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## The Private Causes of Action under CERCLA: Navigating the Intersection of Sections 107(a) and 113(f)

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# THE PRIVATE CAUSES OF ACTION UNDER CERCLA: NAVIGATING THE INTERSECTION OF SECTIONS 107(A) AND 113(F)

*Jeffrey M. Gaba\**

*The Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA) provides three distinct “private” causes of action that allow parties to recover all or part of their cleanup costs from “potentially responsible parties.” Section 107(a)(4)(B) provides a “direct” right of cost recovery. Sections 113(f)(1) and 113(f)(3)(B) provide a right of contribution following a CERCLA civil action or certain judicial or administrative settlements.*

*The relationship among these causes of action has been the source of considerable confusion. Two Supreme Court cases, Cooper Industries, Inc. v. Aviall Services, Inc. and United States v. Atlantic Research Corp. have identified certain situations in which the causes of action exclusively apply, but the Court has left considerable confusion about the appropriate cause or causes of action in a number of other common situations. These include situations in which costs are directly incurred as an obligation under an administrative settlement or following a CERCLA civil action.*

*This Article provides a rational approach to allocating rights of cost recovery among sections 107(a), 113(f)(1), and 113(f)(3)(B) that is consistent both with the language of CERCLA and the Supreme Court’s analysis in Cooper and Atlantic Research. First, the Article evaluates the rather unsatisfying rationales asserted by the U.S. courts of appeals for determining whether the causes of action under 107(a) and 113(f) are mutually exclusive. The Article suggests that the proper resolution focuses on whether there is textual overlap among the sections. Quite simply, in the event of textual overlap, standard canons of construction and the express text of section 113(f)(3)(B), not discussed by any of the courts of appeals, suggest that 113(f) provides the exclusive cause of action for cost recovery under CERCLA.*

*Second, the Article evaluates the textual scope of the causes of action and whether costs incurred in a variety of common situations thus fall within the scope of 107(a)(4)(B) or 113(f). Both the specific text and the Supreme Court’s approach, particularly its focus on the “traditional” meaning of contribution, can help resolve these issues. The result of this analysis is a straightforward applica-*

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*tion of the statute that results in a consistent and coherent structure to CERCLA that both provides incentives for cleanup and helps ensure that the polluter pays.*

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INTRODUCTION

*Courts have frequently grappled with whether and how PRPs may recoup CERCLA-related costs from other PRPs. The questions lie at the intersection of two statutory provisions—CERCLA §§ 107(a) and 113(f).<sup>1</sup>*

*Navigating the interplay between these sections is not easy.<sup>2</sup>*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 stands as one of the central pillars of federal environmental law.<sup>3</sup> Through CERCLA, Congress established mechanisms both to promote the remediation of property contaminated by hazardous substances and, as importantly, to ensure that the cost of cleanup is spread equitably among responsible parties. In other words, CERCLA was intended to ensure that property is cleaned up and that the polluter pays.<sup>4</sup>

Although CERCLA provides the federal government with powerful tools to achieve these goals, one of its major innovations is the creation of private causes of action that allow private parties to recover their costs of cleanup and allocate these costs among other responsible parties. Under section 107(a)(4)(B), private parties have a “direct” right to recover from responsible parties the cleanup costs they “directly incur.”<sup>5</sup> Under sections 113(f)(1) and 113(f)(3)(B) parties have a right of “contribution” to recover an equitable share of cleanup costs they have paid “during or following” a CERCLA civil action or in certain approved administrative or judicial settlements.<sup>6</sup>

The relationship between these three causes of action has been and remains a critical issue that affects the operation of the statute. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Supreme Court held that the statu-

1. United States v. Atl. Research Corp., 551 U.S. 128, 131 (2007).

2. Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 766 (6th Cir. 2014).

3. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2013)); Martina E. Cartwright, *Superfund: It’s No Longer Super and It Isn’t Much of a Fund*, 18 TUL. ENVTL. L.J. 299, 300 (2005).

