Volume 24 | Issue 1 Article 1

2013

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VILLANOVA ENVIRONMENTAL LAW JOURNAL

VOLUME XXIV 2013 NUMBER 1

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ABSTRACT

The United States Supreme Court, especially in recent times, seldom unanimously agrees. Recently, in an unprecedented event in modern legal records, however, the Supreme Court unanimously reversed decisions of all eleven federal circuit courts construing a critical federal statute. This high court decision should have flowed seamlessly through the lower courts and resulted in uniform Superfund enforcement throughout the country, but it has not. Instead, lower federal courts are interpreting the ruling according to their individual factual discretion, resulting in ongoing legal outcomes similar to those the Supreme Court originally overruled.

The Supreme Court's recent decision in *Atlantic Research* clarified that "any . . . party" voluntarily incurring remediation costs, bar none, is entitled to utilize Superfund's § 107 cost recovery, but the Court did not define the critical issue of what was a *voluntary* expenditure. This undefined term makes a big difference for plaintiffs in allocating financial liability for hazardous substances released into the environment. Superfund's §§ 107 and 113 are not similar cost

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redistribution mechanisms for plaintiffs; rather, they impose fundamentally different types of liability, often have fatally different statutes of limitations, and the § 113 route can leave no legal remedy at all because of a lack of prior litigation against the party. These statutory provisions are not interchangeable to plaintiffs and can alter the outcome of how billions of dollars of waste liability are allocated.

Initially, all of the circuit courts blocked access to the more plaintiff-friendly § 107 based on their judicial preferences, rather than interpreting the plain meaning of the statute. Even after a unanimous reversal by the Supreme Court in 2007, the Court's ruling has not always manifested in subsequent jurisprudence. The Third and Fifth Circuit Courts of Appeal, which refused to reopen access to § 107 after the Supreme Court's 2004 *Cooper v. Aviall* decision, have, even after the 2007 *Atlantic Research* decision, used prudential discretion to continue to block access to § 107 for many private parties. Despite three Supreme Court opinions on Superfund liability in a five-year period, lower federal court jurisprudence has not been uniform. The high court has yet to address such Superfund prudential discretion.

This article examines a critical decade of federal court decisions on Superfund liability. It analyzes the Supreme Court's decision, subsequent recent decisions of the lower federal courts, and mechanisms the lower courts use to side-step key elements of the Supreme Court's decision. This article will detail how different interpretations of adjectives taint and alter joint liability for billions of dollars of liability. Finally, this article will draw conclusions about the inconsistent application of prudential judicial discretion.

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I. THE SUPREME COURT STANDS APART FROM THE THIRD BRANCH

"Blue moon, you saw me standing alone"[2]

The Supreme Court, especially the current twenty-first century Court, seldom agrees unanimously on the interpretation of contested core congressional statutes.[3] Recently, the Supreme Court

2. RICHARD RODGERS & LORENZ HART, BLUE MOON (MetroGoldwynMayer 1934).

3. Am. Elec. Power Co. v. Connecticut (Am. Elec. Power Co.), 131 S. Ct. 2527, 2535 (2011) (affirming unanimously but for diverging reasons, Second Circuit's jurisdiction over case); *see also* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 573, 581 (2007) (resolving, unanimously, circuit court split regarding environmental statutory interpretation). This unanimous opinion was in a decision where the

reversed decisions of all eleven federal circuit courts - every appellate court that had decided a case, without any federal appellate decisions to the contrary for the prior three decades – in *United States v. Atlantic Research Corp.*.[4] How rare is this? A search of precedent and legal literature did not identify a single case in recent history where, as here, the Supreme Court reversed every federal circuit court in the country.[5] "Blue moon . . . ," in this Case, the Supreme Court "was standing alone."

This unprecedented event occurred through a unanimous decision of the commonly-split Court on the federal Superfund,[6] the cornerstone law governing hazardous substances and a subject of dispute which the Supreme Court seldom hears.[7] The decision in *Atlantic Research* clarified that "any . . . party" acting voluntarily is entitled to utilize § 107 cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[8] The Court did not, however, reach the critical issue of what was a *voluntary* expenditure that a private party could recover under § 107, or whether an involuntary expenditure tainted § 107 recov-

federal appellate courts were equally divided. *Am. Elec. Power Co.*, 131 S. Ct. at 2535. This was not a situation where the Supreme Court reversed every federal Circuit Court in the country.

4. United States v. Atl. Research Corp. (Atl. Research Corp.), 551 U.S. 128, 131 (2007) (affirming CERCLA allows potentially responsible parties to recover cleanup costs from other potentially responsible parties).

5. Helene Newberg, as the author's Research Assistant, researched in conjunction with librarians at Suffolk University Law School and was unable to document a situation where the Supreme Court unanimously overturned opinions of all circuit courts. In addition, her research uncovered no literature documenting such an event. While this is a difficult phenomenon to comprehensively research, based on the findings, it is fair to conclude that this is a rare event. In fact, it is difficult procedurally for a decision which does not declare a federal law unconstitutional and on which the federal circuit courts are not split in their basic interpretation of federal statute, to even have the Supreme Court grant a petition for *certiorari*. After the *Cooper Indus. v. Aviall Serv.* opinion of the Supreme Court in 2004, which barred § 113 cost recovery in the absence of a government suit resulting in an approved settlement, a Superfund crisis was created. *See* Cooper Indus. v. Aviall Serv. (Cooper Indus.), 543 U.S. 157, 160 (2004). This led to reconsideration of access to the closed off avenue of § 107 cost recovery, which the Supreme Court resolved in 2007 in *Atlantic Research*.

6. *See* Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (2006) (exhibiting federal Superfund statute).

7. *See* Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994) (holding § 107 does not provide for awarding attorney's fees). This was one of the few instances where a CERCLA issue reached the Supreme Court. Between 2004 and 2009, the Supreme Court heard and decided three additional cases regarding CERCLA. *Cooper Indus.*, 543 U.S. at 160; *Atl. Research Corp.*, 551 U.S. at 131; *Burlington N. & Santa Fe R.R. v. United States* (*Burlington N. & Sante Fe. R.R.*), 556 U.S. 599 (2009).

8. *See Atl. Research Corp.*, 551 U.S. at 131-32 (discussing when parties may invoke § 107).

ery for other voluntary expenditures.[9] This makes a big difference for plaintiffs. CERCLA §§ 107 and 113 are not similar legal mechanisms. They provide fundamentally opposite types of liability, statutes of fraud, and requirements of proof, all of which change case outcomes. These statutory provisions are not interchangeable for plaintiffs, especially because plaintiffs are unable to recover costs of litigation expense under either provision.

In a five-year span, the Supreme Court rendered three foundational decisions involving among whom, and precisely how, Superfund law allocates liability for billions of dollars of damages for hazardous substances entering the environment. First, the Court created a path to use CERCLA § 107, the main cost recovery provision of CERCLA.[10] Second, the Court substantially restricted the use of § 113 of CERCLA, which is used to reallocate cost responsibility for environmental problems.[11] Third, the Court expanded a defense against liability for others' wastes.[12]

Theoretically, these high court decisions should have flowed seamlessly through the lower federal courts and resulted in uniform Superfund interpretation and enforcement across the country. But things do not always operate so seamlessly. The interpretation and meaning of the undefined adjective, "voluntary," became a lynchpin for interpreting how expenditures on cleanups were spent. Not only is there significant disagreement about what actions are voluntary, but the meaning of "expenditure" is also disputed.

Altering either of these terms can change the legal outcome under the Superfund statute. Utilizing this license, the lower federal courts have recreated dissonance where the Supreme Court, unanimously, sought to create legal consistency. In 2004, the Third and Fifth Circuit Courts of Appeal refused to reopen access to § 107 after the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*.[13] Even after the 2007 *Atlantic Research* decision reversing such interpretations, the same two circuits used prudential discretion to block private parties' utilization of § 107.[14] When lower

9. *See id.* (declining to address critical questions).

10. *See* § 9607 (illustrating CERCLA liability provisions).

11. *See* § 9613 (explaining § 113 restrictions on cost responsibility allocation).

12. *Burlington N. & Santa Fe. R.R.*, 556 U.S. at 619 (deciding manufacturer was not "arranger" under CERCLA, and apportionment of liability was reasonable).

13. *See Cooper Indus.*, 543 U.S. 157, 160 (2004) (restricting access to § 113 contribution actions for private parties).

14. For further discussion of Third and Fifth Circuit decisions, see *infra* notes 229 and 235 and accompanying text.

federal courts block access to the more plaintiff-friendly § 107 based on their judicial preference, rather than the Supreme Court's articulated plain meaning of the statute, they fundamentally change the nature of Superfund cost allocation for billions of dollars of hazardous substance cleanup.

It is important to note these lower federal court decisions have often abandoned plain meaning, and instead, have recreated the same plaintiff-unfriendly judicial outcomes in contested Superfund cases that the Supreme Court overruled. This article examines not only this "blue moon" Supreme Court decision, but also the eclipse of that moon in subsequent lower federal court decisions that block its result. Namely, this article assesses, in four parts, the choreography of the federal courts on Superfund cost issues. Part I looks at the unwavering circuit court opinions between 1993 and 2004 that held that § 107 of Superfund was not available to anyone, despite its statutory entitlement to "any person." Part II examines the three foundation-altering Supreme Court decisions interpreting the statute that occurred in a five-year period. Part III then analyzes subsequent federal court decisions denying access to the § 107 cost response that the Supreme Court thought it had liberated. Finally, Part IV looks at the future roll-out of Superfund cost allocation.

II. MOONSHADOW: ALL FEDERAL CIRCUIT COURTS ECLIPSE THE CRITICAL LIABILITY ALLOCATION CLAUSE OF SUPERFUND

"I'm being followed by a moonshadow, moonshadow, moonshadow"[15]

The federal circuit courts of appeal orbited collectively into the shadow cast by key clauses of the Superfund statute. They announced opinions with plain meaning links to the statutory language, canons of statutory construction, and legislative history. This significantly truncated the statute's incentives for voluntary remediation of hazardous waste at a time when the Congress eliminated tax revenues for such hazardous substance remediation.[16] At a time of fiscal need, the federal circuit courts created disincentives for voluntary waste cleanup. Collectively, this cast hazardous waste laws into a Superfund "moonshadow."

15. CAT STEVENS, *Moonshadow* (A&M Records 1971), available at http://www.youtube.com/watch?v=UtgXus3eiII.

16. Linda Roeder, *Insufficient Funds for Cleanup Operations, Supreme Court Decision Lead EPA Concerns*, 36 ENV'T REP. (BNA) S-14, S-15 (2005) (noting EPA delayed beginning remediation activities at thirty-four priority sites in 2004 because of funding shortfalls).

On its face, § 107(a)(4)(B) is available to "any . . . person," other than the sovereigns, who are otherwise listed and enabled in § 107(a)(4)(A).[17] Notwithstanding this basic fact, beginning in 1994 and over the course of four years, ten circuit courts confronted the question of whether potentially responsible parties (PRPs) could utilize § 107 of CERCLA to reallocate their voluntary cleanup costs to other responsible parties at a hazardous substance waste site.[18] Each of the circuits, many reversing their district courts, blocked the path that the Supreme Court later decided was unequivocally dictated by § 107's unambiguous statutory language.[19] This trend continued until eleven federal circuit courts of appeal blocked private party access to § 107, which precipitated a hazardous waste remediation crisis.[20]

A. The Two Statutory Allocation Options of Superfund

Under Superfund, there are alternative paths. The allocation of liability pursuant to CERCLA can invoke a macro-level shift of remediation expenses from the plaintiffs who expend funds to the defendants who do not join in the expenditure.[21] Parties have a choice of alternative legal options to reallocate costs under the Superfund statute. PRPs who settle with the government should be able to recover from other co-responsible parties those expended response costs under § 107(a), or receive contribution to cleanup expenses under § 113(f) of CERCLA.[22]

The Environmental Protection Agency's (EPA) preferred enforcement approach to hazardous substance released under CERCLA is private party cleanup, either voluntarily or pursuant to EPA-

17. 42 U.S.C. § 9607(a) (2006) (describing liability for hazardous substance releases).

18. For a further discussion of the circuit court decisions interpreting whether § 107 could be utilized by potentially responsible parties, see *infra* notes 44-75 and accompanying text.

19. For an explanation of the circuit court decisions that blocked access to § 107 and were later reversed by Supreme Court, see *infra* notes 44-75 and accompanying text.

20. For a discussion of circuit court decisions blocking private party access to § 107, *see infra* notes 44-75.

21. § 9613(f)(1) (explaining shift in allocation of liability and remediation funds from plaintiff to defendant). The statute states "[a]ny person may seek contribution from any other person who is liable or potentially liable under [§] 9607(a) of this title, during or following any civil action . . . under [§] 9607(a) of this title." *Id.*

22. *See* §§ 9607(a), 9613(f) (discussing liability and contribution one may seek for hazardous waste dumping).

issued enforcement orders.[23] To the extent that unrecovered costs remain, early settlement leaves both the government and the settling parties free to initiate § 113 contributions or § 107 response cost actions against non-settling parties. There is a potential advantage to the government because it gets an immediate settlement, whether in the form of a cash settlement or a commitment to perform response actions, or both.

Under the first option, § 107(a), liability of PRPs in cost recovery actions against PRPs is strict.[24] Section 107 shifts joint and several liability to the defendants unless a defendant can affirmatively demonstrate the harm is "divisible."[25] Joint and several liability, however, generally has been the norm because of the difficulty imposed on a PRP to affirmatively demonstrate the divisibility of the harm.[26] If a court allows the plaintiff access to § 107 to prosecute a claim, it is much easier to prove damages against a lesser number of defendants. If § 107 is employed, only a few defendants need to be named to shift liability to the named defendants. This is much easier than bearing the burden of proof severally for the contribution share against every PRP.[27]

Under the second option, if liability under § 113(f) is not joint and several, but merely several regarding an individual defendant basis of proof, the plaintiff bears the burden to prove the proportionate share of liability for each and every defendant.[28] Section 113 works as an equitable reallocation of total costs incurred for cleanup among the PRPs according to their proven equitable proportionate shares.[29] This second option comports with the general

23. *See Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, ENVTL. PROT. AGENCY, http://www.epa.gov/lawsregs/laws/cercla.html (last updated Aug. 23, 2012); Broward Gardens Tenants Ass'n v. United States Envtl. Prot. Agency, 311 F.3d 1066, 1068 (11th Cir. 2002) (dismissing case for lack of subject matter jurisdiction under CERCLA).

24. Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp. (Centerior Serv. Co.), 153 F.3d 344, 348 (6th Cir. 1998) (precluding PRPs from recovering under § 107(a)).

25. *Id.* (apportioning liability among wrongdoers); *see also* § 9607(a) (discussing liability for hazardous waste release); *see also* Burlington N. & Santa Fe R.R. v. United States, 556 U.S. 599, 608-10 (2009) (opining various ways to allocate liability).

26. *Centerior Serv. Co.*, 153 F.3d at 348 (noting common usage of joint and several liability).

27. *See* STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS 421-23 (Aspen Publishers 5th ed. 2010) (discussing burden of proof to demonstrate liability).

28. *See* 42 U.S.C § 9613(f)(delineating contribution among responsible parties).

29. *Id.* (stating courts should determine equitable shares on a case-by-case basis).

common law rule of contribution that all joint tortfeasors must contribute equally or proportionately to satisfy a collective burden.[30] Under § 113, district courts are afforded great discretion in allocating liability on an equitable basis.[31]

There are significant differences between the two alternatives of §§ 107 and 113. Section 107 operates pursuant to principles of joint and several liability, a doubly long statute of limitations period to initiate suit, the necessity only to name and prosecute a few and not all of the liable parties, and traditionally the unavailability of equitable defenses to defendants beyond those statutorily prescribed.[32] There is no express statutory prohibition against equitable considerations applied to claims adjudicated under § 107.[33] Section 107 is less likely to result in the plaintiff absorbing "orphan shares" of unfunded PRP liability.[34]

For each alternative, Congress provided contribution protection to all settling PRPs pursuant to the separate § 113(f).[35] A PRP who has settled with the government in a judicially- or administratively-approved settlement is protected from additional liability to both private PRPs and the government for matters the settlement covered.[36] As soon as a settlement is signaled, contribution protec-

30. M'Donald v. Magruder, 28 U.S. 470, 477 (1830) (declining to extend to principle of contribution); Adamson v. McKeon, 225 N.W. 414, 417 (Iowa 1929) (explaining contribution); Easterly v. Barber, 66 N.Y. 433, 439-40 (N.Y. 1876) (explaining instances where contribution may be appropriate); *see also* Yates v. Donaldson, 5 Md. 389, 394-95 (Md. 1854) (noting inherent inequity in contribution and discretion of courts to fashion equitable remedies).

31. United States v. R.W. Meyer, Inc., 932 F.2d 568, 571-74 (6th Cir. 1991) (affirming courts do not abuse discretion by apportioning contribution). This opinion is a subsequent opinion to United States v. Northernaire Plating Co., 685 F. Supp. 1410 (W.D. Mich. 1988), which held that defendants were jointly and severally liable under § 107(a).

32. *See* Ferrey, *supra* note 27,at 421-23 (noting differences between §§ 107 and 113).

33. *See* United States v. Hardage, 116 F.R.D. 460, 465 (W.D. Okla. 1987) (allowing equitable factors raised as defense to bar government's § 107 claims). Many other courts, however, do not follow this opinion.

