SCA to be limited to a contribution claim, holding that strict liability was not akin to liability without adjudication.

The district court distinguished the First Circuit’s decision in United Technologies by noting that the plaintiffs there had admitted liability and were thus foreclosed from pursuing any cause of action other than a contribution claim. The court also noted that, unlike SCA’s consent decree, the consent decree in United Technologies was entered into prior to SARA’s enactment of section 122. Thus, the plaintiffs in United Technologies did not receive the benefit of section 122, which provides: “[t]he participation by any party in the [settlement] process under this section shall not be considered an admission of liability for any purpose.” According to the court, the court in United Technologies, in the face of the plaintiffs’ admission of liability and without section 122 to hang its hat on, had little choice but to limit the plaintiffs to a contribution action.

The court in SCA Services II, while acknowledging the decisions of the First and Seventh Circuits holding that a liable party could maintain only a contribution action, went as far as possible to maintain the pre-Akzo Coatings, pre-United Technologies status quo. The lessons from the court’s holding in SCA

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109. Id. at 547.
110. Id. at 541.
111. Id. at 542.
112. Id. at 542-43.
113. Id. at 543.
114. Id. at 545.
115. Id.
116. Id. (quoting 42 U.S.C. § 9622(d)(1)(B)).
117. Id.
Services II for those parties who resolve their liability with the government are: (1) do not fail to plead a section 107 cause of action simply because a consent decree is in place, (2) make sure that the consent decree explicitly states that it does not constitute an admission of liability, and was entered into for the purpose of avoiding litigation costs, (3) make sure that the consent decree preserves the right of the settling party to pursue section 107 actions against fellow PRPs, and (4) when the consent decree was entered into post-SARA, refer to section 122 in the pleadings.

2. Kaufman and Broad-South Bay v. Unisys Corp. 118

_Akzo Coatings_ and United Technologies formed the basis for the holding in this case, which was decided by the U. S. District Court for Northern District of California in November 1994. 119 Kaufman and Broad-South Bay, Inc. ("K&B") purchased property for residential development, knowing that the property was contaminated with hazardous waste. 120 K&B cleaned up the property and pursued a cost recovery action against Unisys and others. 121 K&B sought to distinguish its position from the position of the plaintiffs in United Technologies by noting that the United Technologies plaintiffs had been sued by the EPA, while K&B had voluntarily undertaken its cleanup. 122 The court refused, however, to distinguish between the two situations, finding: "nothing in [United Technologies] suggests that responsible parties which have not been subject to a government enforcement actions [sic] are entitled to bring suit under § 9607(a)." 123 The court further stated:

Rather United Technologies clearly holds that only innocent parties may bring cost recovery actions and makes no distinction between liable parties who have been forced to incur cleanup costs and those who have done so voluntarily. Thus, any and all responsible parties, even those who have expended response costs voluntarily, are confined to bringing contribution actions under § 9613(f). 124

The court also cited Akzo Coatings in support of its holding, paying particular attention to the hypothetical set forth in Akzo Coatings that illustrated that an

119. Id. at 1212-17.
120. Id. at 1214.
121. Id.
122. Id. at 1215.
123. Id.
124. Id. (citation omitted).
innocent private party could successfully maintain a section 107 action.\textsuperscript{125} Notwithstanding the \textit{Akzo Coatings} example, the court stated: “the reality is that the vast majority of private parties will be limited to suing for contribution under § 9613(f). This is so because CERCLA imposes liability on virtually every private party who would have a reason to recoup cleanup costs.”\textsuperscript{126} The court went on to hold that, because K&B was a current owner, it was a PRP and as such would be limited to bringing a contribution action.\textsuperscript{127}

VI. 1995 Case Law

A. \textit{Appellate Court Opinion}: United States v. Colorado & Eastern Railroad Co. ("CERC")\textsuperscript{128}

The Superfund site at issue in this case was owned by, among others, Farmland Industries, Inc., ("Farmland") and McKesson Corp. ("McKesson").

\textsuperscript{125} \textit{Id}. at 1216.  
\textsuperscript{126} \textit{Id}.  
\textsuperscript{127} \textit{Id}. The court did not cite either of the \textit{SCA Services} cases in its opinion. While there is no indication as to whether K&B admitted liability, the United States District Court for the Northern District of California apparently considered this to be of little import. The court stated: “In this case, K&B, as current owner of the site, is a potentially responsible party under CERCLA.” \textit{Id}.  
This statement can be contrasted with the response of the court in \textit{SCA Services II} to the contention of the defendants in that case that the court should find SCA to be a liable party because SCA allegedly previously owned the waste site. In response to this contention, the court in \textit{SCA Services II} stated:

Clearly, the third-party defendants have stretched the concept of strict liability too far. Even though liability is strict under CERCLA, it is obvious that legal liability cannot attach until either a party has admitted liability or has been adjudicated as liable. Strict liability is simply “liability without fault,” \textit{Black’s Law Dictionary} 1422 (6th ed. 1990), not liability without adjudication. Even in a strict liability case it is still necessary for there to be a determination that the conditions giving rise to strict liability were, in fact present.  

\textit{SCA Services II}, 865 F. Supp. at 543. Under CERCLA, PRPs include present owners of a site and those who owned the site at the time the hazardous waste was deposited. 42 U.S.C. § 9607(a)(1)-(2). It was alleged that SCA was a “former owner,” i.e., an owner at the time the wastes were deposited, and that K&B was a current owner. See Record of Decision, Fort Wayne Reduction Site, EPA-ID: IND 980679542, available in LEXIS, Envirn library, Fdsites file. An additional fact, ownership of the site at the time of the disposal, must be proved to hold former owners liable. Therefore, it is easier to find a current owner liable without an explicit admission or judicial resolution of the issue. This may explain the difference between the holdings in \textit{SCA Services I} and \textit{II} and \textit{Kaufman}; however, in light of the court’s failure in \textit{Kaufman} to mention \textit{SCA Services}, it does not appear as though it was concerned with admissions or findings of liability as a prerequisite to precluding the maintenance of § 107 actions.

\textsuperscript{128} 50 F.3d 1530 (10th Cir. 1995).
McKesson sold a portion of the property to CERC in 1984. Following a suit by the EPA, Farmland and McKesson entered into a partial consent decree with the EPA in 1990, pursuant to which they agreed to perform the cleanup at the site and to reimburse the EPA for its past response costs. In April 1992, CERC entered into a separate consent decree with the EPA. Farmland cross-claimed against CERC under section 107 or, alternatively, section 113 for $734,058. CERC moved for summary judgment on the basis of the contribution bar. The district court allowed Farmland’s section 107 claim to stand and ruled that Farmland was entitled to recover its costs from CERC. CERC appealed, contending in part that the district court erred in allowing Farmland to proceed under the strict liability rubric of section 107 rather than requiring it to prove causation, which would be required under section 113.