4. See *Agere Sys., Inc. v. Advanced Env’tl. Tech. Corp.*, 602 F.3d 204, 226 (3d Cir. 2010); *W.R. Grace & Co. v. Zotos Int’l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009).

5. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

6. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (providing an express right of contribution “during or following” a civil action under CERCLA); CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (providing an express right of contribution for persons who have resolved their liability to the United States or state governments in a “judicially or administratively approved settlement”); see *infra* notes 38–43 and accompanying text (discussing the private causes of action).

tory right of contribution under 113(f) was not available to persons who had voluntarily incurred costs without a prior or pending CERCLA civil action or approved administrative or judicial settlement.<sup>7</sup> Three years later, in *United States v. Atlantic Research Corp.*, the Court held that the “direct cause of action” under 107(a)(4)(B) was available to persons who had directly incurred costs to voluntarily clean up property.<sup>8</sup> Following *Cooper* and *Atlantic Research*, it was clear that persons who had voluntarily “incurred” cleanup costs were limited to cost recovery under section 107(a)(4)(B) and persons who had “reimbursed” others following a civil action or certain judicial or administrative settlements could only recover their costs through an action for contribution under section 113(f).

The Court, however, left a number of critical questions unresolved. Which cause of action applies if a party “involuntarily” incurs cleanup costs responding to a government order? Which cause of action applies if a party has settled with the government and agrees both to reimburse the government and to directly spend additional money on cleanup? What types of settlements will trigger the right of contribution? The line between the direct cause of action and the action for contribution, although sharper following *Cooper* and *Atlantic Research*, remains blurred.

And the choice of cause of action matters. The standard for recovery under 107(a)(4)(B) is “joint and several”; under 113(f) the standard is one of “equitable allocation.”<sup>9</sup> The statute of limitations for cost recovery under 107(a)(4)(B) can be up to six years following commencement of the cleanup; the statute of limitations under 113(f) is three years from the date of judgment or settlement.<sup>10</sup> Persons settling with the government can be protected from subsequent claims for contribution under 113(f), but they remain liable for actions under 107(a)(4)(B).<sup>11</sup>

Since *Cooper* and *Atlantic Research*, U.S. courts of appeals in seven different circuits have addressed the circumstances of when claims under 107(a)(4)(B) or 113(f) can be asserted.<sup>12</sup> Although each court has concluded that the causes of action are mutually exclusive, the approach and rationale advanced by these courts has been inconsistent and, in some cases, unconvincing. Further, they have varied in their treatment of the scope of these sections. Courts have yet to develop a coherent answer to the question of how to allocate rights of cost recovery between 107(a)(4)(B) and 113(f).

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7. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 158 (2004).

8. *United States v. Atl. Research Corp.*, 551 U.S. 128, 131–32 (2007).

9. See *infra* notes 45–50 and accompanying text.

10. See *infra* notes 51–52 and accompanying text.

11. See *infra* notes 53, 95–96 and accompanying text.

12. See *infra* notes 120–51 and accompanying text.

The purpose of this Article is to provide a rational approach to allocating rights of cost recovery that is consistent both with the language of CERCLA and the Supreme Court's analysis in *Cooper/Atlantic Research*. The Article begins with a discussion of the structure of CERCLA and the tools available to the government and private parties. Part II discusses the history of the private causes of action under CERCLA and the rationale and implications of the Supreme Court's holdings in *Cooper* and *Atlantic Research*. It identifies a "taxonomy" of various situations that arise in which there is still uncertainty regarding the applicable cause of action. These include situations where costs are directly incurred under: (1) a CERCLA Unilateral Administrative Order; (2) a government settlement agreement that satisfies the requirements of 113(f)(3)(B); (3) a government settlement agreement that does not satisfy 113(f)(3)(B); (4) a private settlement following a CERCLA civil action; and (5) a private settlement without a CERCLA civil action.