34. *See* Ferrey, supra note 27 at 421-23 (exemplifying orphan share allocation).

35. *See* 42 U.S.C. § 9613(f) (indicating circumstances under which contribution may be available among tortfeasors).

36. § 9613(f)(2) (discussing circumstances where settlement was reached). Typically, settlements of CERCLA liability by private parties involve both the EPA and state government. In the author's experience, the interests of the state and federal government can be quite distinct. The federal government incurs 90% of government capital response costs, while the state government typically incurs the remaining 10% plus ongoing obligations for operations and maintenance. Therefore, a state government may be particularly attuned to long-term risks and costs associated with operating site O&M systems.

tion is effective.[37] Such a settlement with the government confers absolute protection against counterclaims or litigation brought by non-settling defendants.[38] A settlement via an approved consent decree, which automatically invokes § 113(f)(2) contribution protection of the settling party, is distinguished legally in its absolute contribution protection which does not attach if there is no settlement of actual prosecution.[39] Instead there is termination of prosecution risk through adherence to a unilateral EPA order issued pursuant to § 106.[40]

B. The Decade of Reversible Errors

In 1994, the federal trial courts were split on whether a PRP could elect to prosecute a § 107 claim in lieu of a § 113 claim.[41] More than a dozen decisions found no legislative barrier to a § 107 action by "any other person" plaintiffs.[42] The courts allowed, with-

37. Dravo Corp. v. Zuber (Dravo Corp.), 13 F.3d 1222, 1225 (8th Cir. 1994) (holding, pursuant to § 122(a), *de minimus* settlors receive automatic and instantaneous contribution protection subject to condition subsequent to fulfill duties).

38. § 9613(f) (detailing apportionment of liability).

39. § 9606 (stating fines and liability of those who release toxic wastes). While there are many differences between EPA's model consent decree and EPA's model unilateral administrative order, a critical distinction is in the provision of contribution protection to settlors. The model consent decree utilized by EPA contains an optional paragraph pertaining to the contribution protection contained in § 113(f)(2). *See also Dravo Corp*, 13 F.3d at 1225-28 (holding contribution protection applies to administrative settlement as well as consent decrees). The court held it lacked jurisdiction to second-guess EPA on administrative settlements. *Id.* at 1228. While nonparticipating settlors can object during the standard thirty-day public comment period, the court found that there was no other recourse for a third party to challenge a settlement, even where that party would be prevented form seeking contribution against the settling party. *Id.* Effectively, this removes judicial review of administrative *de minimus* settlements. *Id.* at 1227-28.

40. *Dravo Corp*, 13 F.3d at 1227-28 (noting result if there is no settlement of prosecution).

41. *See, e.g.*, Cos. for Fair Allocation v. Axil Corp., 853 F. Supp. 575, 579 (D. Conn. 1994) (upholding PRP's § 107 claim); United States v. SCA Servs. of Indiana, Inc., 849 F. Supp. 1264, 1281 (N.D. Ind. 1994) (allowing PRP to proceed in part of § 107 claim on which statute of limitations did not expire); Transp. Leasing Co. v. California, 861 F. Supp. 931, 937-38 (C.D. Cal. 1993) (allowing PRP to bring § 107 claim for contribution); SC Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354, 1362-65 (D. N.J. 1996) (denying PRP from bringing action for contribution); Kaufman v. Unisys Corp., 868 F. Supp. 1212, 1214-16 (N.D. Cal. 1994) (holding that only a party who is not liable under CERCLA may bring a cost recovery action). These are district court cases that have held PRPs may not use § 107 to recover response costs.

42. Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 748 (7th Cir. 1993) (allowing recovery by "responsible person"); United States v. Kramer, 757 F. Supp. 397 (D. N.J. 1991) (indicating no distinction between government and "any other person" employing § 107 for cost recovery); Barton Solvents, Inc. v. Sw. Petro-Chem, Inc., 843 F. Supp. 342, 346-47 (D. Kan. 1993) (noting contribution is not sole avenue of recovery for private entities); Charter Twp. of Oshtemo, et al. v.

out much controversy, all plaintiffs to access § 113 cost recovery. Prior to 1994, none of the circuit courts had directly addressed the issue of whether a private PRP had standing under § 107 to recover cleanup costs, and the Supreme Court had only brushed past the question in dicta.[43]

Addressing this split of the district courts regarding § 107, I examined this conflicting legal landscape and suggested that § 107 was available by its express terms to allocate costs to all "other . . . persons" or parties.[44] Between 1994 and 2003, as these legal disputes progressed to appeal, the federal circuit courts, one after another, commenced a decade-long cascade of decisions prohibiting § 107 private party voluntary remediation cost recovery at multiparty contaminated sites.[45] During this time period, each of the eleven federal circuits (excluding the D.C. Circuit, which did not hear a case with this dispute),[46] barred most plaintiffs from using

American Cyanamid Co., 898 F. Supp. 506, 508 (W.D. Mich. 1993) (allowing plaintiffs to proceed with § 107 complaint); United States v. Hardage, 750 F. Supp. 1460, 1495 (W.D. Okla. 1990) (hearing case for contribution under CERCLA); Town of Walkill v. Tesa Tape, Inc., 891 F. Supp. 955, 960 (S.D.N.Y. 1995) (holding town, if not governmental plaintiff, would be entitled to maintain both § 107 and § 113 claims); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1119 (N.D. Ill. 1988) (noting Congressional intent to allow recovery against wrongdoers); United States v. Atlas Minerals & Chem., No. 95-5118, 1995 WL 510304, at *81-93 (E.D. Pa. Aug. 22, 1995) (allocating cost of cleanup among parties based on equitable factors); Bethlehem Iron Works, Inc. v. Lewis Indus., 891 F. Supp. 221, 224-25 (E.D. Pa. 1995) (allowing potentially liable plaintiffs to pursue § 107 claims); Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1278 (E.D. Va. 1992) (noting that § 107 serves as an incentive to private parties to cleanup hazardous waste); United States v. SCA Serv. of Indiana, 865 F. Supp. 533, 544 (N.D. Ind. 1994) (discussing differences between §§ 113 and 107); Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1421 (8th Cir. 1990) (permitting recovery of cleanup costs); Transp. Leasing Co. v. California, 861 F. Supp. 931, 938 (C.D. Cal. 1993) (stating that § 107 holds arrangers liable for necessary expenses incurred by another); Kelley v. Thomas Solvent Co., 790 F. Supp. 710, 717 (W.D. Mich. 1990) (discussing apportionment of costs pursuant to CERCLA); Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc., 914 F. Supp. 159, 164 (W.D. Ky. 1995) (denying motion to dismiss plaintiff's § 107 claims); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 915-16 (N.D. Okla. 1987) (finding plaintiff's claim for cleanup costs viable).

43. *See* Key Tronic Corp. v. United States, 511 U.S. 809, 823-24 (1994) (leaving unanswered whether "innocent" parties had standing under § 107 cost recovery claims). Rather, the Court merely held that § 107 did not provide for the award of attorney's fees. *Id.*

44. Steven Ferrey, *Allocation & Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 38 (1994) (discussing CERCLA intent and parties who are entitled to recover).

45. For further discussion of decisions that prohibited § 107 private party voluntary remediation cost recovery, see *infra* notes 44-75 and accompanying text.

46. *See* Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the United States*, CLIMATE CASE CHART, 322, 325, http://www.climatecasechart.com/ (last updated Nov. 6, 2012) (indicating DC Circuit's deference to well-documented

CERCLA's § 107 cost recovery mechanism: the Seventh[47] (July 1994), the First[48] (Aug. 1994), the Tenth[49] (Mar. 1995), the Eleventh[50] (Sept. 1996), the Third[51] (May 1997), the Ninth[52] (July 1997), the Fifth[53] (Aug. 1997), the Fourth[54] (Apr. 1998), the Sixth[55] (Aug. 1998), the Second[56] (Sept. 1998), and the Eighth (2003).[57] Many of the federal circuit opinions overruled their trial courts to arrive at restrictive statutory interpretations regarding the federal structure of incentives for private hazardous substance cleanup.[58] My previous conclusions were not shared by any federal

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and well-explained administrative actions and its tendency to strike down rules that are contrary to plain meaning). The D.C. Circuit tends to defer to the language of the statute and often strikes down rules that contain language contrary to the plain meaning of that statute.

47. Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 770 (7th Cir. 1994) (limiting plaintiff's right of contribution).

48. United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 103 (1st Cir. 1994) (holding claim for contribution barred by statute of limitations).

49. United States v. Colo. & E. R.R., 50 F.3d 1530, 1535 (10th Cir. 1995) (denying plaintiffs ability to proceed under § 107 and finding claim instead controlled by § 113(f)).

50. Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1514 (11th Cir. 1996) (limiting right of contribution under § 107).

51. New Castle Cnty. v. Halliburton NUS Corp., 111 F.3d 1116, 1126 (3rd Cir. 1997) (denying plaintiff's cost recovery claim under § 107 because plaintiff was potentially responsible person).

52. Pinal Creek Grp. v. Newmont Mining Grp., 118 F.3d 1298, 1299-1301 (9th Cir. 1997) (focusing only on ordinary meaning of "contribution" in § 113); *see also* Pinal Creek Grp. v. Newmont Mining Corp., 926 F.Supp. 1400, 1410 (D. Ariz. 1996) (denying defendant's motion for summary judgment on plaintiff's cost recovery claim because plaintiff asserted sufficient allegations that defendant exercised "owner operator" liability). Adhesives Research v. Am. Inks & Coatings, 931 F. Supp. 1231, 1243-44 (M.D. Pa. 1996).

53. OHM Remediation Serv. v. Evans Cooperage Co., 116 F.3d 1574, 1583 (5th Cir. 1997) (noting issues of fact need to be remanded in order to determine viability of § 107 claim).

54. Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 773 (4th Cir. 1998) (discussing validity of §107 claim and allocation of responsibility and costs).

55. Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998) (barring cost recovery claim and limiting right of contribution under § 113(f)).

56. Bedford Affiliates v. Sills (Bedford Affiliates), 156 F.3d 416, 432 (2d. Cir. 1998) (preventing plaintiff from bringing § 107 claim and forcing plaintiff to proceed under § 113(f)).

57. Dico, Inc. v. Amoco Oil Co., 340 F.3d 525, 531-32 (8th Cir. 2003) (holding plaintiff could not bring action against customer group for cost recovery unless it could establish defense set forth in § 107(b)).

58. For further discussion of federal circuit court decisions, see *supra* notes notes 44-75 and accompanying text.

appellate court panels, nor otherwise adopted until the critical Supreme Court decision in 2007.[59]

How did the circuit courts reach this outcome? The legal rationale behind this cascade of circuit court decisions — which barred private parties from invoking § 107's statutory entitlement for any other person — varied somewhat by circuit. Some circuit courts simply ignored the express operative "any other person" language in § 107(a)(4)(B), and instead, construed only § 113 as a backhanded way to limit § 107 access. The First Circuit sought to give effect to each subsection in a statute, including § 113.[60] The Ninth Circuit and Sixth Circuits found the "any other person" language in § 107 to be moot.[61] The First and the Sixth Circuits left open the question of which statute of limitations provision applies if a PRP initiates a cleanup with government prodding.[62]

Six of the eleven circuit courts discuss the 1986 Superfund Amendment and Reconciliation Act (SARA)[63] and how it codified the common law right to contribution.[64] The Second, Third and Tenth Circuits concluded that SARA, by silent implication, pre-

59. For a further discussion on federal appellate decisions, see *supra* note 43 and *infra* notes 111-191 and accompanying text.

60. *See Bedford Affiliates*, 156 F.3d at 423-24 (discussing interplay between §§ 107 and 113). A broad reading of the statute is unacceptable because allowing PRPs to have standing under § 107 would eviscerate § 113(g)(3), and PRPs would readily abandon a § 113 claim for a § 107 claim due to the significant procedural advantages. *Id.* Consequently, § 113(g)(3) would become a nullity and § 107 would eventually swallow § 113. United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101 (1st Cir. 1994) (discussing expansive reading of § 113(g)(3) and its potential to erase § 107).

61. *See* Pinal Creek Grp. v. Newmont Mining Corp., 926 F. Supp. 1400, 1410 (D. Ariz. 1996) (disregarding as moot "any other person" language of § 107). The court also points toward legislative history, including that § 113 "clarifies and confirms" existing law, as supporting the contention that the two provisions work together. *Id.* at 1404. *See also* Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F. 3d 344, 349-50 (6th Cir. 1998) (finding § 107 "any other person" language to be moot). The Sixth Circuit adds that "one must necessarily look to § 107 in contribution actions involving § 113(f)." *Id.* at 350. "[Section] 107 provides the basis and the elements of a claim for recovery of response costs and lists the parties who are liable." *Id.* A contribution claim under § 113 is therefore an effort to recoup the necessary costs of response by the "person" referred to in § 107. *Id.*

62. *United Tech. Corp.*, 33 F.3d at 99 n.913 (leaving open question of which statute of limitations provision applies if PRP initiates cleanup with government prodding); *Centerior Serv. Co.*, 153 F.3d at 354-55 (discussing applicability of statute of limitiations provision used in other circuits).

63. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §101 et seq., 100 Stat. 1613 (1986) (illustrating changes to Superfund).

64. For a further discussion of First, Second, Third, Sixth, Ninth, and Tenth Circuit Courts' analysis of the 1986 Superfund Amendment and Reconciliation Act (SARA) Superfund amendments and how they codified the common law right to contribution, see *infra* notes 63-67 and accompanying text.

cludes a PRP from using § 107.[65] Five of the eleven circuit courts determined that an action between PRPs for apportionment of cleanup costs is always a § 113 action for contribution.[66] The Sixth, Seventh, and Tenth Circuits reached back to either Black's Law Dictionary, the Restatement (Second) of Torts, or American Jurisprudence in defining the term "contribution" in legal context.[67]

The First Circuit looked to the traditional § 113 meaning of the term "contribution" but never interpreted § 107.[68] The Second Circuit held that § 107 was "not available . . . for a potentially responsible party," because it would render § 113 a nullity.[69] The Third Circuit also held that a PRP may not bring a claim for recovery of costs against another PRP.[70]

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65. *See Bedford Affiliates*, 156 F.3d at 435 (reasoning SARA and pre-SARA case law recognizing implicit right of contribution establishes PRPs should not be exposed to joint and several liability in actions by other PRPs seeking to recover cleanup costs); *see also* New Castle Cty. v. Halliburton NUS Corp., 111 F.3d 1116, 1121 (3rd Cir. 1997) (denying plaintiff's cost recovery claim under § 107 because plaintiff was potentially responsible person); United States v. Colo. & E. R.R., 50 F.3d 1530, 1535 (10th Cir. 1995) (illustrating legislative history stated principle goal in creating § 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").

66. *See infra* notes 71-75 (showing courts determined action between PRPs for apportionment of cleanup costs is always § 113 action for contribution).

67. *See* Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F. 3d 344, 350 (6th Cir. 1998) (using Black's Law Dictionary to define "contribution"); *see also* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (using RESTATEMENT (SECOND) OF TORTS § 886A's definition of "contribution"); *Colo. & E. R.R.*, 50 F.3d at 1536 (reaching back to AMERICAN JURISPRUDENCE to define "contribution" in legal context); 18 AM. JUR. 2D *Contribution* § 99 (2012) (helping to define contribution in legal context); BLACK'S LAW DICTIONARY 328 (6th ed. 1990) (defining contribution as "right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear").

68. *See* United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 96 (1st Cir. 1994) (looking to traditional § 113 meaning of "contribution" and failing to interpret § 107).

69. *See* Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998) (holding § 107 was "not available" because it would render § 113 null).

70. New Castle Cty. v. Halliburton NUS Corp., 111 F.3d 1116, 1119 (3d Cir. 1997) (holding PRP may not bring claim for recovery of costs against another PRP); *see also* Pneumo Abex Corp. v. High Point, Thomasville, & Denton R.R. Co., 142 F.3d 769, 776 (4th Cir. 1998) (concluding PRP may not bring cost recovery claim against another PRP); Axel Johnson, Inc. v. Carroll-Carolina Oil Co., Inc., 191 F.3d 409, 415 (4th Cir. 1999) (denying use of § 107 when parties settled with EPA agreeing to perform remediation at their own expense). By the time of the *Axel Johnson* decision, the Sixth and Ninth circuits had also ruled on this issue. *Centerior Serv. Co.*, 153 F.3d at 349 (choosing to interpret § 113 language rather than § 107 language); Pinal Creek Grp. v. Newmont Mining Grp., 118 F.3d 1298, 1299-1301 (9th Cir. 1997) (focusing only on ordinary meaning of term "contribution" in § 113).

Some circuits ignored the language of § 107, as if it was in the legal shadow lands. The Sixth Circuit construed only § 113's language, not the plain language of § 107.[71] The Seventh Circuit left § 107 available only for "innocent other" parties.[72] The Ninth Circuit focused only on the ordinary meaning of the term "contribution" in § 113.[73] The Tenth Circuit concluded that "§ 113(f) would be rendered meaningless" if § 107 were available, and then eliminated access to § 107.[74] The Eleventh Circuit simply held that PRPs may not assert claims for recovery of costs under § 107.[75]

The first eleven of the federal circuits, collectively with responsibility over legal disputes in all fifty United States barring none, in separate matters, definitively reached identical decisions, finding that plaintiff PRPs could not use § 107 to spread their incurred hazardous remediation expenses to other legally liable parties. The cost recovery legal door was closed and locked to private parties. The only remaining circuit, the D.C. Circuit, did not hear a case to reach any decision.