The United States Court of Appeals for the Tenth Circuit agreed with CERC’s contention that Farmland’s claim was one for contribution, not cost recovery. In support of its finding, the court cited CERCLA’s legislative history, case law, and the subsequent addition of section 113 by SARA. The court stated:

In our case, Farmland’s claim against the CERC parties must be classified as one for contribution. There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution. Furthermore, were PRPs such as Farmland allowed to recover expenditures incurred in cleanup and remediation from other PRPs under [section] 107’s strict liability scheme, [section] 113(f) would be rendered meaningless.

Whatever label Farmland may wish to use, its claim remains one by and between jointly and severally liable parties

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129. Id. at 1533. The portion of the property sold to CERC had not been designated as part of the Superfund site when CERC purchased it, but was later added to the site. Id.
130. Id. Farmland and McKesson agreed to pay the EPA for its past response costs, which amounted to $700,000, and to perform all remediation of the site, which cost in excess of $15 million. Id. Included in the $15 million was $1,439,330 spent to clean up contamination allegedly caused by CERC. Id.
131. Id. Under its consent decree, CERC agreed to pay $100,000 to the EPA for its past response costs. Id.
132. Id.
133. Id.
134. Id. at 1534.
135. Id.
136. Id. at 1536.
137. Id. at 1535.
for an appropriate division of the payment one of them has been compelled to make. Accordingly, we hold, as a matter of law, that Farmland's claim is controlled by [section] 113(f) and that the district court erred in proceeding under [section] 107.138

B. Federal District Court Holdings

1. T H Agriculture & Nutrition Co. v. Aceto Chemical Co.139

T H Agriculture & Nutrition Company ("THAN") owned and operated an agricultural chemical facility.140 THAN filed suit against former customers and the former owners of the site for both cost recovery under section 107 and contribution under section 113.141 The defendants moved for partial summary judgment against THAN's section 107 claim and its claim that they were jointly and severally liable.142 The defendants' motion was based upon THAN's stipulation that it was a liable party under CERCLA.143 According to the defendants, as a liable party, THAN could not maintain a cost recovery action under section 107 and was limited to an action under section 113, under which liability is several only.144

The United States District Court for the Eastern District of California, relying in part upon United Technologies, Akzo Coatings, and Kaufman, granted the motion for partial summary judgment, holding: "The weight of authority supports the certain [d]efendants argument that an action by a CERCLA-liable party against other PRPs is for contribution."145 THAN cited Kramer in support of its position that a CERCLA-liable plaintiff could seek joint and several liability from its co-PRPs.146 THAN also pointed to Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co., a two-step case of the type described earlier.147

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138. Id. at 1536 (citations omitted).
139. 884 F. Supp. 357 (E.D. Cal. 1995).
140. Id. at 359.
141. Id.
142. Id. at 358.
143. Id. at 359.
144. Id.
145. Id. at 362.
146. Id. at 361. For a discussion of the court's view of Kramer, see supra note 21.
147. T H Agriculture, 884 F. Supp. at 361 (citing Chesapeake and Potomac Telephone, 814 F. Supp. 1269, 1277 (E.D. Va. 1992)). The court in Chesapeake and Potomac Telephone stated:

Nothing in the statute supports the assertion that only the United States Government or an "innocent" plaintiff can bring a cost recovery action under Section 107(a). To the contrary, the statute specifically provides that covered persons shall be liable to both the United States Government, among others, and to "any other person" who incurs response costs. . . .
The court, noting this aspect of *Chesapeake & Potomac Telephone*, found that it did not support THAN’s position.\(^{148}\)

The court rejected THAN’s suggestion that section 107 remained available to THAN since it had never been adjudged liable by a court nor had it settled its liability.\(^{149}\) The court stated: “Having stipulated to its CERCLA liability, it is disingenuous for THAN to argue that it ‘has never been adjudged liable by any court.’”\(^{150}\)

2. Reichhold Chemicals, Inc. v. Textron, Inc.\(^{151}\)

In *Reichhold*, one of the defendants, Quantum Chemical Corp. (“Quantum”), moved for summary judgment on Reichhold’s section 107 claim.\(^{152}\) Reichhold was the owner of the site, and Quantum was the successor to a string

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814 F. Supp. at 1277. The court went on to point out, however, that it would “retain jurisdiction over this matter throughout its contribution phase, and [would] apportion liability in an equitable fashion at that time.” *Id.* Thus, in *Chesapeake and Potomac Telephone*, a court again ruled that a finding of liability under section 107 would not necessarily result in liability beyond the liable party’s equitable share. *See id.* at 1277-78 (footnote omitted):

The Court is in general agreement with the defendants that a plaintiff, like C&P, itself liable under CERCLA, should not benefit from starting the cleanup operation unilaterally and being the first to the courthouse door to sue its confederates in environmental misbehavior. It is, after all, a time-honored principle of the law that a plaintiff should not be permitted to benefit from its own wrongdoing. But the Court addresses this concern not by ignoring the plain language of CERCLA and precluding C&P from maintaining its cost recovery action, but by imposing joint and several liability on the defendants only for those response costs that are apportioned to the defendants, as a group, in this case—exclusive of the costs attributable to C&P. At the contribution phase of this proceeding, the Court will, as a first cut at apportioning liability, determine a “Plaintiff’s share” and a “Defendants’ share.” The defendants will be jointly and severally liable for the Defendants’ share only. In this fashion, the Court hopes to prevent C&P from being improperly enhanced because of this lawsuit. C&P will be liable—by itself—for its share of response costs and whatever portion of the “orphan shares” the Court decides to allot to it at the contribution phase of this case. The defendants will be jointly and severally liable only for the non-C&P share of liability.

Therefore, even *Chesapeake and Potomac Telephone*, to which PRPs often point for authority for the fact that PRPs may maintain section 107 actions, limits the availability of joint and several liability thereunder.

149. *Id.* at 362.
150. *Id.*
152. *Id.* at 1120.
of companies that operated a resin manufacturing facility at the site. Reedhold acknowledged that it was liable for a portion of the contamination at the site.

The court focused on the nature of contribution and the history of the CERCLA statute in holding that section 107 actions were not available to parties that were themselves liable for a portion of the cleanup. According to the court, pre-SARA case law established a federal common law right to contribution where a PRP had been singled out as a defendant and was thus faced with the prospect, because of the imposition of joint and several liability, of bearing more than its fair share of the cost of cleanup. This right may have been implied in section 107 or "judicially derived as a court-fashioned remedy." In any case, with the addition of section 113 in 1986, this right was codified. Thus, the court held:

Whatever may have been the status of contribution claims prior to the adoption of Section 113 was changed once Congress addressed the subject of contribution under CERCLA. Now, contribution claims are explicitly controlled by the statute. It necessarily follows that the exclusive remedy for a liable PRP seeking contribution from other PRPs is a Section 113(f) contribution claim.