Part III discusses the issue of "exclusivity": are the causes of action in 107(a)(4)(B) and 113(f) mutually exclusive or may a plaintiff choose between them? The section evaluates the unsatisfying rationales asserted by courts of appeals to determine that the causes of action are exclusive. It provides a rational and simple textual approach to resolving this issue. Quite simply, in the event of textual overlap, standard canons of construction and the express text of section 113(f)(3)(B), not discussed by any of the courts of appeals, suggest that 113(f) provides the exclusive cause of action for cost recovery under CERCLA.

Part IV addresses the various situations that arise within the CERCLA taxonomy and evaluates whether the costs incurred in these situations fall within the scope of 107(a)(4)(B) or 113(f). Both the specific text and the Supreme Court's approach, particularly its focus on the "traditional" meaning of contribution, can help resolve these issues. The result of this analysis is a straightforward application of the statute that results in a consistent and coherent structure to CERCLA that both provides incentives for cleanup and helps ensure that the polluter pays.

## I. OVERVIEW OF CERCLA

### A. *History of CERCLA*

The seventies was the environmental decade. From 1970 to 1976, Congress adopted far-reaching regulatory statutes that addressed problems of air pollution, water pollution, and hazardous waste.<sup>13</sup> One piece remained

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13. See, e.g., Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (2013)); Federal Water Pollution Control Act

missing, however; the newly adopted environmental statutes did not provide effective federal mechanisms to ensure that contaminated property was cleaned up. A series of notorious examples of contaminated sites—from Love Canal to the “Valley of the Drums”—increased political pressure to adopt effective federal legislation.<sup>14</sup>

In the late seventies, several versions of a federal cleanup statute were being considered in the 96th Congress, but fate and Ronald Reagan intervened. In November 1980, Reagan was elected president and the Republicans took the Senate. The Democrats, who at that point controlled the Presidency and both houses of Congress, had weeks to adopt legislation before the new President and Congress took office in January 1981.<sup>15</sup>

The result was a rush to legislation. Through a complex process, CERCLA was enacted as a Senate amendment to a House Resolution, under a suspension of the rules that precluded amendments.<sup>16</sup> The legislative history, such as it is, consists of sometimes contradictory floor debates and the Senate and House reports on predecessor bills which had not been adopted.<sup>17</sup> This history, in part, accounts for the universal recognition that CERCLA is a poorly drafted and confusing statute with limited reliable history to guide its implementation and interpretation.<sup>18</sup>

Major amendments to CERCLA were enacted in 1986.<sup>19</sup> The Superfund Amendment and Reauthorization Act (SARA) adopted a variety of changes and clarifications to the law including, among others, new gov-

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Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2013)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k (2013)).

14. See John C. Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1407 (1997); Cartwright, *supra* note 3, at 301.

15. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVIL. L. 1, 1 (1982).

16. To expedite enactment of the legislation, the Senate took an existing House Resolution, replaced its language with a Senate version drawn from earlier proposed Senate legislation, and passed the resulting version as the House Resolution. See *id.*; see also CAROLE STERN SWITZER & LYNN A. BULAN, *CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (SUPERFUND)* (BASIC PRACTICE SERIES) 7 (1st ed. 2002).

17. In *Ninth Ave. Remedial Grp. v. Fiborbond Corp.*, 946 F. Supp. 651 (N.D. Ind. 1996), the court described CERCLA's legislative history, stating, “[T]he bill was enacted without a conference report. Because of the lack of a conference report, the reports on the prior bills presented during that session of Congress, S. 1480 and H.R. 7020, and the debate on those bills, as well as the brief debate on the final bill, constituted the core of the legislative history of CERCLA.” *Id.* at 660–61.

18. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986).

19. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2013)).

ernment settlement authority, clarification of cleanup standards, and, as discussed below, a new set of private causes of action.<sup>20</sup>

### B. Federal Options Under CERCLA

Central to CERCLA is the extraordinary power given to the federal government to address property contaminated with “hazardous substances.”<sup>21</sup> First, the Environmental Protection Agency (EPA) has the power directly to undertake the cleanup of contaminated property.<sup>22</sup> To ensure that the government would have the resources to act, the statute created a separate pot of money, the federal Hazardous Substances Trust Fund, a.k.a. “Superfund,” to be used for government cleanups.<sup>23</sup> CERCLA also gives the government a cause of action under section 107(a)(4)(A) to recover its “response costs” from a group of “potentially responsible parties” (PRPs).<sup>24</sup> The group of PRPs is large and includes (1) the current owners or

20. See, e.g., *id.* §§ 121–22, 310 (codified as amended at 42 U.S.C. §§ 9613(f), 9621–22); see generally U.S. Env’tl. Prot. Agency, *The Superfund Amendments and Reauthorization Act (SARA)*, SUPERFUND, <http://www2.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara> (last updated Sept. 30, 2015).

21. Both cost recovery under section 107(a) and the issuance of orders under section 106 are limited to situations in which there has been a release or threat of release of a “hazardous substance.” See CERCLA §§ 106(a), 107(a)(4), 42 U.S.C. §§ 9606(a), 9607(a)(4) (2013). The term “hazardous substance” is defined, in part, by cross-reference to hazardous and toxic materials identified under other environmental statutes. CERCLA § 101(14), 42 U.S.C. § 9601(14) (cross referencing hazardous air pollutants under the Clean Air Act, toxic pollutants under the Clean Water Act, most hazardous wastes under the Resource Conservation and Recovery Act and certain imminently hazardous chemical substance or mixture under the Toxic Substances Control Act). EPA has promulgated the list of hazardous substances. 40 C.F.R. § 302.4 (2015).

22. CERCLA § 104(a), 42 U.S.C. § 9604(a). Although CERCLA generally authorizes action by “the President,” presidential authority to implement provisions of CERCLA has generally been delegated to the Administrator of the Environmental Protection Agency. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987), *amended by* Exec. Order No. 13,308, 68 Fed. Reg. 37,691 (2003); Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (1996), *amended by* Exec. Order No. 13,308, 68 Fed. Reg. 37,691 (2003).

23. 26 U.S.C. § 9507 (2014) (establishing “a trust fund to be known as the ‘Hazardous Substance Superfund’”). Congressional reauthorization of funding for the Trust Fund has a complex history. See DAVID M. BEARDEN, CONG. RESEARCH SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 21–23 (2012), <https://www.fas.org/sgp/crs/misc/R41039.pdf>.

24. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). CERCLA distinguishes between what are generally short-term “removal” actions and long-term “remedial” actions. See CERCLA § 101(23)–(24), 42 U.S.C. § 9601(23)–(24) (defining “remove,” “removal,” “remedy,” and “remedial action”). Removal actions are designed to address situations requiring immediate action, while remedial actions are designed to permanently address contamination at a site. *Id.* The response costs recoverable under section 107(a)(4)(A) include costs associ-



operators of contaminated sites, (2) past owners or operators of the site at the time of disposal, (3) persons who “arranged for disposal” of hazardous substances at the site, and (4) transporters who were involved in selection of the site for disposal.<sup>25</sup> Critically, courts have held that these PRPs are “jointly and severally” liable.<sup>26</sup> Thus, CERCLA allows the government to recoup all of its costs from a subset of the larger group of PRPs.

Second, the government has the power to compel private parties to undertake the cleanup themselves. Section 106(a) contains two distinct options for the government to compel parties to clean up a site.<sup>27</sup> First, the government may seek a judicial order in which the court grants the requested relief.<sup>28</sup> Alternatively, EPA may issue an administrative order to compel action “as may be necessary to protect public health and welfare and the environment.”<sup>29</sup> These administrative orders are referred to as “Unilateral Administrative Orders” (UAOs),<sup>30</sup> and, given the magnitude of penalties for non-compliance, UAOs are potent tools to compel the cleanup of sites.<sup>31</sup>

Despite the government’s extraordinary unilateral powers, much of the federal CERCLA process involves settlement. It is common for EPA to undertake preliminary investigation at a site and then threaten PRPs with cost recovery and UAOs.<sup>32</sup> The result is a settlement, either in the form of a judicial consent decree or an “Administrative Settlement Agreement and Order on Consent” (ASAOC).<sup>33</sup> Typically, these settlements involve a

ated with performing both removal and remedial actions. See CERCLA § 101(25), 42 U.S.C. § 9601(25) (defining “respond” and “response” to include both “removal” and “remedial” actions and any other related enforcement action).