In 2007, the Supreme Court unanimously rejected these federal appellate opinions and confirmed the original contradictory district court opinions. Before arriving at this outcome, however, the Supreme Court had to deal with another CERCLA case that presented a related, though distinct, CERCLA legal issue.

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71. *See Centerior Serv. Co.*, 153 F.3d at 349 (choosing to interpret § 113 language rather than § 107 language). In interpreting the "any other person" language of § 107, the court held that "any person may seek to recover costs under § 107(a), but . . . it is the nature of the action which determines whether the action will be governed exclusively by § 107(a) or by §113(f) as well." *Id.* at 353.

72. Azko Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764-65 (7th Cir. 1997) (leaving § 107 available only for "innocent" other parties and providing that § 107 applies to only "innocent" other parties). This was one of the first of many times where a circuit court of appeals has called these types of claims "a quintessential claim for contribution." *Id.* at 764. The court, however, suggested that a landowner required to cleanup a release of hazardous substances deposited on its land by entirely unrelated third parties might be able to pursue a § 107 cost recovery action. *See id.* Subsequent Seventh Circuit decisions reiterated this "innocent landowner" exception. *See, e.g.*, AM Int'l, Inc. v. DataCard Corp., 106 F.3d 1342 (7th Cir. 1997); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235 (7th Cir. 1997); NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776 (7th Cir. 2000); Contra W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 689-90 (9th Cir. 2004); Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1134-35 (10th Cir. 2002).

73. *Pinal Creek Grp.*, 118 F.3d at 1299-1301 (focusing only on ordinary meaning of term "contribution" in § 113).

74. United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1535-36 (10th Cir. 1995) (reasoning availability of § 107 would render § 113(f) meaningless and remove access to § 107).

75. *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1512-13 (11th Cir. 1995) (holding PRPs may not assert claims for recovery of costs under §107).

C. The Supreme Court Circles the Moon

1. 2004: Cooper v. Aviall Limits CERCLA § 113

In *Cooper Industries, Inc. v. Aviall Services, Inc.*,[76] the Supreme Court disrupted the uniformly orbiting moon of the circuit courts, addressing one aspect of the barrier created by the federal circuit opinions between 1993 and 2004.[77] *Cooper* prohibited a private party from initiating a claim under the alternative route of § 113(f)(1) against other PRPs for contribution to hazardous waste cleanup expenses unless and until that plaintiff itself first had been sued for response costs by (or settled with) the government under § 107(a) or § 106 in an administratively- or judicially-approved manner.[78] In a large portion of prior § 113 matters, this prerequisite of suit prior to using § 113 was *not* present, and the alternative of using § 113 after 2004 would be legally blocked.

Thus, as of 2004, with the cost-reallocation mechanism of § 107 comprehensively disabled by eleven circuit courts, and the § 113 mechanism now limited by the Supreme Court, hazardous waste remediation hit an impasse. Incentives for voluntary cleanup of hazardous waste sites were eclipsed because cost recovery for the volunteering party was rendered difficult or impossible to pursue efficiently or effectively against co-liable parties.

In its *Cooper* decision, the Supreme Court ruled against the weight of involved stakeholders. On *certiorari*, the odds on paper were stacked: twenty-three states joined *Cooper* as *amici*, as well as numerous corporations and others, to argue in support of the final Fifth Circuit *en banc* decision allowing unfettered use of § 113; the United States filed the sole *amici* brief supporting Cooper Industries.[79] The Court maintained the distinction between § 107 "cost recovery" and § 113 "contribution" actions. "After SARA [the Superfund Amendment and Reauthorization Act], CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances,

76. Cooper Indus. Inc. v. Aviall Serv., 543 U.S. 157, 157 (2004) (addressing barrier created by federal circuit opinions between 1993 and 2004).

77. For further discussion of federal circuit court decisions regarding the critical liability clause of Superfund, see *supra* notes 44-75 and accompanying text.

78. *Cooper Indus.*, 543 U.S. at 167 (prohibiting private party from initiating claim under alternative route of CERCLA § 113(f)(1) against other PRPs for contribution, unless and until that plaintiff party first had been sued for response costs by government under § 107(a) or § 106 of CERCLA in administratively or judicially-approved manner).

79. Brief for United States as Amicus Curiae Supporting Petitioner, Cooper Indus. Inc. v. Aviall Serv. Inc., 543 U.S. 157 (2004) (No. 02–1192), 2004 WL 354181 (supporting position of Cooper Industries).

§§ 113(f)(1), 113(f)(3)(B)."[80] By finding that the authorization to initiate a contribution action after or during such other litigation or settlement is the only means, not an illustration of one of a host of means, to entitle one to bring contribution claims against other potentially liable parties under the statute, *Cooper* followed the plain meaning of the language of § 113 of the statute.[81]

While the 2004 *Cooper* decision was not unanimous, the position of the Justices was revealing. The two dissenters in this 7-2 decision sought to go further in the opinion and address whether there was a private right to cost recovery along the alternative road of § 107(a); however, because Cooper had been forced to drop its alternative § 107 claim after the initiation of litigation, the issue was not briefed nor addressed in the circuit court opinion on review, and therefore, was not before the Court.[82] This 2004 Supreme Court decision cut off § 113 as an effective cost reallocation route to encourage private hazardous substance remediation and cost sharing. The incentive to voluntarily remediate contamination was significantly crimped.

2. *2007: Atlantic Research Reopens CERCLA § 107*

In 2007, the Supreme Court, via a rare unanimous decision, reversed this decade of circuit court decisions.[83] This unanimous reversal of every circuit court in the nation was a rare, and perhaps unprecedented, occurrence in United States judicial history.[84] In fact, procedurally it is difficult for the Supreme Court to grant *certiorari* for a decision that does not declare a federal law unconstitutional and has no circuit split in the interpretation of a statute.

After *Cooper* was decided in 2004, there was some equivocation of four of the circuits, which had previously been part of the eleven circuit blockade of access to § 107 for private parties.[85] The Fifth Circuit reexamined the controversy, but still refused to recognize

80. *Cooper Indus.*, 543 U.S. at 163 (maintaining distinction between § 107 "cost recovery" and § 113 "contribution" actions).

81. *Id.* (following plain meaning of § 113 language).

82. *Id.* (following plain meaning of § 113 language).

83. *See* United States v. Atl. Research Corp., 551 U.S. 128, 131, 136 (2007) (affirming CERCLA allows potentially responsible parties to recover cleanup costs from other potentially responsible parties).

84. *Id.* (reversing prior Circuit Court decisions). For a discussion on the uniqueness of this unanimous effective reversal of eleven circuit courts, see *supra* note 5 and accompanying text.

85. For a discussion addressing barriers created by federal circuit opinions between 1993 and 2004, see *supra* notes 44-75 and accompanying text.

the availability of the § 107 path.[86] The Third Circuit remained fixed: because the Supreme Court in *Cooper* did not overrule the circuits, the circuits should continue to deny PRP access to § 107.[87] Despite its decision denying *all* PRPs access to § 107 to prevent rendering § 113 supposedly "a nullity," in *Bedford Affiliates v. Sills*,[88] the Second Circuit had second thoughts in *Consolidated Edison Co. v. UGI Utilities, Inc.*[89]

After *Cooper*, a different panel of the Eighth Circuit decided its prior decisions had been undermined by the Supreme Court decision, that these prior decisions could be departed from without being directly reversed by the Supreme Court, and that a private PRP plaintiff may avail itself of a § 107 cost recovery action.[90] Some federal trial courts followed both the Second and Eighth Circuit and allowed access to § 107,[91] while other courts followed the Third and

86. Aviall Serv., Inc. v. Cooper Indus. (Aviall Serv.), 694 F. Supp. 2d 567, 577 (N.D. Tex. 2006) (ordering district court to permit Cooper to amend complaint to reassert original § 107 claim).

87. E.I. DuPont De Nemours & Co. v. United States, 460 F.3d 515, 544–45 (3d Cir. 2006) (finding because Supreme Court in *Cooper* did not overrule circuits, circuits should continue to deny PRP access to § 107).

88. Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998) (denying PRPs access to § 107 to preserve § 113).

89. Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 96-97 (2d Cir. 2005) (reevaluating prior decision in *Bedford*). The plaintiff entered into a Voluntary Cleanup Agreement with the state of New York. *Id.* The plaintiff alleged that under that agreement it had resolved its liability to the state, but the court held that the resolution of liability must pertain to liability of claims under CERCLA. *Id.* The court noted that while the plaintiff may have resolved its liability to the state of New York for claims arising under the state's environmental laws, the agreement contained a "Reservation of Rights" whereby the state reserved its right to bring CERCLA claims against the plaintiff. *Id.* Because the state reserved a right to bring future CERCLA claims against the plaintiff, the court held that the plaintiff had not resolved its CERCLA liability to the state and therefore it could not bring a contribution claim under § 113(f)(3). *Id.*

90. Atl. Research Corp. v. United States, 459 F.3d 827, 833 (8th Cir. 2006) (finding prior *Dico* decision was undermined by Supreme Court, but departures from *Dico* would not be directly reversed by Supreme Court). The court also found that private party PRP plaintiffs may avail themselves of § 107 cost recovery action. *Id.*

91. *See* City of Bangor v. Citizens Commc'ns Co., 437 F. Supp. 2d 180, 222 (D. Me. 2006) (declining to interpret *Aviall* as stripping PRPs of their rights to § 107 claims); Raytheon Aircraft Co. v. United States, 435 F. Supp. 2d 1136, 1149-50 (D. Kan. 2006) (holding PRP has implied right to contribution under § 107); McDonald v. Sun Oil Co., 423 F. Supp. 2d 1114, 1133 (D. Or. 2006) (following Ninth Circuit precedent stating § 107 "continues to exist as . . . viable cause of action" for PRPs); Aggio v. Aggio, No. C 04–4357 PJH, 2008 WL 2491697, at *5-6 (N.D. Cal. Sept. 19, 2005) (holding PRPs continue to have rights to claims under § 107 in Ninth Circuit); Ferguson v. Arcata Redwood Co., No. C 03–05632 SI, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005) (recognizing Ninth Circuit allows PRPs to bring contribution claims under § 107); Viacom, Inc. v. United States, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) (noting change in circuit courts and potentially allowing

Fifth Circuit denials of access to § 107 cost recovery.[92] As a result of this rethinking of § 107, which *Cooper* neither mandated nor suggested, there was finally a conflict in the circuit courts.

Thus, in 2007, the Supreme Court finally identified some circuit court equivocation even if it was a bit after the original circuit holding, and thus, granted *certiorari* to take a second review of CERCLA and a potentially significant judicial step. In *Atlantic Research*, the United States argued that "any other person" in § 107(b), who could be plaintiffs, referred to parties other than the four groups of liable PRPs identified in § 107(a)(1)-(4) as "persons," who could be defendants.[93] The Court dismissed this disconnected argument to interpret different sentences of § 107 as making "little textual sense."[94]

Despite the § 113(f)(2) contribution protection statutorily afforded to settling parties, the *Atlantic Research* Court assumed, without directly ruling, that plaintiffs utilizing § 107 would not be

responsible parties to bring § 107(a) action); Kotrous v. Goss-Jewett Co., 523 F.3d 924, 927 (E.D. Cal. 2005) (acknowledging controlling Ninth Circuit precedent and allowing potentially responsible parties to file contribution claims under § 107(a)); Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp., 365 F. Supp. 2d 913, 917–18 (N.D. Ill. 2005) (allowing potentially responsible parties to sue under § 107(a)); *see also* Vine St. L.L.C. v. Keeling, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005) (allowing Vine Street to state claim for cost recovery under § 107(a)).

92. *See* Spectrum Int'l Holding, Inc. v. Universal Coops., Inc., Civ. No. 04–99 (MJD/AJB), 2006 WL 2033377, at *5 (D. Minn. July 17, 2006) (noting Eighth Circuit precedent and holding potentially responsible party may not bring § 107(a) claim); Adobe Lumber, Inc. v. Hellman, 415 F. Supp. 2d 1070, 1076 (E.D. Cal. 2006) (finding "a PRP does not have a *cost recovery action*, and instead has only a *contribution action*"); R.E. Goodson Constr. Co. v. Int'l Paper Co., No. C/A 4:02-4184-RBH, 2005 WL 2614927, at *29 (D.S.C. Oct. 13, 2005) (dismissing plaintiff's § 113 claim for lack of civil action under § 107(a)); Montville Twp. v. Woodmont Builders, 244 Fed. Appx. 514, 527 (D.N.J. 2005) (precluding PRP from obtaining recovery costs from another PRP under § 107(a)); City of Rialto v. United States Dep't of Def., No. 5:04-CV-00079-PSG-SS, 2005 WL 5519062 (C.D. Cal. Aug. 16, 2005) (finding PRPs may only pursue contribution claims under combined effect of § 107(a) and § 113(f)); Boarhead Farm Agreement Grp. v. Advanced Envtl. Tech. Corp., 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005) (finding § 113 is only avenue for PRP contribution claims); Blue Tee Corp. v. ASARCO, Inc., No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at *6 (W.D. Mo. June 27, 2005) (noting PRPs cannot seek contribution against other PRPs under § 107); Atl. Research Corp. v. United States, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484 (W.D. Ark. May 31, 2005) (barring § 107 cost recovery); Waukesha v. Viacom Int'l Inc., 362 F. Supp. 2d 1025, 1027–28 (E.D. Wis. 2005) (stating that to allow § 107 claim would be "futile"); Mercury Mall Assocs. v. Nick's Mkt., Inc., 368 F. Supp. 2d 513, 520 (E.D. Va. 2005) (denying § 107 recovery claim).

93. United States v. Atl. Research Corp., 127 S.Ct. 2331, 2335 (2007) (setting forth United States' argument that "any other person" in § 107(b), who could be plaintiffs, referred to parties other than four groups of liable PRPs identified in § 107(a)(1)–(4) as "persons," who could be defendants).

94. *Id.* at 2336 (dismissing disconnective argument to interpret different sentences of § 107 as making "little textual sense").

immune from litigation counterclaims pursuant to § 113, which would cause a court to equitably apportion *de novo* the total cost burden among co-liable litigants.[95] In *Atlantic Research*, the Supreme Court observed that an equitable allocation of response costs could be achieved by bringing "a [§] 113(f) counterclaim."[96] The Court noted the § 113(f)(2) "settlement bar does not by its terms protect against cost recovery liability under [§] 107(a)."[97] The Supreme Court also noted "a defendant PRP in such a [§] 107(a) suit could blunt any inequitable distribution of costs by filing a [§] 113(f) counterclaim."[98]

As a result, there was less protection for plaintiffs who had already settled with the government against the very § 107 cost recovery claims that the Court had liberated from the blockage of the eleven circuit courts. The Court did not seem to bar any § 113(f) counterclaims by defendants and noted that they would be protected from reimbursement claims by their own prior settlement with the government, if not from § 107 cost recovery.[99] Settling parties were now opened up to § 107 claims, which are distinguished from contribution claims and not limited by any contribution protection under § 113(f)(2).

Subsequently, a federal district court held that *Cooper* and CERCLA definitively establish that no § 113(f)(1) contribution action may be brought in the absence of a prior § 106 or § 107 action directly against the would-be contribution plaintiff. The district court reconsidered its prior analysis and held that § 113(f)(1) requires would-be plaintiffs to have been the subject of a § 106 or § 107 action in order to state a claim for contribution.[100] The court

95. *Id.* at 2338-39 (assuming, without directly ruling, that plaintiffs utilizing § 107 would not be immune from litigation counterclaims pursuant to § 113, which would cause court to equitably apportion *de novo* total cost burden among co-liable litigants).

96. *Id.* (observing equitable allocation of response costs could be achieved by bringing "[§] 113(f) counterclaim").

97. *Id.* at 2339 (noting § 113(f)(2) "settlement bar does not by its terms protect against cost recovery liability under [§] 107(a)").

98. *Atl. Research Corp.*, 127 S.Ct. at 2336-39, n.7 (2007) (noting that "defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a [§] 113(f) counterclaim").

99. *Id.* (failing to bar any § 113(f) counterclaims by defendants and noting they would be protected from reimbursement claims by prior settlement with government, if not from § 107 cost recovery).

100. Port of Tacoma v. Todd Shipyards Corp., No. C08-5132BHS, 2009 WL 113852, at *3 (W.D. Wash. Jan 14, 2009) (holding *Cooper* and CERCLA definitively establish that no § 113(f)(1) contribution action may be brought in absence of prior CERCLA § 106 or § 107 action directly against would-be contribution plaintiff). Despite previously concluding that a contribution action was authorized

held that *Atlantic Research* did not alter the holding of *Cooper* with regard to the viability of actions under § 113(f)(1), and reiterated the *Cooper* analysis.[101]

Atlantic Research also punctuated a shift in the way the Supreme Court interpreted federal statutes. In 2005, the Supreme Court announced that it should interpret statutes through a reading of language "that makes sense of each phrase" and "the one favored by our canons of interpretation."[102] Sequentially, the Court then relied on a plain language interpretation, building on the rationale of its 2007 global warming and other environmental decisions during that period.[103] This canon of statutory construction asserts the actual words of the statute are "the most important evidence of its meaning," "the final expression of the meaning intended," and the most authoritative "interpretive criterion."[104] "[J]udges are not at liberty," according to this interpretive theory, "to pick and choose among congressional enactments, and when two or more statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[105]

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under *Atlantic Research* if it "stemmed" from an action instituted under § 106 or § 107, Judge Settle's reconsidered opinion recognized that the *Atlantic Research* opinion did not alter the holding in *Cooper Industries* with respect to the timing of actions under § 113(f)(1). *Id.* In order to proceed, such claims must be brought by PRPs "with common liability" stemming from an action instituted under § 106 or § 107. *Id.* A contribution plaintiff may not rely on the mere *possibility* that it will be held liable under § 106 or § 107, but itself must first be subject to a claim brought under those sections of the statute. *Id.*

101. *Id.* (restating holding in *Cooper*).

102. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (finding Supreme Court should interpret statutes in ways "that makes sense of each phrase" and are "favored by our canons of interpretation").

103. *See Atl. Research*, 551 U.S. at 136 (describing possible litigants under § 107(a)(4)(B)); Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 172 (providing plain language to be used when interpreting "any other person"); Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 679 (2007) (giving plain language interpretations of environmental statutes); Envtl. Def. v. Duke Energy, 549 U.S 561, 576-77 (2007) (conforming to other decisions regarding plain language interpretation); Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 528-29 (2007) (using plain language interpretation of Clean Air Act to refute EPA position that carbon dioxide was not meant to be regulated by Congress).

104. Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (refuting conception that most judges actually begin statutory interpretation by looking at language of act). Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 212–13 (1996) (quoting United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929)).

105. Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265-66 (1992) (describing duties incumbent upon judges when making judicial interpretations of legislative acts).

It has been uncommon during recent years for the Supreme Court to render a unanimous decision. As mentioned, it is almost without precedent for the Supreme Court to unanimously take a position contrary to every federal circuit court's prior opinions and decisions. For over a decade, no federal appellate court in the country sanctioned the view expressed in 1994; however, it became the law of the land when the Supreme Court unanimously reversed all circuits in 2007.[106]

When such a reversal happens, normally the lower federal courts seamlessly follow suit; however, this trend is not quite so straightforward when examined. Complex statutes, such as Superfund, require a number of factual determinations that are wholly within trial court jurisdiction in an individual case, that can redirect the outcome of a dispute, and allow lower courts the opportunity to redirect judicial vectors.

For example, the Supreme Court noted *voluntarily* incurred costs can only be allocated by recourse to § 107. The Supreme Court did not define the line between what is and is not *voluntary*.[107] The Supreme Court clarified "a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a)."[108]

There are three restrictive constellations of opinion under which recent lower court decisions are now construing the Supreme Court's statement. First is the most restrictively tight constellation, where any settlement with the government nullifies as involuntary all prior or subsequent private party-plaintiff payment of remediation costs and use of § 107 for any cost recovery, even those not reimbursed through the settlement amount and otherwise incurred. Second, the moderately restrictive constellation, where a settlement with the government nullifies only recovery under § 107 cost recovery for the amount directly reimbursed to the government as involuntary, not subsequent independent direct expenditures by the private party for remediation. Finally, under

106. Steven Ferrey, *Allocation & Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 53-78 (1994) (arguing for infusion of common law equity principles despite explicit inclusion in language of statute).

107. United States v. Atl. Research Corp., 551 U.S. 128, 141 (2007) (affirming lower court decision in line with author's opinion).

108. *Id.* at 139 n.6 (describing allocation of costs sought to be paid under § 107).

the third constellation, private party-plaintiffs may use § 107 cost recovery or § 113 contribution, yet courts have grafted on to the analysis their prudential preference for § 113 and so restrict plaintiffs.

Navigating among these constellations creates an inconsistent tangle of federal precedent that hardly lends any precision or consistency to the original Supreme Court enunciation of more open access to § 107. The lower federal courts can alter basic, clearly articulated Supreme Court doctrine, merely by determining whether the particular facts in a subsequent case comply with an undefined adjective. Undefined particles of speech change the resultant legal landscape profoundly when applied differently. We will plumb some of these unusual constellations of recent federal court decisions.

III. THE "POISON PILL": CASH SETTLEMENT WITH THE GOVERNMENT MAKES FUTURE DIRECTLY INCURRED "RESPONSIVE COSTS" ALSO NOT ELIGIBLE FOR § 107 COST RECOVERY

"O, swear not by the moon, the fickle moon, the inconstant moon, that monthly changes in her circle orb, Lest that thy love prove likewise variable."[109]

Should a settlement of past remediation costs incurred by the government also taint recovery of future directly incurred remediation costs? Does settling some costs make the entire remediation not voluntary, and thus negate the use of § 107 to recover any remediation costs, even when not part of the government settlement, from other liable parties? It seems to depend on what is deemed a voluntary incursion of costs. The lower federal courts, however, have not spoken with a uniform interpretation on this. There are three different ways that remediation work can be performed: (1) the plaintiff can hire the contractor or do the work itself; (2) the plaintiff can settle with a government agency which can use the settlement proceeds to have work performed or restitute amounts to the government; or (3) some combination of the first two options.

Defendants argue against imposing shared liability under § 107 for anything other than option one — plaintiff's original cash payment for remediation expenses paid directly to a remediation contractor. This makes settlement with the government, something

109. William Shakespeare, *The Complete Works: Romeo and Juliet* 345 (Stanley Wells & Gary Taylor eds. 1998).

normally encouraged by CERCLA and the EPA, a poison pill that taints all other costs a party incurred. This analysis focuses on who signs the first check, rather than the ultimate shared responsibility of multiple defendants. This focus on the mechanics of the plaintiff, rather than the liability of the defendants, accomplishes this shift.

Such a holding makes suit and settlement a double-edged sword; it is a prerequisite for § 113 actions and it can be poison for § 107 actions. Settle improperly, and the party can be left high and dry under this interpretation of Superfund. First, we examine court distinctions regarding with whom one settles for § 113 access and what does and does not constitute a settlement.

A. Settling With Whom?

1. Settling with the State Rather than the EPA

The states are major players in hazardous substance remediation, relative to federal agencies: The states conduct 90% of all enforcement actions, as well as 97% of the inspections at regulated facilities, compared to the remainder performed by the EPA.[110] In doing so, the states can operate under their own state statutory authority. The Supreme Court's language contemplates recourse to a § 113 contribution action to spread costs incurred among liable parties "after an administratively or judicially approved settlement that resolves liability to the United States or a State."[111] Section 113(f) does not define or limit the key factual determination of what is an "administratively-approved" settlement.[112] In the use in this statutory text of the disjunctive conjunction between the levels of federal or state government, it would appear that an approved settlement with a state environmental agency is an equally valid option to enable a subsequent § 113 contribution action by a private party to recover costs of cleanup.

The states have rights under CERCLA or state law to recover their own specifically-incurred site response and cleanup costs, which by definition do not include any federally-incurred response

110. Dean Scott, *State Officials Urge Funding Shift to Restore Fiscal Year 2007 Grants*, 37 ENV'T. REP. (BNA) 400, 401 (2006) (noting enforcement statistics of state enforcement actions under CERCLA).

111. Cooper Indus., Inc. v. Aviall Servs. Inc., 543 U.S. 157, 165 (2004) (construing 42 U.S.C. 9613(f)(3)(A) and specifying parties against whom contributions may be sought).

112. *Id.* (interpreting 42 U.S.C. 9613(f) and 9601, and describing administratively approved settlement without further clarification or examples).

costs or rights.[113] Section 104 provides that the EPA may enter into a contract or cooperative agreement with the State, whereby the State may exercise CERCLA authority, including the EPA's authority to enter into settlement agreements.[114] Many state environmental agencies do not have memoranda of understanding with the EPA to allow the state to be able to discharge or resolve any federal claims against a potentially responsible party via a settlement with the state.[115] In such circumstances, the state settlement cannot qualify as an administratively approved settlement under CERCLA.

To utilize § 113, prior settling parties claimed that even though it was not recited in past responses to orders or settlements, the hidden intent of the parties was to resolve federal CERCLA liability. Trial courts in the Fifth[116] and Ninth Circuits[117] took a pragmatic response and allowed amendment of § 107 claims to comport with allowable pending litigation post-*Cooper*. It is questionable whether a state settlement that is finalized without some form of public comment and agency response, as CERCLA regulations require, could qualify under § 113 as an administratively — or judicially — approved settlement.[118]

Many other courts take a narrower perspective on state settlements. For example, a federal court in Wisconsin dismissed an ac-

113. 42 U.S.C. § 9622(d)(1)(A) (defining costs recoverable by state actors in CERCLA claims).

114. 42 U.S.C. § 9604 (providing EPA to enter into contract or cooperative agreement with state, where state may exercise CERCLA authority).

115. 42 U.S.C. § 9626 (describing procedure by which state agencies can reach pre-existing agreements with EPA regarding discharge of settlement claims).

116. *See* Vine St. LLC v. Keeling, 362 F. Supp. 2d 754, 763 (E.D. Tex. 2005) (permitting access to § 107 as default alternative where § 113 is not available after *Aviall*). Note that *Cooper v. Aviall* came before the Supreme Court from the Fifth Circuit, and returned there on remand. *Cooper Indus.*, 543 U.S. at 165, 171. On remand to the Fifth Circuit, the *en banc* remanded the case to the district court and ordered the district court to permit Aviall to amend its complaint to reassert its original § 107 claim for cost recovery. Availl Serv. Inc. v. Cooper Indus., 572 F. Supp. 2d. 676, 683–84 (N.D. Tex. 2008). On remand, however, the district court ultimately refused to recognize the availability of the § 107 path. Aviall Serv., Inc. v. Cooper Indus., LLC, No. 3:97–CV–1926–D, 2006 WL 2263305, at *10 (N.D. Tex. Aug. 8, 2006). The district court concluded that Aviall could not use § 107(a) for either a cost recovery action or a contribution claim. *Id.* Thus, prior to a judicially approved settlement with the federal government, parties cannot recover costs under any federal scheme, as both § 107 and § 113 are walled off. *Id.* Over the years, different panels of the Fifth Circuit had suggested, but never squarely held, that a private PRP could utilize § 107 for cost recovery. OHM Remediation Serv. v. Evans Cooperage Co., 116 F.3d 1574, 1583 (5th Cir. 1997) (remanding to determine viability of § 107 claim).

117. *See* Kotrous v. Goss-Jewett Co. of N. Cal., 523 F.3d 924, 927 (9th Cir. 2007) (describing practical response of court).

118. 42 U.S.C. § 9622(d)(2)(B) (2006) (lacking clarity as to exact requirements for finalization of state settlements).

tion because there was no settlement of federal claims as part of the state litigation.[119]

A Texas federal court held state consent agreements do not constitute settlements resolving CERCLA liability.[120] A California federal court held that letters exchanged between the plaintiff and state and federal authorities did not qualify as a settlement agreement under § 113(f)(3) because the words "settlement" and "CERCLA" were nowhere contained in the letters, and failed to show that the state was acting pursuant to authority granted by the EPA.[121] An Arizona federal court found a memorandum agreement under state law settling a dispute that had not evolved to litigation did not constitute a settlement satisfying the post-*Cooper* § 113 requirement.[122] A Connecticut federal court found a state civil order to remediate a site was not a federal order under § 106 and could not qualify to enable a § 113 contribution cost recovery path.[123]

2. *Settling in Response to EPA Suit Compared to Settling through Administrative EPA Order*

The Supreme Court in its 2004 *Cooper* opinion did not address the issue of whether private parties cleaning contaminated sites pursuant to a unilateral administrative order (UAO) entered into with a government agency have a right of contribution toward their expenses pursuant to § 113(f)(1); thus, the Supreme Court did not reach the interstices of whether such settlement provides a § 107

119. Waukesha v. Viacom Int'l Inc., 362 F. Supp. 2d 1025, 1026–28 (E.D. Wis. 2005) (stating that to allow § 107 claim would be "futile").

120. Vine St. LLC v. Keeling, 362 F. Supp. 2d 754, 761 (E.D. Tex. 2005) (rejecting state consent agreements for purpose of resolving CERCLA liability).

121. Ferguson v. Arcata Redwood Co., No. C 03–05632 SI, 2005 WL 1869445, at *5 (N.D. Cal. Aug. 5, 2005) (requiring more explicit language in purported settlement agreement).

122. *See* Asarco, Inc. v. Union Pac. R.R. Co., No. CV 04–2144–PHX–SRB, 2006 WL 173662 at *16 (D. Ariz. Jan. 24, 2006) (finding agreement satisfied neither § 113 nor § 122, and rejecting argument that where states were delegated to oversee cleanup, states could fashion CERCLA cleanup outside normal contours of § 111). *See also* Pharmacia Corp. v. Clayton Chem. Acquisition, LLC, 382 F. Supp. 2d 1079, 1081-85 (N.D. Ill. 2005) (finding administrative order on consent was not "administrative settlement" contemplated by § 113 for contribution action); W.R. Grace & Co.-Conn. v. Zotos Int'l, No. 98-CV-838S(F), 2005 WL 1076117, at *2-3 (W.D.N.Y. May 3, 2005) *aff'd in part, rev'd in part*, 559 F.3d 85 (2d Cir. 2009) (describing consequences of limited settlement options).

123. Cadlerock Props. Joint Venture v. Schilberg, No. 3:01CV895 (MRK), 2005 WL 1683494, at *6 (D. Conn. July 19, 2005) (disallowing use of state order to trigger § 113 cost recovery path).

plaintiff contribution protection against one of its defendants' counterclaim for equitable contribution under § 113.[124]

The jurisprudence in the federal courts is split on whether an administrative order on consent (AOC) constitutes an eligible settlement for purposes of allowing a private plaintiff § 113 contribution actions after *Cooper*. UAOs can qualify as a civil action for purposes of a PRP's contribution claim under § 113(f)(1); however, the majority holding is that an AOC does not qualify because it is not the result of a "civil action."[125] Under this rationale, an AOC is a pre-litigation agency resolution or settlement; it does not settle a contested adjudicatory proceeding.

A federal trial court in New York limited the ability of a settlement with the state to be stretched after-the-fact to resolve CERCLA liability so as to enable a private party § 113 contribution action.[126] Where a party enters an AOC with the state that does not contain any reference to CERCLA and does not purport to release federal CERCLA liability of the settler, that settlement relieves only state liability of the settler and does not qualify to enable a private party federal contribution action under § 113.[127] In this particular case, the settling party amended its complaint after the decision in *Cooper* to add a § 113(f)(3) contribution claim.[128] The plaintiff argued that it had entered into "two administratively approved settlements" with the state Department of Environmental Conservation, which by their terms resolved the plaintiff's liability to the state, and there-

124. Cooper Indus., v. Aviall Serv., 543 U.S. 157, 166 (2004) (lacking mention of UAO). The Court held that the private party who had not been sued in CERCLA administrative or cost recovery action could not obtain contribution from other liable parties. *Id.*

125. Carrier Corp. v. Piper, 460 F. Supp. 2d 827, 841 (W.D. Tenn. 2006) (holding unilateral administrative orders can qualify as civil actions). A current owner of a facility, from which there was a release of a hazardous substance, brought action against former facility owner and current operator to recover past and future response costs, damages, and other relief. *Id.* A unilateral administrative order qualifies as a civil action for purposes of a PRP's contribution claim under CERCLA § 113(f)(1) and PRP can also seek cost recovery under § 107. *Id.* *See also* Centerior Serv. Co. v. ACME Scrap Iron & Metal Corp., 153 F.3d 344, 351-52 (6th Cir. 1998) (holding potentially responsible parties could not bring joint and several cost recovery action, but were restricted to action for contribution).

126. W.R. Grace & Co.-Conn. v. Zotos Int'l, No. 98-CV-838S(F), 2005 WL 1076117, at *6-7 (W.D.N.Y. May 3, 2005) (limiting effect of agreement reached prior to § 113 claim for cost contributions). The AOCs were entered with the state environmental agency during the 1980s. *Id.* The AOC purported only to resolve state liability, did not purport to release CERCLA liability, and did not indicate any EPA concurrence with the settlement. *Id.* The liability was relieved only as to the state claims and not the CERCLA claims. *Id.*

127. *Id.* (noting precise and explicit language required for valid agreement).

128. *Id.* (describing procedural posturing of settling party).

fore allowed the plaintiff to bring a claim for contribution under § 113(f)(3).[129]

The court disagreed and held that for a settlement to be valid under § 122, it "must be *judicially* approved – i.e., entered as consent decree in the appropriate United States District Court."[130] Section 122 grants the EPA the authority to enter into settlement agreements with a PRP and the settlement "must be 'entered in the appropriate United States district court as a consent decree.'"[131]

States can execute settlements pursuant to CERCLA, but not *sua sponte*. The EPA must pre-approve States to exercise such settlement authority. Section 104 provides that a state may seek to exercise CERCLA authority, including the EPA's authority to enter into settlement agreements, only upon application to the EPA and its "'enter[ing] into a contract or cooperative agreement with the State.'"[132] A federal court in Illinois found an administrative order on consent with the EPA pursuant to § 106, which contained standard language that the parties did not admit to liability, and belied any argument that it was a settlement and not an "administrative settlement" contemplated by § 113 for purposes of a subsequent contribution action.[133] Furthermore, a federal court in Pennsylvania held that a private cooperative agreement to share in the

129. *Id.* (reciting plaintiff's claim).