3. Ekotek Site PRP Committee v. Self

The United States District Court for the Central District of Utah, located in the Tenth Circuit, followed the Tenth Circuit's holding in CERC, ruling that the plaintiffs, who shipped used oil to the site, could not maintain a section 107 action against others who contributed contamination to the site, including the former owner-operator.
Faced with the Tenth Circuit’s decision in CERC, the Ekotek Site PRP Committee (“Committee”) in Ekotek attempted to distinguish themselves from the plaintiffs in that case. The Committee contended that it should not be treated like the PRPs in other cases who had been foreclosed from pursuing section 107 actions because: (1) the Committee had “voluntarily” incurred response costs, and (2) the defendants in the other actions had already settled their liability with the EPA. The court rejected these arguments, stating that the “broad language of the court’s opinion” in CERC prevented an interpretation that would allow the Committee to pursue its section 107 claim on those bases and found that the “decisive point” in CERC was the plaintiff’s status as a PRP. Paraphrasing the Tenth Circuit’s holding, the court stated:

That it is the plaintiff’s status as a PRP, and not the degree of voluntariness with which it initiated cleanup activity or the settling status of other PRPs, which is controlling may be seen in the court’s simple and straightforward approach to the issue, and its conclusion that “claims between PRPs to apportion costs(190,519),(995,567) regardless of how they are pled.”

While not mentioning SCA Services I and SCA Services II, the court in Ekotek rejected the reasoning set forth therein. The court in SCA Services I went to great pains to distinguish between section 107 claims made against those parties who had settled their liability with the government and claims made against non-settlers. According to the court in Ekotek, “the existence of such settlements plays no substantial role in the [CERC] court’s discussion of the issue.” In SCA Services II, the court emphasized that the plaintiffs had not admitted liability in the consent decree which they entered into and therefore, in a sense, voluntarily cleaned up the site. The court in Ekotek focused instead on the plaintiffs’ status as PRPs, “not [on] the degree of voluntariness with which it initiated cleanup activity.” The court, recognizing the realities of the situation, implied that non-liable parties do not “voluntarily” enter into consent

163. Id.
164. Id. (quoting CERC, 50 F.3d at 1539).
165. Id.
168. See supra text accompanying notes 87-92.
169. 881 F. Supp. at 1521.
170. See supra text accompanying notes 111-17.
171. 881 F. Supp. at 1521.
decrees obligating them to incur substantial cleanup costs in the hope (after expending substantial sums of money) of recovering a portion of the cleanup cost. The court seemed to recognize that there is a irreconcilable conflict between the "any other person" language of section 107 and the nature of contribution, and did not, like some other courts, attempt to "split the baby" by giving limited effect to both provisions.


In *Bethlehem Iron Works*, the plaintiffs, former owner-operators of a facility at the site in question, sought to recover costs under section 107 from the defendants, who were also former owner-operators of the facility.174 The United States District Court for the Eastern District of Pennsylvania refused to grant the defendants' motion for summary judgment, despite the fact that it "appear[ed] that Plaintiffs . . . are potentially 'liable' as defined in CERCLA section 107(a)."175 Like other courts that allowed PRPs to maintain a section 107 action, the court in *Bethlehem Iron Works* cited language of section 107 and certain policy considerations.176 The court also put a different spin on the existing case law to support its holding.

Turning first to familiar arguments in favor of allowing a PRP to proceed under section 107, the court noted the "any other person" language in that section.177 This language, taken in conjunction with the failure to list the plaintiff's PRP status as a defense to section 107 liability, suggested to the court that "Congress intended section 107(a) liability to sweep broadly."178 The court also noted that there were different statutes of limitations for: (1) recovering removal costs, (2) recovering remedial costs, and (3) contribution claims.179 The statute of limitations for contribution claims begins to run only upon "the date of judgment, administrative order, or entry of a judicially approved settlement concerning costs or damages."180 A party who is truly an "innocent" party will not enter into a judgment, administrative order, or judicially approved settlement, and thus there is no point at which the statute begins to run.181 According to the

172. *Id.*
174. *Id.* at 222.
175. *Id.* at 223. The court also said that there was no evidence that any of the parties had entered into a consent decree or other agreement with the state or federal governments concerning liability for the contamination or responsibility for the cleanup. *Id.* at 222.
176. *Id.* at 225.
177. *Id.*
178. *Id.* For a discussion of the defenses to CERCLA liability, see *supra* note 24.
180. *Id.* (citing 42 U.S.C. § 9613(g)(3)).
181. *Id.*
If parties that voluntarily cleanup are permitted to raise claims only pursuant to section 113(f), it seems strange that no statute of limitations applies to these parties. Thus, the Court believes that the text of sections 107 and 113 suggest that section 107 creates a right of action for potentially responsible parties.\(^{182}\)

The policy arguments discussed by the court in support of its holding are also not unfamiliar. The court, after noting that in this situation, the section 107 action would neither threaten the protection offered by the contribution bar nor serve as a ploy to avoid section 113’s shorter statute of limitations period, held:

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Finally, permitting Plaintiffs to raise their section 107(a) claims comports with CERCLA’s goal of encouraging parties to initiate cleanup operations promptly and voluntarily. Any unfairness that might result in imposing joint and several liability on Johnston will be remedied through the resolution of Johnston’s counterclaim for contribution. Plaintiffs are permitted to pursue their section 107(a) claims.\(^{183}\)
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The court put a slightly different spin on the recent case law than other courts having occasion to consider it. It first grouped *CERC*, *Ekotek*, and *Kaufman* into a class of cases.\(^{184}\) According to the court, this class holds that only “innocent” parties can maintain a section 107 action.\(^{185}\)

In the second class of cases, the determining factor as to whether a section 107 action can be pursued is whether the party seeking to pursue it has entered into a consent decree or “other agreement imposing liability or obligating it to pay money.”\(^{186}\) Into this class, the court placed *United Technologies*, *Akzo Coatings*, and *Reichhold*, in which it was held that a section 107 action could not be pursued. The court placed considerable emphasis on the footnote in *United Technologies* that stated: “a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607(c).”\(^{187}\) The *Reichhold* opinion held that the “exclusive remedy for a *liable* PRP seeking contribution from other PRPs is a

\(^{182}\) *Id.*

\(^{183}\) *Id.*

\(^{184}\) *Id.* at 223.

\(^{185}\) *Id.*

\(^{186}\) *Id.*

\(^{187}\) *Id.* at 224 (citing *United Technologies*, 33 F.3d at 99 n.8).
Section 113(f) contribution claim.” According to the court, “[t]he use of the term ‘liable PRP’ instead of just ‘PRP’ suggests that the fact that the plaintiff had already entered into a consent decree with a state agency influenced the court’s decision.” It is interesting to note that in each of the cases cited as being members of this second class, the plaintiff had, in fact, entered into a consent decree. The court did not mention either of the SCA Services decisions in its discussion of the consent decree issue, even though the district court in these decisions dealt with the issue at some length.