130. *Id.* at *10 (holding valid CERCLA agreement must be judicially approved and properly filed with appropriate District Court).

131. *W.R. Grace & Co.-Conn.*, 2005 WL 1076117, at *10 (citing 42 U.S.C. § 9622(d)(1)(A)) (describing requirement for reaching qualified § 122 agreements).

132. *Id.* (noting requirements for states wishing to independently exercise CERCLA authority). In looking at the terms of the 1988 Consent Order issued by the state, the court found that nowhere did it "state that the DEC was exercising any authority under CERCLA, does not indicate that the EPA concurred with the remedy selected and . . . provide a release as to any CERCLA claims." *Id.* Moreover, nowhere within the order was the term "CERCLA" used. *Id.* Thus, the 1988 Consent Order only resolved Grace's liability to New York state and it could not bring a claim for contribution under § 113(f)(3). *Id.*

133. Pharmacia Corp. v. Clayton Chem. Acquisition, LLC, 382 F. Supp. 2d 1079, 1081-85 (N.D. Ill. 2005) (describing procedural findings). The court looked at the term "civil action" in Black's Law Dictionary and found it defined as a "noncriminal litigation," whereas "administrative order" is defined as "[a]n order issued by a government agency after an adjudicatory hearing" as well as "[a]n agency regulation that interprets or applies a statutory provision." *Id.* The court noted that § 122 authorized EPA to enter into administrative settlements, but the administrative order on consent was issued pursuant to § 106 rather than § 122(d)(3). *Id.* It was consistently captioned as an "order" rather than a "settlement." *Id.*

costs of cleaning up a Superfund site did not qualify as a suit or settlement.[134]

B. When Voluntarily Paying the Government Even A Portion of Total Cleanup Costs Negates Private Party Use of § 107 to Recover Other Direct Future Costs as not "Voluntary"

How important is timing in terms of Superfund liability? Does a payment by a settling PRP to the government, when the government then uses the funds to pay the remediation contractor, rather than the PRP paying the contractor directly, prevent that private party from taking advantage of recovering from other PRPs under § 107 cost recovery?[135] Does it change if the government collects the settlement funds before it pays the remediation contractor, as opposed to being reimbursed for its past expenditures? A number of lower federal courts have found these factual distinction of who hands over the cash, and when, to be important legal distinctions.

In *Atlantic Research,* the Supreme Court noted that costs incurred *voluntarily* can only be allocated by recourse to § 107, without defining what is *voluntary*, other than stating that reimbursing others' costs does not qualify: "a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution.[136] By reimbursing response costs paid by other parties, however, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a)."[137] Thus, one must incur one's own costs to utilize § 107.

Nevertheless, does some reimbursement also stop use of § 107 for one's own directly incurred costs? The Court did not indicate whether reimbursing the government for previous incurred costs negates use of § 107 for cost recovery of later privately incurred expenses.[138] Some of the lower federal courts, however, have continued walling-off private parties from access to § 107 cost recovery even for their directly-incurred costs, just as they had prior to such actions being overturned in 2007 by the Supreme Court.[139] Such

134. Boarhead Farm Agreement v. Advanced Envtl. Tech Corp., 381 F. Supp. 2d 427, 436 (E.D. Pa. 2005) (eliminating private cooperative agreement from qualification as suit or settlement).

135. 42 U.S.C. 9607(a) (describing CERCLA litigation claim timing).

136. United States v. Atl. Research Corp., 551 U.S. 128, 128 n.6 (2007) (explaining proper allocation of voluntary costs under CERCLA).

137. *Id.* at 139 (noting limited access to § 107(a) recovery).

138. *See generally id.* (suggesting gap in Court's analysis).

139. *Id.* (acknowledging lower court resolutions of gap in Court's analysis).

decisions convert settling with the government, something generally encouraged, to a significant impediment to § 107 private party cost recovery. Four circuits have concluded that a settlement with the government renders all private party remediation expenditures not voluntary, along with some federal trial courts. Involuntary remediation expenditures are not recoverable under § 107 from other responsible parties.

1. Second Circuit

The Second Circuit took the position disclaiming access to § 107, drawing a distinction between incurring the costs indirectly through payments to the government with incurring and paying contractors directly. Niagara Mohawk Power Co. (NiMo), after settling with a state government environmental agency in New York for a monetary sum, was entitled to seek contribution for expenses only under § 113(f)(3)(B) rather than recovering response costs under § 107(a)(4)(B).[140] The court concluded that "[b]ecause NiMo resolved its CERCLA liability through an administrative settlement, [and not by paying a contractor directly,] it [was] not entitled to bring a claim under § 107(a)(4)(B)."[141]

In its decision, the court grappled with the definition of contribution, ultimately deciding that even plaintiff NiMo's future expenditures were not directly voluntary, but were a financial outlay anticipated only by § 113 contribution and not § 107 cost recovery.[142] Only if a settling party directly hires and writes the check to

140. Niagara Mohawk v. Chevron, 596 F.3d 112, 118 (2d Cir. 2010) (allowing state settlements only for § 113 actions, not § 107 actions).

141. *Id.* at 140 (explaining court's conclusion and rationale). The court held that:

> A potentially responsible party's CERCLA liability settlement with a state qualifies the PRP for contribution under § 113(f)(3)(B) and the state agency does not need express authorization for the settlement from the EPA. NiMo satisfied the requirements of the National Contingency Plan by settling its CERCLA liability with New York. Because NiMo resolved its CERCLA liability through an administrative settlement, it is not entitled to bring a claim under § 107(a)(4)(B).

Id. at 140.

142. *Id.* at 127-28 (grappling with "contribution").

> To the extent that NiMo seeks recovery of its actual response costs and does not seek reimbursement from others for response costs it disproportionately paid to a third party, NiMo's claims do not seem to fit the common law definition of contribution that the Supreme Court employed in defining the statutory term in *[Atlantic] Research.* The *[Atlantic] Research* Court, however, recognized that there could be an overlap of the *concepts* of cost recovery and contribution. . . . (internal citation omitted) While NiMo's claims might fall within "the overlap" of the concepts of cost recovery and contribution recognized by *[Atlantic] Research,* "concepts" do

the contracting firm for work, and takes responsibility for accomplishing such cleanup, could it avail itself of § 107 cost recovery under this interpretation. According to the Second Circuit, if the settling party instead writes the check to the government which then in turn uses the money to retain and pay the remediation contractor, § 107 is no longer legally available. In either case, the financial responsibility is similar, but legal recourse is bifurcated between §§ 107 and 113.

In *New York v. Next Millennium Realty, LLC*,[143] the defendants' § 107 claim was based on remediation costs they already incurred and future anticipated costs they anticipated under § 107(a).[144] The court found that § 107(a) action is viable where a party itself incurred cleanup response costs as opposed to reimbursing costs other parties paid, which are more appropriately covered under § 113(f).[145] The settlement of some costs barred § 107 as to even directly incurred costs.[146]

2. *Third Circuit*

The Third Circuit reached a seminal decision in *Boarhead Farm Agreement Group v. Advanced Envtl. Tech Corp.*.[147] It honored the Supreme Court's decision on the availability of § 107 cost recovery to any other private party; yet it reverted to the Circuit's pre-Supreme Court decision preference for negating use of § 107 cost recovery.

At the Boarhead Farms Superfund site in Bucks County, Pennsylvania, Agere and four other private-party plaintiffs filed claims for § 107 cost recovery and § 113 contribution for expenditures related to the site.[148] Seeking to distinguish their situation from *Cooper*, the plaintiffs had entered into a private cooperative agreement to share in the costs of cleaning up two areas of the Boarhead

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not alter the plain language of the statute in play here. NiMo's claims clearly meet the more specific parameters of the terms of § 113(f)(3)(B). Id. at n.18.

143. *Id.* (stating § 113 provides proper cost recovery).

144. New York v. Next Millennium Realty, LLC, No. CV–03–5985(SJF)(MLO), 2008 WL 1958002, at *6 (E.D.N.Y. May 2, 2008) (holding incurred cleanup response costs are recoverable under § 107, as opposed to reimbursing costs paid by other parties).

145. *Id.* (reciting defendant's argument that proper remedy available under § 113(f)).

146. *Id.* (emphasizing lack of access to § 107).

147. Boarhead Farm Agreement Grp. v. Advanced Envtl. Tech. Corp., 381 F. Supp. 2d 427 (E.D. Pa. 2005) (negating use of § 107 cost recovery).

148. *Id.* at 435 (E.D. Pa. 2005) (concluding Third Circuit law precludes PRPs from bringing § 107 claim).

Farm Superfund Site.[149] The court stated that to "stretch the holding of *Cooper [ ]* in such a way . . . would torture the plain meaning of the statute and discourage PRPs not sued from cooperating and settling with PRPs who were sued."[150] There was no government initiated civil action in *Boarhead*.[151]

Twenty-two of twenty-three defendants either settled or were dismissed from the litigation.[152] The Eastern District of Pennsylvania entered judgment for cost recovery against the lone non-settling defendant, Carpenter, for 80% of the costs paid by plaintiffs, plus interest.[153] The court also found future liability.[154] The Third Circuit vacated the district court's judgment.[155]

The Third Circuit found "[c]ontribution claims under § 113(f) require a 'common liability' among PRPs at the time the underlying claim is resolved."[156] The court disagreed with defendant Carpenter under a plain-meaning interpretation.[157] The circuit court noted that § 113(f) as an alternative vehicle for recovery would not be available to private-party plaintiffs as they had not been sued themselves, as *Cooper* required.[158] The court was concerned that the plaintiffs, by using § 107, would be able to shift all costs to defendants, even beyond their equitable share.[159] This possibility was discussed fifteen years before *Atlantic Research*, in *United States v.*

149. *Id.* at 428-29 (detailing facts surrounding settlement). All but one of the members in the group had entered into one or more settlement agreements with the EPA, which were thereafter entered in the district court as consent decrees. *Id.*

150. *Id.* at 436 (explaining reasoning for not denying motion to dismiss).

151. *Id.* at 433 (discussing case's real parties). Even though the EPA settlement in *Boarhead* was entered in the district court as consent decrees, the actions in *Boarhead* were not § 106 or § 107 civil actions, but were governed by § 122 of CERCLA and therefore do not fall within the scope of § 113(f)(1). *Id.*

152. Agere Sys. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 210-12 (3d Cir. 2010) *cert. denied*, 131 S. Ct. 646 (2010) (detailing nearly three decades of factual background).

153. *Id.* (noting court judgments against only non-settling defendant, Carpenter).

154. *Id.* at 210-11 (explaining process leading to Carpenter's appeal).

155. *Id.* (presenting reasons for vacating district court's judgment).

156. *Id.* at 219-20 (agreeing with Carpenter's assertion it must have common liability).

157. *Agere Sys.*, 602 F.3d at 225 (stating Supreme Court did not intend novel meaning of "incurred").

158. *Id.* (reasoning Supreme Court could not have intended this result).

159. *Id.* at 228 (highlighting CERCLA goal of encouraging site cleanup).

Kramer,[160] but the Supreme Court dismissed it in *Atlantic Research*.[161]

Thus, in *Agere Sys. v. Advanced Envtl. Tech. Corp.*, the Third Circuit allowed only an equitable contribution action under § 113 to proceed.[162] The court, nonetheless, still voiced concern for such sharp edges, and expressed a preference for the imbued equitable elements of § 113 cost contribution over § 107 cost recovery. In doing so, it expressed a prudential preference for holding § 107 in abeyance if § 113 is available.[163]

3. Sixth Circuit

The Sixth Circuit struggled with whether a PRP who was required to incur costs pursuant to a consent decree may bring a § 107(a) cost recovery action.[164] In a 2009 decision after remand,

160. *See* United States v. Kramer, 757 F. Supp. 397, 416-17 (D.N.J. 1991) (holding any temporary windfall to private plaintiff employing § 107 for cost recovery was justified by incentives for voluntary private cleanup).

161. United States v. Atl. Research Corp., 551 U.S. 128, 129 (2007) (stating complementary components of §§ 107 and 113).

162. *Agere Sys.*, 602 F.3d at 229 (holding §§ 107 and 113 do not overlap in instant case).

> Thus, we hold that plaintiffs in the position of Cytec, Ford, SPS, and TI, who if permitted to bring a § 107(a) claim would be shielded from contribution counterclaims under § 113(f)(2), do not have any § 107(a) claims for costs incurred pursuant to consent decrees in a CERCLA suit.

Id. (internal citations omitted).

163. *See infra* note 226 and text following in Part V for more discussion on prudential preferences of CERCLA courts.

164. ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 457-58 (6th Cir. 2007) (discussing proper remedy for PRPs and court's struggles in finding appropriate remedy). A successor corporation to previous owner and operator at Superfund site brought a CERCLA claim seeking recovery of response costs and contribution from other potentially responsible parties after it incurred expenses in investigating and addressing hazardous conditions on two sites regulated by the Environmental Protection Agency. *Id.* This PRP sustained expenses pursuant to a consent decree following a suit under § 106 or § 107(a). *Id.* In this case, therefore, the PRP did not incur costs voluntarily, but also did not reimburse the costs of another party. *Id.* In its October 18, 2007 decision in *ITT Industries, Inc.*, the Sixth Circuit affirmed a PRP's right to pursue cost recovery under § 107. *Id.* The Sixth Circuit rejected a PRP's right to bring a contribution action under § 113(f). *Id. Borg Warner* concerned two different operable units of the North Bronson Industrial Area Superfund Site, which EPA placed on the National Priorities List after trichloroethylene contamination was found at the site. *Id.* The contamination stemmed from manufacture of fishing reels. *Id.* As a corporate successor to the fishing reel manufacturer, the EPA named ITT Industries as a PRP, and it sought to recover cleanup costs from others that had previously owned or operated the sites when hazardous substances were deposited on the property. *ITT Indus., Inc.*, 506 F.3d at 455. ITT entered into an AOC, under which it agreed to undertake a remedial investigation and feasibility study (RI/FS) for one of the sites, spending approximately $2 million on the RI/FS. *Id.* The other operable unit was cleaned up under the supervision of the Michigan Department of Environmental

the Michigan's Western District Court held that such a party was an involuntary plaintiff because it was required to incur cleanup costs at a site pursuant to a consent decree, and therefore could not bring a § 107 cost recovery claim with respect to that site.[165]

4. Seventh Circuit and Trial Courts

The Seventh Circuit allowed § 107 to apply to those who have voluntarily initiated cleanup without having been subject to any kind of EPA administrative order.[166] The court held that a PRP could sue under § 107(a) where that PRP neither settled any liability with the government, nor had been subject to a CERCLA suit or the subject of an EPA administrative order under § 106. This negates the benefits inherent in the statute to settle first with the government.

Four trial courts within the Seventh Circuit denied access to § 107 cost recovery even where the private plaintiff undertakes the remediation, if a settlement with the government is executed first, holding "[t]his [prior] Order requires, among other things, certain Respondents to perform response actions . . . ."[167] Because the response costs were found to be involuntarily, the court found that the claim was one for contribution under § 113 rather than cost recovery under § 107.[168] Having barred access to § 107, the court then denied the plaintiff any recovery under the § 113 claim it allowed by holding that it was time-barred under the much shorter

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Quality. *Id.* ITT and several other parties entered into a Consent Decree with the state agency to perform the cleanup, incurring $1.6 million in costs pursuant to the Consent Decree. *Id.* The Sixth Circuit reversed the district court's dismissal of the plaintiff's § 107(a) cost recovery claim and remanded that action to the district court for further consideration in light of the *Atlantic Research* decision. *Id.* at 461.

165. ITT Indus., Inc. v. BorgWarner, Inc., 615 F. Supp. 2d 640, 647-48 (W.D. Mich., 2009) (holding post-*Atlantic Research* precedent follows reasoning that § 113 is only available avenue for action). On remand, the Western District of Michigan held that to establish defendants' liability under a § 107 claim, plaintiff, who was required to pay cleanup costs at one site pursuant to consent decree, could not bring a cost recovery claim with respect to that site. *Id.*

166. Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, 473 F.3d 824, 831 (7th Cir. 2007) (holding § 107 applied because Metropolitan Water voluntarily financed and performed cleanup). This court relaxed the "innocent parties" standard for parties who have voluntarily initiated cleanup without having been subject to any kind of EPA administrative order. *Id.* at 836.

167. Bernstein v. Bankert, No. 1:08-cv-0427-RLY-DML, 2010 WL 3893121, at *14 (S.D. Ind. Sept. 29, 2010) (denying plaintiffs' arguments in favor of a § 107 claim).

168. *Id.* at 16 (discussing contribution claim as only available avenue for plaintiffs).

§ 113 statute of limitations.[169] This decision, therefore, illustrates that choice between § 107 and § 113 can be more than just procedural; the choice can also negate a claim due to different statutes of limitation and proof requirements between §§ 107 and 113.

A different federal trial court rendered a similar all-in-the family inclusion by not following a PRP group's argument that "a so called voluntary PRP . . . who incurs cleanup costs voluntarily and not after being sued . . . cannot sue for contribution from its fellow PRP's under [§] 113(f) . . . ."[170] The district court did not endorse this argument:

> [T]he Supreme Court has re-shaped CERCLA law and removed several non-statutory glosses that lower courts had added to the statute. It is now clear that a PRP who has been sued under [§] 106 or [§] 107(a) may pursue contribution under [§] 113(f). It is equally clear that a PRP who has carried out a voluntary cleanup may seek recovery of its costs from other PRPs under [§] 107(a). As the Supreme Court explained, "[§] 113(f) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a)." And 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs.[171]

In another decade-long dispute, private-party plaintiffs were allowed to bring a § 107 claim to recover costs that they incurred directly and voluntarily, and not mentioned in a prior settlement with the government.[172] The court confessed that courts were not in agreement with this conclusion, nor was either treatment compelled, or even addressed, by the Supreme Court decisions:

> Starting with what is clear in light of *Atlantic Research,* Crossclaim Plaintiffs' may not attempt to recover from Rogers Cartage any reimbursable expenses incurred pursuant to their settlement agreements with the United

169. *Id.* at 26 (holding because Plaintiffs filed their complaint on April 1, 2008, § 113 three-year statute of limitations barred their claim).

170. Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec., 661 F. Supp. 2d 989, 992, 995-96 (S.D. Ind. 2009) (holding mining company could seek contribution for costs).

171. *Id.* at 1005 (quoting United States v. Atl. Research Corp., 551 U.S. 128, 139 (2007)) (holding only PRPs who have been sued under § 106 or § 107 can seek contribution under § 113).

172. United States v. Pharmacia Corp., 713 F. Supp. 2d 785, 789 (S.D. Ill. 2010) (finding § 107(a) allowed cost recovery action even where private party had previously defeated contribution claim).

> States - those claims have been dismissed. On the other hand, under *Atlantic Research,* Crossclaim Plaintiffs apparently may pursue their § 107(a) cost recovery action for any so-called "voluntary costs"—if the potentially voluntary nature of these costs is supported, of course, by sufficient evidence. To demonstrate such voluntary response costs, Crossclaim Plaintiffs' will need to show, at a minimum, that these costs were 1) incurred voluntarily *outside* the scope of any administrative order or consent decree, and 2) not reimbursable to another party. Such costs, incurred voluntarily, "are recoverable only by way of § 107(a)(4)(B)." This much is seemingly clear.[173]

In reality, both the circuit courts and many district courts are deeply divided on this specific issue – whether claims for expenses incurred directly in response to an administrative order or consent decree (and therefore, "compelled"), may be brought under § 107(a).[174]

In *Pharmacia Corp. v. Clayton Chem. Acquisition,* nineteen PRPs entered an administrative order on consent with the EPA pursuant to § 106 to perform a remedial investigation and feasibility study ("RI/FS") at a Superfund site.[175] The court held that the administrative order of consent was not an "administrative settlement" contemplated by § 113 for purposes of a subsequent contribution action.[176] The court focused on the fact that the parties did not qualify as a civil action and contained standard language in which

173. *Id.* (delineating clear standard set forth by *Atlantic Research*).

174. *Id.* at 789-90 (stating § 107(a) action was not foreclosed due to uncertainty amongst various courts).

175. Pharmacia Corp. v. Clayton Chem. Acquisition, LLC, 382 F. Supp. 2d 1079, 1081 (S.D. Ill. 2005). The EPA also issued an administrative order unilaterally after the administrative order on consent. *Id.*

176. *Id.* at 1089 (holding there must first be § 106 or § 107 action before claim can be brought under § 113(f)(1)). In *Pharmacia,* despite the holding in *Cooper v. Aviall,* the plaintiffs asserted their contribution claim under § 113(f)(1) on the basis that its facts were distinguishable because, unlike *Cooper,* plaintiffs incurred cleanup costs by responding to two separate orders issued by the EPA: in an Administrative Order on Consent and a Unilateral Administrative Order pursuant to § 106. *Id.* The court noted that § 122 authorized EPA to enter into administrative settlements, but the administrative order on consent was issued pursuant to § 106 rather than § 122(d)(3). *Id.* It was consistently captioned as an "order" rather than a "settlement." *Id.* The plaintiff was attempting to recoup through a contribution action some of the $3 million that it had expended after entering the administrative order on consent. *Id.* The court noted the caption of the AOC provided that it was issued pursuant to § 106, but that the provisions of § 106 did not provide for settlements and the term "settlement" does not appear in § 106. *Id.* Moreover, the court found that the penalties for violating the AOC were those imposed pursuant to § 106 and that if the AOC was intended as a settlement, the

the parties did not admit to liability. According to the court, this belied any argument that it was a settlement.[177] Therefore, there was no ability for the responding PRPs to initiate a contribution action after they began cleanup in compliance with an administrative order on consent.[178] The *Pharmacia* court concluded:

> Further, while some courts have held otherwise, nowhere in *Atlantic Research* did the Supreme Court hold that a PRP previously subject to a suit by the United States may not bring a § 107(a) cost recovery action against another private party. What the *Atlantic Research* Court did hold is, if a PRP is eligible to seek contribution under § 113(f), "the PRP cannot simultaneously seek to recover the *same expenses* under § 107(a)."[179]

Thus, according to this trial court, if a PRP agrees with the government to spend money, even as a course of first expenditure, the agreement poisons the ability to use § 107 to recover some of these costs from other co-responsible defendants. This strong preference for use of § 113 in lieu of § 107 is very different than preventing simultaneous recovery of the same expenses, or double recovery under § 107 and § 113. This logic as to finer preferences of courts, not addressed in the statute, again inserts § 113 as an impediment to using § 107.

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penalties provided in the document would have been consistent with the penalties provided by § 122(1). *Id.*

177. *Id.* (defining meaning of "civil action"). The court looked to the Federal Rules of Civil Procedure and found that under Rule 2(a) "'civil action' refers to the 'entire civil proceeding, including all component 'claims' and 'cases' within that proceeding;'" under Rule 3, "'[a] civil action is commenced by filing a complaint with the court.'" *Id.* Nowhere within the Rules is an administrative order even discussed. *Id.* (stating definition was more in line with other CERCLA sections). The court looked at the term "civil action" in Black's Law Dictionary to find the term defined as a "non-criminal litigation," whereas "administrative order" is defined as "[a]n order issued by a government agency after an adjudicatory hearing" as well as "[a]n agency regulation that interprets or applies a statutory provision." *Id.*

178. *Id.* (discussing Congress's likely distinction between civil actions and administrative orders). The Court applied the *Aviall* reasoning that if Congress intended to allow a contribution action at any time, it would not have created two separate avenues for a PRP to seek contribution nor would it have specified separately the conditions of a civil action in § 113(f)(1) as well as an administrative or judicially approved settlement in § 113(f)(3). Aviall Serv. Inc. v. Cooper Indus., 572 F. Supp. 2d. 676, 687 (N.D. Tex. 2008).

179. United States v. Pharmacia Corp., 713 F. Supp. 2d 785, 790 (S.D. Ill. 2010) (holding that allowing plaintiffs to seek cost recovery action did not contradict Supreme Court decisions).

Even before *Pharmacia*, the Northern District of Illinois similarly excluded private-party plaintiffs from utilizing § 107 cost recovery as involuntary, impugning use of § 107 for recovery of any costs, even if first directly incurred and paid for by the private party, that are mandated as part of a settlement with the government.[180] The court was preoccupied with the question of the voluntary nature of remediation expenditures, as opposed to their first-incursion or restitutionary nature:

> In sum, it appears that the nature of a party's incurred response costs (e.g., voluntary, reimbursement, etc.) determines whether it may seek to recoup all or part of them under [§] 107(a), [§] 113(f), or possibly both . . . . The Court requires this information to determine whether Waukegan might have a claim for recovery of its own voluntary costs under [§] 107(a), for contribution for costs it paid as a result of the consent decrees under [§] 113(f), or both.[181]

5. Other Federal Trial Courts

Several lower courts have reduced the effective application of the change of the Supreme Court's 2007 opinion. A plaintiff, Frontier Communications Company, sought contribution from several defendants for $7.625 million in liability it assumed for remediation of tar from a site on the Penobscot River after settlement of litigation with the City of Bangor.[182] A First Circuit trial court barred the defendants' counterclaims against the plaintiff because the plaintiff's liability had been settled with the government, and the plaintiff received automatic CERCLA contribution protection:

> As [PRPs] that have not incurred their own response costs in relation to the site or facility in question, the Railroad cannot maintain a claim under § 107 of CERCLA as a matter of law. As the Supreme Court explained in *Atlantic Research*, the remedial options available under § 107(a) of

180. City of Waukegan v. Nat'l Gypsum Co., No. 07 C 5008, 2009 WL 3053725, at *11-12 (N.D. Ill., Sept. 2, 2009) (noting key question is nature of incurred costs).

181. *Id.* at 12-14 (internal citations omitted) (concluding that nature of Waukegan's involvement in consent decree did not matter).

182. Frontier Commc'n Corp. v. Barrett Paving Materials, Inc., Civ. No. 1:07-cv-00113-GZS, 2009 WL 3280402, at *4, *8 (D. Me. Oct. 8, 2009) (detailing factual background surrounding Frontier's cost recovery action).

> CERCLA are restricted to parties that have themselves incurred cleanup costs.[183]

In *Morrison v. Dravo*, a Nebraska federal district court found a blanket barrier use of § 107 after settlement where the EPA filed suit under §§ 106 and 107 and entered a consent decree.[184] In 2009, Morrison, an already-settled private party-plaintiff, filed a complaint under § 107(a).[185] The trial court concluded that "'PRPs who have entered into an administrative or judicially approved settlement must seek contribution under [§] 113(f),' 42 U.S.C. § 9613(f), rather than [§] 107(a)."[186] The court reasoned:

> In the wake of *Atlantic Research[ ]*, a number of courts have analyzed one of the questions left open by the Supreme Court, i.e., whether PRPs that have been compelled to incur costs pursuant to an administrative or judicially-approved settlement are able to assert § 107(a) claims or are limited to bringing contribution claims under § 113(f). . . . *Atlantic Research[ ]* overruled circuit precedents to the extent that they held that actions between PRPs can *only* be brought pursuant to § 113(f), but circuit cases remain viable insofar as they hold that claims for costs incurred pursuant to consent decrees or administrative settlement agreements must be brought under § 113(f).[187]

This cordoning off access to § 107 is similar to what all of the federal circuit courts held between 1994 and 2003, and opposite to the Supreme Court's 2007 decision.[188] These decisions continued to follow the pre-*Cooper* decisions, but arrived at their conclusions by narrowly constructing what was and was not a voluntary expenditure of funds by plaintiffs, who agreed to spend their own money on common liability. Of note, there is no such express provision or requirement in the statute itself, in the legislative history of CER-

183. *Id.* at *12-13 (citations omitted) (stating Railroad's contribution option properly came under § 113).

184. Morrison Enters., LLC v. Dravo Corp., No. 4:08CV3142, 2009 WL 4325749, at *20-21 (D. Neb. Nov. 24, 2009) (highlighting Dravo's procedural circumstances as reason for § 107 preclusion).

185. *Id.* at *13 (detailing counts asserted by plaintiffs against Dravo).

186. *Id.* at *16 (agreeing with Dravo's argument that Morrison's claim was barred).

187. *Id.* at *21-22, *26 (reasoning that § 107 was unavailable and that § 113 was proper course for contribution action at issue).

188. United States v. Atl. Research Corp., 551 U.S. 128, 136 (2007) (holding plain meaning of § 107(a)(4)(B) allows PRP to recover costs from other PRPs).

CLA and its amendments, or in the Supreme Court decisions. This disinheritance of § 107 rights, however, is a new *post hoc* determination of what is or is not a voluntary action by certain lower federal courts. These decisions turn the necessity of prior suit/settlement for access to § 113 contribution into a barrier to access to § 107 cost recovery.[189] Any settlement with the government is deemed to make everything that follows involuntary. Involuntary incursion of liability negates the ability to recover an unfair amount of other costs the plaintiff incurred. These decisions render a mirror reversal of eligibility.

IV. A HALF LOAF: SETTLEMENT WITH THE GOVERNMENT NEGATING § 107 COST RECOVERY FOR PRIOR, BUT NOT DIRECT FUTURE, PRIVATE REMEDIATION COSTS

"Moon River, wider than a mile. I'm crossing you in style, someday"[190]

A. What is Voluntary?

In *Atlantic Research*, the Supreme Court employed the term voluntary, but did not define the term. The Court noted that voluntarily incurred costs can only be reimbursed through litigation under § 107.[191] Administrative orders from, and consent decrees with, the EPA, which are a common currency and means of resolving alleged responsibility at Superfund sites, were not classified into a group, but instead, were subsequently left to the courts to sort through. The Supreme Court clarified that the alternative of § 113 can be used when:

> a PRP pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a).[192]

The Supreme Court interpreted statutory contribution protection given by § 113(f) to only protect against contribution actions

189. *See* 42 U.S.C. § 9613(f)(1) (2006) (detailing framework for contribution actions); § 9607(a) (detailing framework for liability under § 107).

190. HENRY MANCINI, *Moon River* (1961), available at http://en.wikipedia.org/wiki/File:Henry_Mancini_-_Moon_River-1961.ogg.

191. *Atl. Research*, 551 U.S. at 138 n.6 (demonstrating that recourse to § 107 or § 113 provides differing types of remedies for plaintiffs).

192. *Id.* at 139 (differentiating between types of recovery for plaintiffs under §§ 113 and 107).

under § 113, not against § 107(a) cost recovery actions.[193] Still left open is whether a hybrid settlement — incurring some of one's own costs, and restituting some costs to the government — provides plaintiffs access to § 107 or § 113, or both. Previously, this article illustrated several recent federal court decisions interpreting any settlement with the government, or even resulting after government prosecution, to eliminate access to § 107 for cost recovery, even for later directly incurred remediation costs.[194] Not all courts subscribe to this interpretation. Interpretation of undefined terms has again created a diversion among jurisdictions interpreting Superfund.

For some courts, there is a divide that can be crossed between past costs settled by reimbursement to the government that has already incurred the costs and future costs that the settler paid directly. Once reimbursed, the past settled costs, because they are not voluntarily incurred but are a reimbursement of previous government-incurred costs, cannot be shifted to other PRPs via a § 107 cost recovery action. Future costs incurred directly and paid by the plaintiff-party, however, can form the basis of a follow-on plaintiff § 107 cost recovery action against other PRPs, including the imposition of joint and several liability against defendants, as interpreted by courts willing to cross this divide for a settling party.

B. Crossing the Divide

Some circuit courts and federal trial courts do not see a government settlement as rendering all cleanup costs involuntary. Instead, they follow the Supreme Court's order literally and only deem those reimbursed costs as involuntary. It is typical that in a settlement of Superfund liability with the government, the settler reimburses EPA costs and directly expends additional future remediation costs. In fact, EPA cost recovery can only recover costs incurred to date as restitution.[195] It is typical that after making restitution, the settling party also covenants to pay certain prescribed future costs directly. Some of the courts allow plaintiffs to use § 107 for cost recovery of those expenditures directly undertaken.

193. *Id.* at 139-40 (reasoning that § 107(a) does not create right of contribution because parties do not incur their own costs in satisfaction of settlement or judgment).

194. For a further discussion of CERCLA § 107 cost recovery access, see generally *supra* notes 135-190 and accompanying text.

195. 42 U.S.C. § 9607(a) (detailing covered persons and scope of recovery).

1. Second Circuit

The Second Circuit appears to have shifted in how it views a consent decree with the EPA and the subsequent right to access § 107 cost recovery. In *NiMo,* a plaintiff entered into two consent decrees with the state, which were held not to give it the ability to bring a § 113 contribution action because the decrees were not deemed voluntary, and thus, neither could the plaintiff seek recovery under § 107.[196] The court held that nothing in *Atlantic Research* provided authority to change its previous decisions where it ruled that a party who had incurred expenditures pursuant to a consent order with a government agency and was found partially liable under § 113(f)(1), could not seek to recoup those expenditures under § 107(a).

For comparison, the Second Circuit decided some cases between the 2004 and 2007 Supreme Court opinions, and thus before the Supreme Court reopened § 107.[197] In one case, a settlement made without a court or administrative order could maintain a § 107 claim, although an administrative order could not.[198] In another, the panel held that § 107 is available not just for "volunteers," but also for parties that have conducted a cleanup pursuant to a consent decree entered with the government.[199]

2. Trial Courts in the Second Circuit

In a federal trial court decision in New York, a plaintiff brought a § 107 claim against several defendants to recover monies it spent to remediate contamination at an industrial site in *Chitayat v. Vanderbilt Assocs.*[200] Defendants successfully moved for summary judgment on the basis that there was no § 107 claim because Chitayat reimbursed the government for remediation, rather than

196. Niagara Mohawk Power Corp. v. Consol. Rail Corp., 565 F. Supp. 2d 399, 402-03 (N.D.N.Y. 2008) (discussing any settlement with government negates any future use of § 107 by the settling party).

197. Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 100 (2d Cir. 2005) (stating § 107 was available for private parties to recoup cleanup costs where cleanup was incurred "voluntarily, not under a court or administrative order or judgment").

198. *Id.* (holding consistent with prior Second Circuit decisions before § 113(f)(1) was enacted).

199. Schaefer v. Victor, 457 F.3d 188, 201-02 (2d Cir. 2006) (stating that party conducting cleanup pursuant to consent decree must have conducted at least some cleanup activities prior to entering into consent decree, and so as long as some original expenses were undertaken, subsequent settlement had no bearing).