Other than the scenario set forth in Akzo Coatings, in which a landowner is forced to clean up hazardous substances that a third party had spilled on its land or that had migrated there from adjacent lands, it is difficult to imagine a scenario under which a party would spontaneously begin a cleanup. Parties with no ownership interest in the site would have little motivation to remedy the conditions in the absence of government action or the threat thereof. Even in the face of such a threat, a truly “innocent” party would likely assert the defenses available to it rather than incurring substantial cleanup costs in the hope of recouping them at some later time. Thus, those who clean up a site are more than likely to in fact be “liable” and would want the protection afforded by a consent decree. While the cases cited in Bethlehem Iron Works indicate that there may, in theory, be a distinction between those PRPs who have entered into consent decrees and those who have not, the reality is that rarely will non-liable parties clean up a site. While the court set forth this theory, it did not use it as the basis for its holding. The irony is that the plaintiffs in Bethlehem Iron Works did spontaneously clean up the site, and thus the court could have used this as the basis for its holding. To its credit, the court chose not to rely on this artificial distinction but clearly stated that a liable party could, in its view, maintain a section 107 action.

The heart of the opinion in Bethlehem Iron Works is its reliance on the third class of cases, those in which a liable PRP is allowed to maintain a section 107 action. The court Axil, SCA Services, and Kramer in this class. The court, without much elaboration, found these cases, in combination with the language of section 107 and the other considerations discussed above, to be “persuasive.”

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188. Id. (citing Reichhold Chemicals, 888 F. Supp. at 1122 (emphasis added)).
189. Id.
190. See supra text accompanying note 186.
191. Bethlehem Iron Works, 891 F. Supp. at 225. While discussing the Supreme Court decision in Key Tronic, 114 S. Ct. 1960, in which a plaintiff PRP had maintained a § 107 action, the court in Bethlehem Iron Works acknowledged that this was merely a “background issue” in Key Tronic. Bethlehem Iron Works, 891 F. Supp. at 225.
5. Town of Wallkill v. Tesa Tape, Inc.\textsuperscript{192}

In \textit{Tesa Tape}, the town of Wallkill ("Town") entered into a consent order with the State of New York pursuant to which it agreed to clean up a municipal landfill that it had operated.\textsuperscript{193} The landfill had accepted both municipal and industrial waste.\textsuperscript{194} The Town sought to recoup its cleanup costs from the defendants, who were haulers and industrial generators.\textsuperscript{195}

The Town sought to maintain both a section 113 and a section 107 claim.\textsuperscript{196} The defendants, citing \textit{United Technologies}, contended that the Town, as an admitted owner and operator of the site, could not maintain the section 107 action.\textsuperscript{197}

The court distinguished \textit{United Technologies} on two grounds; the plaintiff in \textit{United Technologies}: (1) had admitted liability, and (2) was not a governmental entity.\textsuperscript{198} Turning to the first of these contentions, the court took a tack similar to that of the court in \textit{SCA Services}. It relied upon section 122 of \textit{CERCLA} which states that consent decrees "shall not be considered an admission of liability for any purpose."\textsuperscript{199} In the face of this provision, "[n]either the Town's fulfillment of its cleanup obligations under \textit{CERCLA}, nor the degree to which such efforts are 'voluntary' rather than imposed upon the Town by statute, are controlling in this action."\textsuperscript{200}

The court contrasted the cases in which the plaintiff PRP was a private owner or operator with the situation in which the plaintiff was a governmental entity, finding support in the case law and the policies underlying \textit{CERCLA} to hold that a governmental entity should not be precluded from maintaining a section 107 action.\textsuperscript{201} In the absence of any ruling from the Court of Appeals for the Second Circuit, the court cited \textit{Axil}, decided by another district court within the circuit, in holding that, "[e]ven if the Town were not a governmental plaintiff, it would be entitled to maintain both [section] 107 and [section] 113 claims; this

\textsuperscript{193}. \textit{id}. at 958.
\textsuperscript{194}. \textit{id}.
\textsuperscript{195}. \textit{id}.
\textsuperscript{196}. \textit{id}. at 958-59.
\textsuperscript{197}. \textit{id}. at 959.
\textsuperscript{198}. \textit{id}. The court quoted a portion of \textit{United Technologies}, stating: "we must limit § 107 claims to those brought by governmental entities or innocent parties and require PRPs to settle their claims between themselves pursuant to § 113(f)." \textit{id}. (citation omitted).
\textsuperscript{199}. \textit{id}. at 959 (quoting 42 U.S.C. § 9622(d)(1)(B)).
\textsuperscript{200}. \textit{id}.
\textsuperscript{201}. \textit{id}. at 959-60.
Court so concludes.  

6. City of Fresno v. NL Industries, Inc.  

The plaintiff ("City") owned and operated a municipal landfill for over fifty years. Having owned and operated the landfill and transported hazardous substances to the site, the City was a liable party under sections 107(a)(1) and 107(a)(4). The City sought to maintain a cost recovery action against the defendant, and the defendant moved for summary judgment, arguing that the City, because it had admitted liability, was limited to a contribution claim.

The United States District Court for the Eastern District of California reviewed the case law on both sides of the issue and found "persuasive" decisions limiting a PRP to a section 113 action. The court first noted the role that the Restatement of Torts had played in defining the scope of liability under section 107. Section 107 does not explicitly provide for joint and several liability. Courts had previously concluded that Congress had, via its silence in defining the scope of liability, intended for courts to determine the scope of liability using common law principles, and the courts had relied on the Restatement to hold defendants jointly and severally liable under section 107 and to define the scope of liability in contribution actions. Additionally, the Restatement limited the availability of joint and several liability between joint tortfeasors, i.e., "liable" parties. Thus, the court held:

Here, the facts support a finding that this action is one for contribution: (1) the plaintiff has admitted CERCLA liability; (2) this is a civil action under [section] 107(a), as plead inter alia;

202. Id. at 960 (citing the Axil opinion's analysis of the logic underlying CERCLA's broad remedial purposes). The court also noted that the Supreme Court had allowed the plaintiff in Key Tronic to maintain actions under §§ 107 and 113. Id. at 959.
204. Id. at *6.
205. Id.
206. Id. at *6, *9.
207. Id. at *16.
208. Id.
211. Id. (citing RESTATEMENT (SECOND) OF TORTS § 886A (1977) which provides: The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability and is limited to the amount paid him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.)
and (3) defendants argue that plaintiff should contribute to the cleanup operations. The defendants persuasively argue that the City is not an "injured party" analogous to a tort plaintiff. Instead, the City is one of the parties responsible for the injury; i.e., the purported threat to human health and to the environment posed by hazardous substances at the landfill. Regardless of how it is drafted, the complaint's gravamen is that the City has and will incur costs for which the City contends the defendant is also responsible. Thus, the City is seeking reimbursement for any incurred expenses which exceed its own liability and an assurance that it will not be responsible for a disproportionate share of any future costs. This is a quintessential contribution claim.

As with United Technologies and the cases following it, the focus of this holding is the claimant's status as a liable party.

The court stated that its holding was not inconsistent with CERCLA's policy of encouraging prompt cleanups of hazardous waste sites. The concern was that, by limiting PRPs to contribution actions, they would be stuck with orphan shares and thus would be hesitant to initiate cleanups. The court stated, that because it was allowed to consider equitable factors in allocating liability under section 113, such a result would not occur and each share would not necessarily be a pro rata share. Rather, the court would, in allocating liability, take into account numerous factors, stating that it would "not be blind to the initiative taken by the City, which has protected the public health and safety by beginning the abatement of release of hazardous substances from the Landfill." The orphan shares would be equitably apportioned among the parties so that the City would not bear the full risk of the shares. This approach was the fairest in terms of dealing with the allocation of liability and cuts off the argument that limiting PRPs to a section 107 action punishes those who initiate the cleanup.

NL Industries was decided a mere two days after Tesa Tape. Unlike Tesa Tape, however, the court in NL Industries did not distinguish between governmental plaintiffs and private plaintiffs and did not mention that the City

212. Id. at *18-19 (citation omitted).
213. Id. at *19.
214. Id. at *19-20.
215. Id. at *20.
216. Id.
was a governmental entity when it dealt with the question of the City's right to maintain a section 107 claim.

7. Bancamerica Commercial Corp. v. Trinity Industries, Inc.\textsuperscript{217}

The plaintiffs, the current owner of the site and the successor corporation to a company that operated a lead smelting plant at the site in the 1890s, brought an action under both sections 107 and 113 against the defendants, who formerly conducted operations at the site.\textsuperscript{218} The court, located within the Tenth Circuit, followed the \textit{CERC} decision in holding that the plaintiffs were limited to a contribution claim, and did not elaborate on the \textit{CERC} decision.\textsuperscript{219}

8. Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.\textsuperscript{220}

Plaskon Electronic Materials, Inc., ("PEMCO") was the current owner of a Superfund site.\textsuperscript{221} According to the court:

\begin{quote}
The question at issue is whether a [PRP], as PEMCO admits it is, is restricted to bringing a contribution claim under [section] 113(f) or whether such a party may also pursue a cost recovery action under [section] 107(a). The question is of import because liability under [section] 107 is joint and several, while liability under [section] 113(f) is merely several.\textsuperscript{222}
\end{quote}

PEMCO sought to distinguish \textit{United Technologies} and its progeny on the basis that the plaintiffs in those cases, unlike PEMCO, had admitted "joint and several liability."\textsuperscript{223} The court summarily rejected this contention, stating: "This position is unconvincing, however, as it is quite clear that PEMCO is liable under [section] 107(a) because it is the current owner of the Site. Whether it admits [section] 107 liability is irrelevant; as the current owner, PEMCO is a PRP pursuant to [section] 107(a)(1),"\textsuperscript{224} and thus the defendants were liable for their

\textsuperscript{218} \textit{Id.} at 1435.
\textsuperscript{219} \textit{See id.} at 1450. "The Tenth Circuit recently held that when one potentially responsible party sues another to recover expenditures incurred in cleanup and remediation, the claim is one for contribution and is controlled by § 113(f)." \textit{Id.} (citing \textit{CERC}, 50 F.3d at 1536).
\textsuperscript{220} 904 F. Supp. 644 (N.D. Ohio 1995).
\textsuperscript{221} \textit{Id.} at 649.
\textsuperscript{222} \textit{Id.} at 650.
\textsuperscript{223} \textit{Id.} at 652. As the current owner of the site, PEMCO could not make the claim that it was not a liable party. So, it was constrained to taking the position that it had not admitted "joint and several liability."
\textsuperscript{224} \textit{Id.}
several share of liability.225

9. United States v. Bay Area Battery226

In Bay Area Battery, the government sought approval of an “ability to pay” consent decree that it had entered into with certain defendants at the site (“Settling Defendants”).227 The decree allowed the Settling Defendants, due to their limited financial resources, to pay less than their full share of the site’s cleanup cost and granted them protection under the contribution bar.228 Another group of defendants which had previously settled with the government (“Group”) and was pursuing the Settling Defendants objected to the decree.229 Among the reasons the Group objected to the decree was that it would cut off their contribution claims against the Settling Defendants.230

The Group sought to circumvent the contribution bar and the contribution protection provided in the consent decree by characterizing its claims as cost recovery claims under section 107.231 Because the Group was comprised of liable parties, the court held that its claims against the Settling Defendants were claims

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225. Id. The court noted also that:

Based upon the recent decisions of the First, Fifth, Seventh and Tenth Circuits, as well as the cited district courts, this Court is compelled to conclude that, as the current owner of the Site, PEMCO is a PRP under § 107(a)(1), and therefore not an “innocent party.” Consequently, regardless of how its action is pled, this action must be construed to be an action for contribution pursuant to § 113(f) of CERCLA. Given this ruling, Defendants may only be held liable for their individual, several and equitable share of responsibility of the recoverable costs incurred by PEMCO.

Id. (citations omitted).


227. Id. at 1527.

228. See id. at 1529-30:

Here, the Government has entered into what it calls an “ability to pay” decree. When negotiating with PRPs who are small businesses or individuals of modest means, the Government seeks to avoid settlements that will force the businesses and individuals into bankruptcy or require them to sell off major assets. Instead, the Government requires such PRPs to pay an amount that will allow businesses to continue operating and will not jeopardize the modest lifestyles of individual parties. In this fashion, the Government will recover some of its past costs while the PRPs are spared financial ruin.

229. Id. at 1528.

230. See id. at 1532. The Group was to receive 20% of any settlement with the government retaining the balance. Id. at 1527.

231. See id. at 1532.
for contribution and thus were cut off by the consent decree. The court rejected *Axil* and the other cases relied on by the Group, terming them "unconvincing." The court stated that these cases' reliance on the "any other person" language of section 107 was misplaced because they relied on this language to the exclusion of other provisions of the statute, namely, section 113. The court stated:

While a PRP qualifies as "any other person" under section 107(a)(4)(B), when it sues another PRP it is still seeking to apportion liability between two culpable parties. The suit is therefore an action for contribution governed by section 113(f). The cases cited by the Group do not recognize this basic point.

On its face, the language of section 107(a)(4)(B) allows PRPs such as the Group's members to bring suit under that section to recover response costs. Section 107 cannot, however, be read in isolation. In addition to expressly authorizing contribution actions under CERCLA, section 113(f) mandates "such claims shall be brought in accordance with this section . . ." Thus, if a claim is for "contribution," it is subject to section 113(f)—including the subordination and contribution protection provisions. In this fashion, section 113(f) qualifies the broad cause of action created in section 107(a).