200. Chitayat v. Vanderbilt Assocs., 702 F. Supp. 2d 69, 83 (E.D.N.Y 2010) (discussing settlement with government entitles settlor only to use of § 113).

incurring those expenses directly.[201] Once relegated by default to only a § 113 claim, the plaintiff's claim failed due to § 113's shorter statute of limitations; therefore, the plaintiff was prevented from receiving reimbursement from other responsible defendants for any of the costs incurred for which it was not equitably responsible.[202] Against this inequitable outcome for the jointly responsible plaintiffs, however, there is no indication that "*Atlantic Research* require[d] its dismissal," contrary to the trial court's conclusion, and there is no express statutory prohibition against equitable considerations applied to claims adjudicated under § 107.[203]

After both Supreme Court opinions, a district court in the Second Circuit amended its decision in *Champion Laboratories v. Metex Corp.* in light of the *Atlantic Research* opinion, reinstating Champion's § 107 claim against Metex for contamination at the Champion site.[204] In another case in the Second Circuit territory, after both Supreme Court opinions, the court ruled that Solvent Chemical Company had a cause of action for cost recovery against the defendant under § 107, as it has directly incurred response costs in performing remedial activities.[205] "[R]egardless of what section of CERCLA is involved, it will make every effort to fairly and equitably apportion liability."[206]

3. Fourth Circuit

In *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, the court denied the defendant's cost recovery claim under § 107 because it was not a voluntary PRP, as it had only reimbursed other parties' costs for remediation and did not incur any of its own cleanup

201. *Id.* at 77-78 (discussing distinction of 'incurred' expenses).

202. *Id.* at 81-83 (stating statute of limitations began on date of consent order).

203. *See* United States v. Hardage, 116 F.R.D. 460, 465 (W.D. Okla. 1987) (allowing equitable factors as defense to bar government's § 107 claims).

204. Champion Labs. v. Metex Corp., Civ. No. 02-5284, 2008 WL 1808309, at *8 (D.N.J. Apr. 21, 2008) (reversing prior decision that Champion did not have standing to sue under § 107(a) because it was PRP).

205. New York v. Solvent Chem. Co., No. 83-CV-1401C, 2008 WL 3211273, at *2 (W.D.N.Y. Aug. 6, 2008) (finding defendant sustained expenses pursuant to consent decree following suit under § 107(a) and did not incur costs voluntarily nor reimburse costs of another party).

206. Order Granting Request for Leave to Amend Pleadings at 2-3, N.Y. v. Solvent Chem. Co., (No. 83-CV-1401C), 2008 WL 3211273, at *3 (granting request for leave to amend pleadings due to holding in *Atlantic Research*).

costs.[207] In theory, had it incurred direct costs, § 107 would have been available to the defendant for cost recovery on those claims.

4. Fifth Circuit

Of note, the Fifth Circuit precedent has not changed. The original Fifth Circuit 1997 precedent blocking the use of § 107 has not been overruled.[208] In the interim between the two Supreme Court decisions in 2004 and 2007, in *Vine St. LLC v. Keeling*,[209] a federal district court within the Fifth Circuit held that a PRP could bring § 107 cost recovery claims for voluntary cleanup costs.[210] The court held that a PRP who voluntarily works with a government agency to remedy environmentally contaminated property should not have to wait to be sued to recover cleanup costs as § 113(f)(1) is not meant to be the only way to recover cleanup costs.

5. Trial Courts in the Seventh Circuit

Even Ford, the success story among American automakers during the 2008-2010 recession, was not able to enjoy a literal interpretation of the 2007 Supreme Court decision.[211] Ford and Severstal filed suit under § 107 for cost recovery and under § 113 for contribution.[212] The defendant argued that the plaintiffs did not incur their costs voluntarily.[213] Plaintiffs countered that no case actually

207. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., Civil Action No. 2:05-2782-CWH, 2008 WL 2462862, at *6 (D.S.C. June 13, 2008) (finding party that does not incur remediation costs directly can not use § 107).

208. OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1583 (5th Cir. 1997) (holding that "language of CERCLA permits only PRPs to bring contribution actions under § 113(f), but that OHM is a PRP under the statute because it is a defendant in the suit.").

209. Vine St. LLC v. Keeling, 362 F. Supp. 2d 754, 762 (E.D. Tex. 2005) (holding costs voluntarily incurred, even though working with government agency, still qualify private party access to § 107 cost recovery).

210. *Id.* at 760 (noting Vine Street can state claim against potential responsible parties despite itself being PRP).

211. Order Denying as Moot Defendant's October 30, 2008 Motion to Dismiss and Granting in Part and Denying in Part Defendant's December 31, 2008 Motion to Dismiss at 18-27, Ford Motor Co. v. Michigan Consol. Gas Co., (No. 08-CV-13503-DT), 2009 WL 3190418, *available at* http://docs.justia.com/cases/federal/district-courts/michigan/miedce/2:2008cv13503/232684/36/0.pdf?ts=1270168983 (hereinafter Order Granting in Part and Denying in Part Defendant's Motion to Dismiss) (finding Ford could continue with claim for cost recovery under § 107 but could not sustain contribution claim under § 113). The site harbors volatile organic compounds, semi-volatile organic compounds, metals, free-phase dense non-aqueous phase liquid, and PCBs. *Id.* at 2.

212. *Id.* at 4 (discussing procedural history of case).

213. *Id.* at 10 (outlining Supreme Court precedent in regards to when PRPs can recover costs).

holds that only voluntarily incurred costs may be recovered. The court agreed with the plaintiffs and concluded "there is nothing in the statute itself which confines liability to costs voluntarily incurred."[214] In this case, the direct costs could be recovered from others under § 107, while the indirect costs of reimbursement were not effectively transferable because of *Cooper*.[215] A state settlement was not the required federal claim and settlement, and resulted in dismissal of the § 113 claim.[216]

In *City of Waukegan v. Nat'l Gypsum Co.*, another Seventh Circuit district court held that *Atlantic Research* "did not determine, however, that a party to a consent decree that thereafter incurs additional response costs cannot sue to recover those costs under [§] 107(a)."[217] The court found sufficient facts for Waukegan's claim for future response costs.[218] The court concluded that the city had "undertaken additional, voluntary response costs beyond the terms of its obligations under the consent decrees . . . These allegations are sufficient to preclude dismissal of the Waukegan claim under [§] 107(a)."[219]

There continues to be a split amongst the federal courts as to whether a settlement with the government precludes access to § 107 for private cost recovery of any costs remotely associated with the matter, or merely bars its use for those costs restituted to the government or another party and thus not directly incurred. A couple of circuits have rendered recent opinions on both sides of this issue.[220] This is understandable, given that a circuit is not just one panel of judges, but different panels of judges constituted to hear different cases. These separate panels of the same circuit can

214. *Id.* at 12-15 (rejecting Michigan Consolidated's argument that case falls within gray area and therefore should not be decided under Supreme Court precedent).

215. *Id.* at 16-18 (reasoning that recoverable costs under § 107 are not limited to those voluntarily incurred); *see also* Cooper Indus. v. Aviall Servs. Inc., 543 U.S. 157, 165-66 (2004) (holding PRPs not involved in CERCLA administrative or cost recovery actions could not obtain contribution under CERCLA § 113(f)(1)).

216. See Order Granting in Part and Denying in Part Defendant's Motion to Dismiss *supra* note 211 at 26-28, (finding Ford did not supply facts EPA delegated its authority to Michigan to settle federal CERCLA claims).

217. City of Waukegan v. Nat'l Gypsum Co., No. 07 C 5008, 2009 WL 3053725, at *11-12 (N.D. Ill., Sept. 2, 2009) (stating that § 107(a) does not specify that only parties who 'voluntarily' remediate have cause of action).

218. *Id.* at *16 (allowing for future response costs where not in conflict with EPA's Record of Decision).

219. *Id.* at *25 (including costs incurred to permit dredging and conducting soil investigation).

220. For a further discussion of the circuit split on private cost recovery, see generally *supra* notes 197-219 and accompanying text.

announce principles differently, and an argument can be made for either perspective; however, other courts avoid such theories and still exert prudential preferences against private parties' employment of § 107. The Supreme Court did not sanction these preferences when it opened § 107 to any person.

V. THE FAVORITE SON: JUDICIAL PRIORITIES AMONG DIFFERENT CERCLA PROGENY

"Mom always liked Me Best"[221]

Even where some courts have allowed access to § 107 cost recovery for some or all of the costs private parties incurred, it has been pushed aside by other courts in preference of § 113 contribution, even after the Court's definitive rulings in *Cooper* and *Atlantic Research.* There is nothing in the statute to indicate any basis for preference.[222] In fact, "any other person" is entitled to utilize § 107 cost recovery against any other party for which it can satisfy the burden of proof.[223] So to apply a prudential barrier to the use of § 107 after the Supreme Court unanimously opened up it up to all parties is reminiscent of the cascade of 1994-2003 circuit court opinions announcing the preference for § 113 instead of § 107.

A. Third Circuit

In 2007, the Third Circuit vacated its prior judgment in light of the Supreme Court decision in *Atlantic Research.*[224] The court articulated the difference between "those who voluntarily admitted their responsibility" and those who have "in fact been held responsible [via adjudication or settlement with the EPA]" under § 107(f).[225] Since this decision in 2007, the Third Circuit again addressed § 107's "voluntary" and "joint and several" liability issues

221. TOM SMOTHERS, *Mom Always Liked You Best!* (Mercury Records 1965).

222. *See* 42 U.S.C. § 9607 (discussing requirements for § 107 cost recovery); *see also* § 9613 (discussing requirements for § 113 cost recovery).

223. United States v. Atl. Research Corp., 551 U.S. 128, 137 (2007) (clarifying that "any other person" functions to exclude persons enumerated in §107(a)(4)(A)).

224. E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 521 (3d Cir. 2006) (allowing for recovery of voluntary cleanups consistent with national contingency plan). Section 113 provided the sole means for potentially responsible persons to obtain contribution for cleanup costs. *Id.* In their earlier opinion, the Third Circuit majority held DuPont could not pursue an action under CERCLA to recover from the United States a portion of its cleanup costs. *Id.*

225. *Id.* at 133 (foreclosing opportunity for parties who concede they are PRP but whose responsibility has not been established).

left unresolved in *Atlantic Research*.[226] Pursuant to the Restatement, the court construed "voluntary" as having responded to no litigation or order on the record, recognizing that any other interpretation of "voluntary" would leave such plaintiffs without a remedy.[227]

The *Kramer* case was one of the original district court decisions that foreshadowed the logic employed in the Supreme Court's *Atlantic Research* decision more than a decade later.[228] In that opinion, a trial court held its ground by maintaining the ability of any other person to utilize § 107:

> The Supreme Court held that a PRP that has incurred cleanup costs may assert a claim under [§] 107(a) of CERCLA - which provides a cause of action for "cost recovery (as distinct from contribution)," 127 S. Ct. at 2338 - against another PRP. However, with regard to one of the precise matters at issue in this suit - where a "PRP . . . sustain[s] expenses pursuant to a consent decree following a suit under § 106 or § 107(a)" - the Court did not "decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both." *Id.* . . . the Settling Work Defendants . . . assert a [§] 113(f) claim for the funds paid to reimburse the State for its past response costs, and both a [§] 107(a) claim and a [§] 113(f) claim for the costs they incurred in paying for ongoing remediation efforts.[229]

From this premise, the court concluded that permitting plaintiffs to assert a § 107(a) claim against Alumex would risk exposing the defendant to a disproportionate share of liability that it could not have anticipated. It has long been recognized that "[d]isproportionate liability, a technique which promotes early settlements and deters litigation for litigation's sake, is an integral part of the statutory plan."[230] The court also suggested that equitable

226. Reichhold, Inc. v. United States Metals Ref. Co., Civ. No. 03-453 (DRD), 2008 WL 5046780, at *7 (D.N.J. Nov. 20, 2008) (discussing definition of "voluntary").

227. *Id.* (explaining that costs incurred even as result of protracted negotiation are "voluntary").

228. *See* Ferrey, *supra* note 44, at 80 (recognizing "dual possibilities of § 107 claims by allowing a private party PRP to bring a cost recovery action under a joint and several theory of liability.").

229. United States v. Kramer, Civil Action No. 89-4340 (JBS), 2009 WL 2339341, at *4 (D.N.J. July 27, 2009) (discussing resolution of Circuit split over regulatory vehicles available under CERCLA to PRPs).

230. *Id.* (discussing disproportionate liability).

apportionment of damages may be an appropriate avenue for Alumax in light of the potential futility of countersuit.[231]

Additionally, the court noted the policy implications of a restrictive limitation grafted onto CERCLA: "[n]o rational PRP would step forward and take upon itself the costs of cleanup if it had no prospect of recovering any share of those costs from other PRPs."[232] The court also buried efforts to revive a test of "innocence" that was so popular with circuit courts before the Supreme Court dismissed it in 2007; this court follows *Cooper* and *Atlantic* to the extent that the question relevant before the trial court is "no longer one of innocence."[233]

B. Fifth Circuit

In 2010, the Fifth Circuit erected another barrier to the use of § 107 in *Lyondell v. Occidental*.[234] There, the court asserted:

> The Supreme Court has expressly declined to answer whether potentially responsible parties who "sustain expenses pursuant to a consent decree" . . . may recover these compelled costs "under § 113(f), § 107(a), or both." The district court, in dismissing the claims under § 107 but allowing Lyondell and El Paso to recover their compelled costs anyway, implicitly held that compelled costs may be recovered under § 113(f).[235]

This language would seem to open the gates for a plaintiff to choose § 113(f), § 107(a), or both to shift costs incurred or compelled under a government settlement. The Fifth Circuit, instead of reading this statement as an open option for what the plaintiff may select, read it as a menu of what the circuit court may prudentially restrict in favor of § 113.

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231. *Id.* at *19-20 (undercutting Alumax's contention again by citing its own strong divisibility defense). The court reasoned, "[§] 107(a) and [§] 113(f) both afford defendants the opportunity to reduce their exposure to disproportionate liability - by proving that the harm in question is divisible in the case of [§] 107(a), and through the equitable apportionment of damages by the Court in the case of section." *Id.*

232. Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec., 661 F. Supp. 2d 989, 1005 (S.D. Ind. 2009) (finding plaintiffs no longer need be 'innocent' to seek relief under CERCLA § 107(a)).

233. *Id.* at 1006 (looking instead at whether costs are necessary and incurred consistent with national contingency plan).

234. Lyondell v. Occidental, 608 F.3d 284, 291 n.19 (5th Cir. 2010) (discussing dismissal of § 107 claims).

235. *Id.* at 291 n.19 (deferring to district court dismissal of § 107 action, despite Supreme Court discussing this).

C. District Court in the Eleventh Circuit

In a recent case in the Eleventh Circuit, *Solutia, Inc. v. McWane, Inc.*,[236] Solutia asserted § 107 claims to recover response costs. The district court recognized the availability of both §§ 107 and 113 causes of action for private party cost reallocation, but then imposed a hierarchy where § 107 is only available by default where § 113 is unavailable. This hierarchy is neither contained in the CERCLA statute nor sanctioned in any of the three Supreme Court decisions interpreting CERCLA during the past decade.

Settler Solutia removed soil from a contaminated site, and remediated lead-contaminated soil for which others were responsible. Solutia brought suit under both §§ 113 and 107 against a number of other PRPs.[237] Initially, in 2008, the court denied summary judgment to defendants to dismiss the plaintiff's § 107 claim because § 107 was available to any party that had financed cleanup efforts and was not limited to only non-PRPs.[238]

It was correct to not give countenance to the "innocent party" criterion which, although several federal circuit courts adopted as a *de novo* prudential requirement, appears nowhere and is not even suggested in the CERCLA statute.[239] The Supreme Court did not require the invention of some required plaintiff "innocent" status in *Atlantic Research* when it unanimously reversed every federal circuit opinion.[240]

The district court reconsidered its original *Solutia* decision at a separate hearing in 2009 in response to a request by the United States. The United States argued that Solutia's § 107(a) claim should have been dismissed because its incursion of response costs followed the consent decree with the government that effectively compelled involuntary actions.[241] Additionally, the government claimed that an Eleventh Circuit decision precluded cost recovery

236. Solutia, Inc. v. McWane, Inc., 726 F. Supp. 2d. 1316, 1345-46 (N.D. Ala. 2010) (discussing availability of § 107 and § 113 to plaintiffs in distinct circumstances).

237. *Id.* at 1323 (detailing procedural history of case).

238. *Id.* at 1327 (describing lower court's rationale for denying summary judgment).

239. *See* United States v. Atl. Research Corp., 551 U.S. 128, 136 (2007) (finding "even parties not responsible for contamination may fall within the broad definitions of PRPs in §§ 107(a)(1)-(4)"); *Solutia*, 726 F. Supp. 2d at 1331 (reasoning that "[u]nder CERCLA's strict liability regime, a party that falls within any of the four PRP categories of § 107(a) may be held jointly and severally liable . . . even if the party is 'innocent'."). *See generally* 42 U.S.C. 9601 *et seq.* (2006) (providing definitions of responsible parties).

240. *Atl. Research*, 551 U.S. at 141 (affirming judgment of lower court).