Taken to its logical extreme, the reasoning of the Group and the decisions upon which it relies would render section 113(f) a dead letter. Since any PRP qualifies as a "person" within the meaning of CERCLA, a PRP could always avoid section 113(f)'s provisions merely by styling its suit a "cost recovery action" under section 107(a). Following the lead of the First Circuit in *United Technologies*, the Court "refuse[s] to follow a course that ineluctably produces judicial nullification of an entire [CERCLA] subsection."
The court's reasoning in *Bay Area Battery* is the most explicit rejection of the "any other person" language in section 107 as a basis for allowing a PRP to maintain a cause of action against its fellow PRPs. The court did not really attempt to reconcile the differences in the two sections, but rather in effect held that section 113 superseded section 107 insofar as the claims of PRPs were concerned.\(^\text{236}\)

10. United States v. Atlas Minerals & Chemicals, Inc.\(^\text{237}\)

The third-party plaintiffs sued the third-party defendants under sections 107 and 113.\(^\text{238}\) The third-party defendants pointed to *United Technologies* in support of their position that the plaintiffs' claim should be interpreted as a single claim for contribution.\(^\text{239}\) The court found the decision in *United Technologies* wanting.\(^\text{240}\)

The court followed the line of cases allowing a PRP to maintain a cost recovery action.\(^\text{241}\) Among the cases discussed was *United States v. Kramer*.\(^\text{242}\) The court found persuasive *Kramer* 's position that section 107 encouraged swift cleanups with its potential for complete recovery of costs, "even if . . . recovery is later reduced in a subsequent contribution action."\(^\text{243}\) It acknowledged that it was aware of the criticism that *Kramer* had received because it encouraged more litigation, but reasoned that, "under CERCLA, streamlining litigation is secondary to promoting the swift and efficient cleanup of hazardous waste disposal sites. The spectre of protracted litigation should not impel courts to evade a

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\(^{236}\) *Id.* at 1533.

In addition to expressly authorizing contribution actions under CERCLA, section 113(f) mandates "[s]uch claims shall be brought in accordance with this section . . . ." Thus, if a claim is for 'contribution,' it is subject to section 113(f)—including the subordination and contribution protection provisions. In this fashion, section 113(f) qualifies the broad cause of action created in section 107(a).

\(^{237}\) *Id.*


\(^{239}\) The third-party plaintiffs were industrial generators, and the third party defendants were primarily generators or transporters of municipal solid waste. *Id.* at *16-17. Most of the third party defendants had settled or were dismissed prior to the trial, leaving only two defendants, one of them being SCA Services, Inc. *Id.* at *17-18.

\(^{240}\) See *id.* at *216.

\(^{241}\) The court claimed that it was unable to find any statutory support for *United Technologies* 's position that Congress intended that only innocent parties would be able to recoup all of their costs. See *id.* It stated: "A parsing of CERCLA reveals no basis upon which to preclude 'non-innocent' parties from seeking cost recovery under § 107(a)." *Id.* (citing 42 U.S.C. § 9607(a)(4)(B)).

\(^{242}\) See *id.* at *216-225.

\(^{243}\) *Id.* at *223-25.

\(^{244}\) *Id.* at *224.
methodology that is designed to encourage responsible parties to undertake cleanup.\textsuperscript{244} The court also stated that the “any other person” language of section 107 should be given “its plain meaning.”\textsuperscript{245} Because the third-party plaintiffs brought their claim in timely fashion and the third-party defendants had not settled with the government and were thus not immune from contribution claims, the court stated: “the distinction is meaningful only because it defines the contours of the third-party action and, importantly, establishes the burden of proof to be borne by each party.”\textsuperscript{246}

The situation in \textit{Atlas Minerals} was somewhat unique in that none of the parties had settled with the government. The court, following \textit{Kramer}, stated that the third-party defendants had the option of pursuing a contribution action during the pendency of the third-party plaintiffs’ cost recovery action.\textsuperscript{247} In \textit{Atlas Minerals}, this was true because the third-party plaintiffs had not settled with the government and were thus not immune to contribution suits. However, if the PRP seeking to recover its costs has settled with the government, the defendant does not have the option of maintaining any contribution action, be it during the pendency of the cost recovery action or otherwise. The picture painted by \textit{Atlas Minerals} of an equitable resolution of the claims does not necessarily hold true then when the effect of the contribution bar is considered.\textsuperscript{248}

11. \textbf{New Castle County v. Halliburton NUS Corp.}\textsuperscript{249}

The defendant, Halliburton NUS Corp. ("NUS"), contracted with the EPA to perform the Remedial Investigation/Feasibility Study ("RI/FS") at the site.\textsuperscript{250}

\textsuperscript{244} Id. at *226. For a discussion of \textit{Kramer}, see supra note 21.
\textsuperscript{245} \textit{Atlas Minerals}, 1995 U.S. Dist. LEXIS 13097, at *228.
\textsuperscript{246} Id. The third-party plaintiffs would have to prove that the prerequisites for liability under § 107 existed, and, for purposes of their claim for equitable apportionment of past costs, the equitable share of that liability. \textit{Id.} at *229. The third-party defendants who counterclaimed for contribution thus were required to prove the third-party plaintiffs equitable share. \textit{Id.} at *230.
\textsuperscript{247} \textit{Id.} at *226.
\textsuperscript{248} \textit{Id.} at *230 ("At the end of the day, the court will allocate the past and future response costs, applying equitable factors under § 113(f)"). Thus, even though the PRPs were allowed to maintain a section 107 action, the extent of defendants’ liability would be determined by the application of equitable factors, and defendants would not be forced to bear a disproportionate share of the cleanup cost.
\textsuperscript{250} \textit{Id.} at *2. The remedial investigation and the feasibility study are actually studies which are typically conducted simultaneously. The goal of the remedial investigation is to “collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives.” 40 CFR § 300.430(d)(1). The aim of the feasibility study is to “ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected.” 40 CFR § 300.430(e)(1). The performance of the RI/FS is one of the steps
While performing the RI/FS, NUS drilled a well at the site.\textsuperscript{251} The plaintiffs contended that NUS drilled the well improperly, resulting in the migration of waste from one strata of the sand underlying the site to another and brought negligence and CERCLA claims against NUS for negligent construction.\textsuperscript{252}

NUS moved for summary judgment on the CERCLA claim, contending that it was a claim for contribution and thus time barred since the plaintiff had brought it more than three years after the entry of the plaintiffs' consent decree.\textsuperscript{253} Because the action was brought more than three years after the entry of the consent decree, the classification of the claim as a cost recovery action or a contribution action was critical.\textsuperscript{254}

The Magistrate-Judge hearing the motion recommended that NUS' motion for summary judgment on the CERCLA claim be denied.\textsuperscript{255} The Magistrate-Judge distinguished the United Technologies decision on the basis that the plaintiffs could be determined to be wholly innocent because: (1) the release may have been caused solely by the negligence by NUS in drilling the well, and (2) the plaintiffs made no admission of liability under their consent decree.\textsuperscript{256}

The court rejected the Magistrate-Judge's recommendations, however, finding that: (1) the site was the entire landfill, not just the area surrounding the well—according to the court, the plaintiff's were "clearly" PRPs with respect to the site,\textsuperscript{257} and thus, even if NUS' actions were the sole cause of the release at the well, the other problems at the site formed a basis for finding the plaintiff liable; (2)

the fact that the consent agreement does not contain an admission of liability is not dispositive. While plaintiffs have not made a formal admission of liability, they have incurred a substantial liability in that they have agreed to incur substantial costs to clean up the landfill. Through this action, plaintiffs seek to recover a portion of this obligation from NUS. This is a quintessential claim for contribution;\textsuperscript{258}

and (3) the fact the plaintiffs might be found innocent was irrelevant—the mere fact that they were PRPs with the potential to be found liable limited them to a

\textsuperscript{251} Halliburton NUS, 1995 U.S. Dist. LEXIS 15499, at *2.
\textsuperscript{252} Id. at *3-4.
\textsuperscript{253} Id. at *14.
\textsuperscript{254} Id.
\textsuperscript{255} Id. at *4.
\textsuperscript{256} Id. at *22.
\textsuperscript{257} Id.
\textsuperscript{258} Id. at *23.
section 107 claim. Thus, the court adopted the United Technologies holding. The court realized that, because of the statute of limitations, its holding might act to bar the plaintiffs' CERCLA claim against NUS. It said that the functioning of the statute of limitations was consistent with CERCLA's goals.


In Hydro-Manufacturing, the plaintiff, Hydro-Manufacturing, Inc., ("Hydro"), was the current owner of the site, and Kayser-Roth was the owner/operator at the time the contamination occurred. Hydro brought a section 107 and a section 113 claim against Kayser-Roth. Kayser-Roth moved for summary judgment, asserting that the section 107 claim was, in fact, a section 113 claim, and because it was brought more than three years after Hydro entered into its consent decree, it should be barred. The court found that Hydro, as the current owner of the site, was a liable party under section 107. As a court

259. Id. at *24-25.
   Third, the Court finds that the United Technologies holding does not turn on the question of whether a plaintiff is eventually found to be "innocent." The First Circuit clearly stated its view that all claims by potentially liable parties, not liable parties, were claims for contribution and could be brought solely under § 113(f). United Technologies, 33 F.3d at 100. The Tenth Circuit, which has adopted the United Technologies holding, has taken a similarly broad view. United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1536 (10th Cir. 1995).

260. Id. at *27.

261. Id. at *27-28.
   Most importantly, however, the imposition of a statute of limitations does not frustrate the purposes [sic] of CERCLA, which inter alia is to achieve prompt clean up of polluted sites such as the Tybout's Corner Landfill. The deadline imposed by the statute of limitations encourages settling parties to move quickly and begin the work of investigating and cleaning up the site, for it is only by doing so that these settling parties can discover evidence of other as yet unknown polluters.

262. Id. The court did not rule that the plaintiffs' claim was time barred. The plaintiffs claimed that statute had been equitably tolled. Id. The court sought additional briefing prior to ruling on this issue. Id.


264. Id. at 274. The contamination resulted from a release of trichloroethylene ("TCE").

265. Id. at 274-75.

266. Id. at 276.
   In section 107, entitled "Liability," CERCLA lists the following persons as "covered": (1) owner or operator of facility; (2) any person who at the time of disposal owned or operated the facility; (3) any person who arranged for the disposal of wastes at the site; or (4) who transported the wastes to the site for
within the First Circuit, the court followed United Technologies and ruled that Hydro was limited to a contribution claim.\textsuperscript{267}

Hydro argued that it was an innocent party because it had not owned the site at the time of the contamination.\textsuperscript{268} The court stated:

This proposition ignores the plain language and the purpose of CERCLA. The legislation is designed to impose strict liability on a variety of actors, including past and present owners, irrespective of their culpability, because the aim of CERCLA is to facilitate repair and clean up. . . . That Hydro may be blameless for the original contamination is irrelevant for purposes of CERCLA, because simply as owner of the site, Hydro bears partial responsibility for aiding clean up.\textsuperscript{269}

The court stated that United Technologies was “instructive” of the proper result in the case. According to the court:

Hydro, like the plaintiff in United Technologies, did not spontaneously clean up the site; rather, it entered into a Consent Decree, agreeing to incur costs related to mending the tainted land. In effect, Hydro agreed to pay what the site was worth when it could sell it and bear the carrying costs in the meantime. The fact that Hydro agreed to the Consent Decree provides compelling evidence that Hydro recognized that it might be liable pursuant to § 9607(a)(1) and sought to expedite an inevitable outcome. Participation, even if reluctant, is implicit acknowledgment that Hydro may fall under the grasp of CERCLA liability.\textsuperscript{270}

\textsuperscript{267} Id.

\textsuperscript{268} Id.

\textsuperscript{269} Id. (citations omitted).

\textsuperscript{270} Id. (citations omitted). The court also noted that Hydro did not avail itself of the “innocent landowner” defense available under CERCLA for those landowners who: (1) bought the site post-contamination, (2) did not know and had no reason to know that it was buying a contaminated site at purchase, and (3) exercised due care after the discovery of the contamination. \textit{Id.} (citing \textit{In re Hemingway Transport}, 993 F.2d 915, 932 (1st Cir. 1993); United States v. DiBase, 45 F.3d 541, 545 n.4 (1st Cir. 1995)). There was a “cloud” on the property when it was deeded to Hydro in that the Rhode Island Department of Health began investigation the wells around the site two years prior to Hydro’s acquisition. \textit{Id.} at 274. Therefore, Hydro probably could not have met the second of the three elements necessary to assert an innocent landowner defense.
The court also stated that the language in the consent decree, asserting that the decree did not amount to an admission of liability, was irrelevant.\textsuperscript{271}

Thus, the court found Hydro was limited to a claim for contribution and, because it had brought its claim more than three years after the approval of the consent decree, it was time barred.\textsuperscript{272} Given the development of the case law, Hydro could not have known three years after it entered into its consent decree that it would be precluded from asserting anything other than a contribution claim.

The result in \textit{Hydro} seems particularly harsh. A plaintiff who did not contribute to the contamination was precluded from maintaining even a contribution action against its fellow PRP. However, \textit{United Technologies} and the cases following it dictate that this be the result, the apparent inequity notwithstanding.\textsuperscript{273} Cases decided later, such as \textit{Halliburton NUS}, indicate a willingness on the part of courts to adopt a hard and fast rule that PRPs are limited to section 113 actions, no matter the consequences.\textsuperscript{274}

\textbf{VII. CONCLUSION}

The “scorecard” for these decisions is as follows:

\textsuperscript{271} \textit{Id.} (citations omitted). The consent decree stated: “the execution of this Consent Decree by the settling Defendant is not an admission of liability by it, or by its current shareholders . . . with respect to any issue dealt with in the Consent Decree nor is it an admission or denial of the factual allegations set out in the Amended Complaint.” \textit{Id.}

\textsuperscript{272} \textit{Id.} at 277.