241. *Solutia*, 726 F. Supp. 2d at 1304 (rejecting United States' argument).

for compelled cleanup expenditures under § 107(a).[242] The court properly disagreed with this assertion, noting that the Eleventh Circuit's reference to § 107(a) "does not purport to preclude § 107(a) claims for response costs that are incurred 'involuntarily.'"[243]

The legal reconsideration did not end there. Following the government's lead, private defendants filed motions to reconsider the original breadth allowed by the court's order, based on Solutia being "compelled" by the administrative agreements and enforcement measures that leave only "claims by [Solutia] for contribution under § 113(f)."[244] Solutia countered that private cost recovery plaintiffs had a choice in utilizing overlapping provisions of § 107(a) and/or § 113(f) claims, and § 107(a) was viable for response activities but not actually "compelled" by the government's enforcement measures.[245]

With this reconsideration, the court bifurcated the history of CERCLA. Between 1980 and 1986, "the only express provision that potentially authorized a private party to recoup expenditures made in connection with the cleanup of a site from other private parties or polluters was § 107(a)(4)(B)."[246] A § 107 cause of action is warranted "even if the plaintiff was itself a PRP."[247] According to the court, private parties were initially assumed precluded from using § 107(a)(4)(B) by the fact that their costs were incurred under a CERCLA consent decree.[248]

The court then outlined the history after 1986 when Congress amended § 113 in 1986; many circuit courts anointed it as the exclusive remedy by which a private party might bring suit against others to recoup a portion of costs associated with a cleanup, unless the plaintiff could show that it was an "innocent" party that did not contribute to the site contamination.[249]

Cooper and *Atlantic Research* "established a different template for assessing the relationship between § 107(a) and § 113(f)."[250] Section 113 is positioned for claims for contribution where there has

242. *Id.* at 1340 (holding that no binding precedent governs viability of § 107 claims based on compelled costs of response).

243. *Id.* (rejecting conclusion that Eleventh Circuit precludes § 107(a) claims for response costs that are incurred involuntarily).

244. *Id.* at 1330 (summarizing Solutia's argument with respect to scope of CERCLA's cost recovery and contribution remedies).

245. *Id.* (explaining Solutia's argument on § 107 application).

246. *Solutia*, 726 F. Supp. 2d at 1332 (providing history of § 107 case law).

247. *Id.* at 1333 (arguing that party has choice of remedies).

248. *Id.* (providing history of § 107 case law).

249. *Id.* at 1336 (providing history of § 107 case law).

250. *Id.* (providing history of § 107 case law).

been prior government-initiated litigation or settlement with the private party defendants.[251] Section 107 applies where a private plaintiff seeks to recover costs expended voluntarily and is not under suit itself; *Atlantic Research* is applicable to cost recovery claims regardless of the presence of a settlement.[252]

Applying this debatable rubric on reconsideration, the court characterized Solutia's cleanup costs as involuntary.[253] The defendants argued that *Atlantic Research* limits claims under § 107(a) to those having been preceded by suit under §§ 106 or 107, or where § 113(f) is unavailable.[254] The court disagreed. First, a PRP who has been subject to an enforcement action is not limited only to § 113(f); the trial court characterized as dicta and dismissed any language in *Atlantic Research* that could suggest such a requirement.[255] The court noted that the Supreme Court did not reach this issue, leaving it to the lower courts.[256] The court similarly rejected one defendant's argument regarding the relative non-innocence of the plaintiffs as a reason to bar claims due to statutes of limitations.[257]

The issue of voluntary versus compelled direct expenditures by private parties was not before the Supreme Court in *Atlantic Research.* Courts have taken different perspectives on this distinction.[258] The lower court here relegated § 107 to residual option status by making it available only where § 113(f) contribution is not available, thereby recognizing § 113 claims exclusively where response expenditures have been compelled by a cleanup pursuant to a judgment, consent decree, or settlement that gives rise to contribution rights under § 113(f).[259]

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251. *Solutia*, 726 F. Supp. 2d at 1336 (describing applicability of § 113).

252. *Id.* at 1336-37 (finding if there has been litigation, § 113 is the contribution remedy that is available).

253. *Id.* at 1337 (holding that no binding precedent governs viability of § 107 claims based on compelled costs of response and finding if there is no government litigation, § 107 is available).

254. *Id.* (describing defendants' argument).

255. *Id.* (rejecting defendants' argument).

256. *Solutia*, 726 F. Supp. 2d at 1338 (noting that *Atlantic Research* reserved issue of whether § 113(f) contribution claim is exclusive remedy of PRP that has been subject to enforcement action under §§ 106 or 107); *see* United States v. Atl. Research Corp., 551 U.S. 128, 139 n.6 (2007) (reserving issue).

257. *Solutia*, 726 F. Supp. 2d at 1338 (rejecting defendant's argument).

258. *Id.* at 1340-41 (explaining different conclusions reached by lower courts).

259. *Id.* at 1341-42 (holding § 113(f) is exclusive remedy to recoup cleanup costs).

The court, therefore, dismissed a requirement of voluntariness of remediation to utilize § 107, if § 113 were not available.[260] The plaintiffs argued that the only prerequisite to utilizing § 107 is whether response costs were directly paid, regardless of whether the motivation was a prior agreement, settlement, or government enforcement action. In other words, plaintiffs argued that direct cost incursion is more determinative than motive. "[D]irect cleanup costs should also be subject to a claim for cost recovery, even if incurred carrying out obligations under a consent decree or other government enforcement because, strictly speaking, that party is not reimbursing another for its response costs."[261]

The court acknowledged that use of § 107(a)(4)(B) requires neither innocence nor involuntariness.[262] The court reasserted reasoning reminiscent of the Courts of Appeal decisions that were overturned in the *Atlantic Research* decision:

> [T]he Congress that codified the contribution cause of action in the SARA amendments intended that a particular set of costs and underlying circumstances should give rise to both a claim for contribution under § 113(f) and a claim for cost recovery under § 107(a)(4)(B), at least *after* a judgment, consent decree, or settlement that resolves CERCLA liability.[263]

This reasoning reads a motive into congressional action that is not apparent anywhere in the legislation or its legislative history.[264] The court also noted that there must be a difference between the two sections beyond merely renumbering the section of code in the complaint.[265] A similar line of reasoning, however, was the predicate for numerous circuit court cases decided between 1994 and 2003 that have since been overturned.[266]

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260. *Id.* at 1342 (holding § 107 can be used when § 113 is not available to a party).

261. *Id.* at 1342-43 (describing plaintiffs' argument).

262. *Solutia*, 726 F. Supp. 2d at 1342-43 (recognizing § 107(a)(4)(B) does not require innocence or involuntariness).

263. *Id.* at 1343 (clarifying Congress's intent).

264. *Id.* at 1343-44 (clarifying Congress's intent).

265. *Id.* at 1344 (clarifying Congress's intent).

266. For further description of circuit court cases see *supra* notes 44-75 and accompanying text.

D. Other Federal Trial Courts

Despite the *Atlantic Research* Court's distinction between voluntary and involuntary to separate costs recoverable under § 107(a) and those recoverable under § 113(f), a different operative principle adopted by some lower courts appears to be that § 107(a) is available to recover payments only in cases where § 113(f) is not.[267] One federal district court held cleanup costs incurred pursuant to a consent decree were not incurred voluntarily, noting that payments made under government duress are not voluntary.[268]

The Ninth Circuit held that a plaintiff who had not been sued under § 106 or § 107 was entitled to a cost recovery action under § 107 in *Kotrous v. Gross-Jewett Co. of Northern California*.[269] The *Kotrous* case also addressed an issue not decided by *Atlantic Research*: whether a § 113 claim is an appropriate counter-claim to a § 107 claim.[270] The Ninth Circuit determined that any defendant sued under a § 107 claim could bring a § 113 claim for contribution.[271]

VI. CONCLUSION

"Well it's a marvelous night for a Moondance"[272]

It is a wonderful Moondance; however, the inconsistency has cast hazardous substance cleanup into a bit of chaos. Prior to the Supreme Court's action, all federal courts were consistent, but as it turns out, were reading beyond the plain meaning of the text of the statute. Complicating this issue is the Supreme Court's hesitance to reach issues not fully before it.

In *Cooper*, the Court, despite two vigorous dissents, did not reach the critical claim that the lower court forced plaintiffs to drop: whether PRPs could utilize § 107 for cost recovery. In *Atlantic Research*, the Court did not define in detail what "voluntary expenditures" could be recovered under § 107, nor did it reach the critical issue of whether some involuntary expenditure tainted § 107 recovery for other voluntary expenditures.

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267. *See, e.g.*, Appleton Papers Inc. v. George A. Whiting Paper Co., 572 F. Supp. 2d 1034, 1042-43 (E.D. Wis. 2008) (supporting defendants' construction of text of CERCLA).

268. *Id.* (resolving voluntary versus involuntary distinction).

269. Kotrous v. Gross-Jewett Co. of Northern California, 523 F.3d 924, 934 (9th Cir. 2009) (holding plainitiff entitled to recovery under § 107).

270. *Id.* at 933 (relying on *Atlantic Research*).

271. *Id.* (addressing viability of § 113 as counterclaim to § 107 claim).

272. VAN MORRISON, *Moondance* (Warner Bros. 1970).

This first factual question left the trial courts reaching differing opinions between 2004 and 2007, until the Supreme Court's resolution of the issue in 2007. However, the second factual question was then left open, resulting in the lower courts taking various paths, and often again denying private parties who expend money to remediate a site access to § 107 cost recovery. The federal trial and circuit courts have been gnashing on this issue since the 2007 opinion, unable to agree on what is and is not a voluntary incursion of cost.

The three sections of this Article categorized and analyzed the degree and means of the partial and more wholesale closure of § 107 still affected by the lower federal courts, despite the Supreme Court's 2007 effort to open the provision. In Parts III and IV, we saw that when recent courts have found the incursion of private party costs as involuntary (using very different interpretations of motivation, the role of litigation, and factual catalysts for such cost incursion), they can either block access to § 107 cost recovery for all costs, or only past costs reimbursed to the government or another party, respectively. Differences in semantics and interpretation produce very different outcomes.

Part V dissected recent decisions wherein lower federal courts blocked private parties' access to § 107 cost recovery because of their preference for § 113. If §§ 113 and 107 were similar mechanisms, such a preference would be only a slight pleading and mechanical difference; however, they are not. Rather, they contain fundamentally opposed and different types of liability, statutes of fraud, and requirements of proof. These differences change the outcome. These statutory provisions are not interchangeable to plaintiffs, especially because costs of § 107 or § 113 litigation are not recoverable by plaintiffs. Therefore, when based on nothing more than a court's preference, rather than the plain meaning of the statute, these decisions fundamentally change the nature of Superfund cost allocation for billions of dollars of hazardous substance cleanup.

Also of interest are the positions of several of the circuit courts of appeal. After *Cooper*, the Third and Fifth Circuits reconsidered their positions against the use of § 107 and refused to budge. Both circuits are among those that, after *Atlantic Research*, have used the prudential blockage described in Part V to cut off access to § 107 for private parties. These circuits and the trial courts under them have construed a variety of other factual determinations regarding CERCLA. The Second and Eighth Circuits, however, were the two

circuits that chose to reverse their prior decisions blocking § 107, upon reconsideration after the Supreme Court rendered its first of three decisions in 2004.

The Second Circuit is one of those circuits identified in Parts III and IV of this Article, which have been rendering tight factual determinations on a case-by-case basis regarding access to § 107, rather than resorting to a discretionary prudential blockage. The circuits are not rigid personifications of a particular jurisprudential perspective, but rather changing panels of judges deciding individual cases. Nonetheless, the constellation and alignment of courts is interesting. Despite Supreme Court opinions, there are many ways for lower federal courts to construe factual issues in a given case to preserve interpreting fine distinctions to maintain particular results.

The steps in this Moondance are particularly interesting. It is procedurally difficult for a decision, which does not declare a federal law unconstitutional, and on which the circuit courts are not split in their basic interpretation of federal statute, to have a petition for *certiorari* granted to reach the Supreme Court.[273] In *Atlantic Research*, the Court announced a less exclusionary "edge" to applying § 107 cost recovery. The Supreme Court articulated obvious, yet often bypassed, principles of statutory construction. There is no express statutory prohibition against equitable considerations applied to claims adjudicated under § 107.[274]

The Supreme Court left some of the finer factual determinations under this rearticulated rule of law untouched, particularly whether a settlement with the government under which the settler agrees to absorb and pay future site remediation expenses constitutes a cost incurred (or a cost imposed) that is recoverable under

273. The author's research assistant, Helene Newberg, was unable to document a situation where the Supreme Court unanimously overturned opinions of all circuit courts. In addition, her research uncovered no literature documenting such an event. This does not ascertain that this has not happened before, but it is difficult to find any evidence of it. It is at least an extremely uncommon or rare event. Typically, the Supreme Court would not grant certiorari on a case of statutory interpretation if there was no dispute among the circuit courts to resolve. In its 2004 decision in *Cooper,* two members of the Court suggested that the circuits were in error on the interpretation of law, even though the issue was not then before the Court. Aviall Serv., Inc. v. Cooper Indus., 694 F. Supp. 2d 567, 577 ((N.D. Tex. Aug. 8, 2006). After this, two different panels of two circuits retreated enough in subsequent opinions to create disputes within these two circuits, such that the Supreme Court could hear an appeal in *Atlantic Research.* See *supra* notes 229 and 240 and accompanying text.

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

§ 107. In *Agere*, the Third Circuit recognized that there was no statutory basis left to discriminate against private use of § 107. Instead, it effected a similar outcome by exercising an announced prudential discretion to control which of the two CERCLA avenues provided to plaintiffs it preferred to allow.

Prior to the *Atlantic Research* decision, this same outcome was accomplished by implying a congressional intent that was nowhere evident in the statute or legislative history. After *Atlantic Research*, this identical outcome, ignoring plaintiff access to § 107, was accomplished by invoking a procedural judicial preference not found in the statute or its history. Other courts have found any partial government settlement by the private-party plaintiff to forfeit use of § 107 for cost recovery.

This raises a catch twenty-two dilemma that is nowhere in the statute. First, no wise PRP would spend large amounts of money beyond its own share of responsibility to cleanup a third-party site, without a prior or simultaneous settlement with the government, so as to bring some practical and legal finality to its potential liability.[275] Some courts have recently held that such a settlement forfeits the settlor's access to § 107. At best, it is half of a legal loaf.

Merely because a commitment of a private party to pay future costs is an element of a settlement, does not change the status that the cost will be incurred and paid directly by a private PRP. These are not costs that are incurred by the EPA and later derivatively reimbursed by the settling PRP. While not before the Court in *Atlantic Research*, nor reached in its decision, there is no indication in CERCLA or its legislative history that such response costs are not recoverable by any party entitled to utilize § 107.

Many of the lower federal courts have reached a new blockage of access to § 107, not from legal parsing of the letter of the statute, but as an exercise of their own prudential discretion not yet addressed by higher courts. The outcome takes these courts back to § 113 as the preferred, or required, judicial cost contribution mechanism. Section 113, while available on paper, may be of limited use because of its shorter statute of limitations and lack of joint and several liability. Defendants, expressing legal principles surrounding § 113, often attempt to prevail simply by evading the much longer statute of limitations available to plaintiffs in a § 107 action,

275. *See* 42 U.S.C. § 9613(f)(2) (2006) (providing contribution protection to private parties who settle with government). Such a settlement provides automatic contribution protection against later claims against settlers by the government or by private parties; without this, there would be no *quid pro quo* or advantage to such an excessive expenditure.

or avoid its more generous joint and several liability provisions for shifting costs incurred under § 107. Such prudential preferences for § 113 by several circuit courts were not found consistent with the plain meaning of the statute in *Atlantic Research*.[276]

This echoes the outcomes of pre-*Atlantic Research* cases, resulting from successive opinions by eleven federal circuit courts from 1993 through 2004, that § 107 was not available to private parties under different theories of law. Le plus ca change, le plus ca reste le meme.[277]

After the Supreme Court unanimously reversed the circuit courts in 2007, these same defendant-parties have been successful in convincing some lower federal courts to continue the ban on § 107 when used by private parties. Their efforts to eliminate § 107 cost recovery are not matters of legal principle, where the defendant-parties willingly contribute cash pursuant to § 113 contribution actions as "the lesser of two routes" to contribution. Rather, simultaneously, they are defenses that: (1) the shorter statute of limitations accompanying § 113 has expired, (2) there has not been the required prior litigation and settlement with the government to use § 113, (3) that litigation and settlement is not with an appropriate level of government, or (4) any cost sharing would not be equitable. Section 113 claims are not available without prior litigation against the party; some courts declare § 107 is not available if the expenditures are not voluntary, a term that is not defined. Therefore, this can become a double-barreled exercise by affected parties to close out any cost shifting to liable parties.

Perhaps of key lasting importance is the Court's new emphasis on the plain meaning doctrine to interpret environmental statutes. This places more pressure on Congress to say exactly what it means, without resort or risk of judicial embellishment. In several environmental decisions in addition to *Cooper* and *Atlantic Research*, the Justice Roberts Court has used plain meaning to straightforwardly interpret federal environmental statutes.[278] And this may be a key lasting element of these CERCLA decisions.

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276. United States v. Atl. Research Corp., 551 U.S. 128, 932 (2007) (finding § 107 provides PRPs with avenue for cost recovery action).

277. *List of French Words and Phrases Used by English Speakers*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_French_words_and_phrases_used_by_English_speakers (last visited Nov. 16, 2012). Translated from French to English, this means "the more things change, the more they stay the same."

278. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (interpreting Clean Water Act and Endangered Species Act); Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007) (interpreting Clean Air Act; Massachusetts v. EPA, 549 U.S. 497 (2007) (interpreting Clean Air Act).