\textsuperscript{273} It is worth noting that Kayser-Roth, as a result of having lost its trial, was required to reimburse the government and to “execute remedial steps at the site.” \textit{Id.} at 274. Under its consent decree, Hydro was to: (1) sell the site, subject to EPA approval, (2) pay the proceeds to the EPA, and (3) remain responsible for land maintenance costs (including sewer assessments and real estate taxes) until the sale. \textit{Id.} So, the result may not be as inequitable as appears at first blush. \textit{See} discussion of innocent land owner defense, \textit{supra} note 270.

\textsuperscript{274} \textit{See Halliburton NUS}, 1995 U.S. Dist. LEXIS 15499, at *27. The court noted: While the effect of the three year statute of limitations may seem harsh in some cases, the Court’s role is not to evade the limitations period established by Congress by judicially revising the statute. Not only are all limitations periods intrinsically harsh at times, but CERCLA also has many other harsh aspects, such as the imposition of strict liability upon PRPs whose involvement with a site occurred years before CERCLA was even a gleam in Congress’s eye, or the provision of immunity from contribution actions to parties who resolve their liability with the Government. \textit{Id.}
United Technologies remains the leading case, and, as the scorecard indicates, it has found considerable support among the district courts. The 1994-95 decisions of the circuit courts are unanimous in precluding liable parties from maintaining a cost recovery action. However, Tesa Tape, Bethlehem Iron Works, and Atlas Minerals, all of which were decided in the summer of 1995, buck the recent trend embodied in cases that refuse to allow a non-innocent PRP to maintain a section 107 action. Thus, a point of law which appeared to be becoming clearer remains in doubt. Conflicts continue to arise. For example, two district courts within the Third Circuit have reached contradictory results. Similarly, one court has advanced a rationale for treating the section 107 claims of municipalities different from the claims of private parties, while another court made no distinction between the claims of the differently situated PRPs.

The private party CERCLA actions under sections 107 and 113 represent two contradictory mechanisms for achieving the overriding goal of prompt site cleanup. Both seek to achieve a prompt cleanup by insuring that those who undertake cleanup will not be left “holding the bag” for cleanup costs that are not attributable to their actions. It is difficult to imagine a PRP who would be willing

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276. Compare Tesa Tape, 891 F. Supp. 955, with NL Industries, 1995 U.S. Dist. LEXIS 15534 described in Section VI.
to clean up a site without such assurance.

The contribution provisions, specifically the contribution bar, seek to expedite the cleanup process. Parties will be more willing to settle with the government if they know that their settlement will fully resolve their liability. The contribution bar, by its terms, protects settlors from contribution actions, not private party cost recovery actions. PRPs will be less willing to settle with the government, and thus cleanups will not be effectuated as quickly, if they are faced with the possibility of further liability under private party cost recovery actions. Limiting the availability of these actions so that they may be pursued by only truly innocent parties should encourage settlements and consequently speed up the remediation process. However, the fundamental conflict between the traditional view of contribution and the "any other person" language of section 107, has led to contradictory decisions regarding the availability of the private party cost recovery action. The lack of any clear legislative history exacerbates the problem.

Those second-tier PRPs who have available to them the statute of limitations defense or the contribution bar can be expected to resist any attempt by the first-tier PRPs to classify their claims as section 107 claims, which could abrogate the protections from liability offered by these provisions. Conversely, so long as the law remains unsettled, the first-tier PRPs, who are faced with second-tier PRPs asserting that these provisions relieve them of liability, will attempt to use section 107 as a means of preserving their claims against the second-tier PRPs.

The case law seemingly indicates that, in any event, a second-tier PRP will not be forced to shoulder a disproportionate share of liability. Even those courts that have allowed PRPs to maintain section 107 actions have stated that they will use equitable factors to allocate the liability among the PRPs. First-tier PRPs may, however, continue to assert section 107 claims because the threat of joint and several liability may give them a bargaining tool in their negotiations with the second-tier PRPs.

Thus, given the motivations for pursuing and resisting section 107 actions,

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277. It is for this reason that the government filed an amicus brief in *SCA Services II*. See supra text accompanying note 104.
278. Theoretically, joint and several liability could foist the burden of pursuing and recovering money from the third tier of PRPs upon the second-tier PRPs. Under a true application of joint and several liability, the second tier could be stuck with the "orphan share" attributable to the activities of those PRPs who are financially unable to contribute to the cost of the cleanup. Although highly unlikely in the face of the case law, the potential for complete recovery of all costs exists under a section 107 claim. This alone may be ample motive for first-tier PRPs to continue making section 107 claims. Any mechanism that may have the potential to shift these burdens is a powerful tool, which will not be easily abandoned. It should be emphasized that the case law indicates that these are no more than theoretical possibilities, but they may increase the first-tier PRPs leverage in negotiating with its fellow PRPs.
it can be expected that litigation will continue until there is a definitive statement of the law—money better spent in pursuit of a remedy for the site. The answer might be found in legislative reform. CERCLA is scheduled for reauthorization, and the joint and several liability provisions have come under scrutiny.\textsuperscript{279} Repealing joint and several liability is an option, but opponents assert that it would prolong the time it takes to clean up sites.\textsuperscript{280} Other have suggested replacing joint and several liability with a proportional liability standard.\textsuperscript{281}

A less radical approach would be to require the government to pursue and name as many PRPs as possible at the first-tier stage. The first-tier PRPs would be foreclosed from pursuing section 107 claims against the second-tier PRPs, but the risk of loss would be associated with orphan shares and other unknown costs by spreading this risk. A better alternative would be to create a mechanism for spreading the unknown costs among all tiers of PRPs or to have them borne by the government. This would lessen the exposure to the first tier of PRPs and make them more likely to initiate cleanup. This would also make the second tier less likely to contest their share of liability via litigation. The second (and later tiers) would be faced with a definitive exposure more or less proportional to their "fault." This would decrease the incentives to litigate, which, because of joint and several liability have always been powerful and have been magnified by the recent decisions. With less money being spent on litigation, more money could be directed the cleanup. Then, CERCLA's ultimate goal of prompt and complete cleanups will be more of a reality and less of a myth.

\textsuperscript{279} See Costs of Repealing Retroactivity May Make Proposals Impossible, 17 HAZARDOUS WASTE NEWS, July 24, 1995, § 30.

\textsuperscript{280} See id. (quoting Department of Justice official as saying that repeal of joint and several liability would cause Superfund to become "public works program" with increased costs to taxpayers). See also Superfund Reform Principals Unfair and Unworkable, EPA Claims, 23 PESTICIDE & TOXIC CHEM. NEWS, July 12, 1995, § 37 (quoting EPA official as saying that repeal of retroactive and joint and several liability would create new incentives to litigate rather than clean up).