25. CERCLA § 107(a)(1)–(4), 42 U.S.C. § 9607(a)(1)–(4).

26. See *infra* notes 45–50 and accompanying text.

27. CERCLA § 106(a), 42 U.S.C. § 9606(a).

28. *Id.*

29. *Id.*

30. U.S. Env’tl. Prot. Agency, *Superfund Cleanup Subject Listing Orders - Unilateral, ENFORCEMENT*, [http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub\\_id=1230](http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=1230) (last updated Sept. 30, 2015).

31. Persons who, without “sufficient cause,” fail to comply with an administrative order are potentially subject to both a \$25,000 per-day fine and a penalty of up to three times the amount of the final cleanup. CERCLA §§ 106(b)(1), 107(c)(3), 42 U.S.C. §§ 9606(b)(1), 9607(c)(3).

32. See *e.g.*, CERCLA § 122(e), 42 U.S.C. § 9622(e) (providing “special notice” procedures designed to facilitate negotiation of settlements); OFFICE OF SITE REMEDIATION ENFT, U.S. ENVTL. PROT. AGENCY, CERCLA ENFORCEMENT PROJECT MANAGEMENT HANDBOOK (1999) [hereinafter EPA HANDBOOK] (outlining EPA’s practices and policies when enforcing CERCLA).

33. See EPA HANDBOOK, *supra* note 32, at ch. 5. These agreements were previously referred to as “Administrative Orders on Consent” or AOCs. EPA revised the terminology in 2005 in response to the Supreme Court’s decision in *Cooper Industries, Inc. v. Aviall Ser-*

group of PRPs who agree to reimburse the government for the government's costs and commit to undertake additional cleanup actions.

In the SARA amendments, Congress created special authorization and incentives to foster the use of settlements to resolve CERCLA disputes.<sup>34</sup> Section 122 contains distinct authority to enter settlements in which the settling parties agree to undertake cleanup actions at a site<sup>35</sup> and/or reimburse government costs.<sup>36</sup> It also provides procedures for approval of settlements.<sup>37</sup>

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*vices, Inc.*, 543 U.S. 157 (2004). The revisions were an attempt to assure PRPs that settlements would provide contribution protection and authorize a right of contribution under 42 U.S.C. § 9613(f)(3)(B). See Memorandum from Susan Bromm, Dir., Office of Site Remediation Enft, U.S. Env'tl. Prot. Agency, on Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f) (Aug. 3, 2005) [hereinafter 2005 EPA Revised Settlement Memo], <http://www2.epa.gov/sites/production/files/2013-09/documents/interim-rev-aoc-mod-mem.pdf>.

EPA has since issued a series of revisions to its model administrative settlements and consent decrees. See, e.g., Memorandum from Marcia Mulkey, Dir., Office of Site Remediation Enft, U.S. Env'tl. Prot. Agency, on Interim Revisions to CERCLA Judicial and Administrative Settlement Models to Clarify Contribution Rights and Protection from Claims Following the *Aviall* and *Atlantic Research Corporation* Decisions (Mar. 16, 2009) [hereinafter 2009 EPA Revised Settlement Memo], [http://www2.epa.gov/sites/production/files/documents/interim-settle-arc-mem\\_0.pdf](http://www2.epa.gov/sites/production/files/documents/interim-settle-arc-mem_0.pdf); Cindy Mackey, Dir., Office of Site Remediation Enft, U.S. Env'tl. Prot. Agency, on Revisions to 2009 ARC Memo and Issuance of Revised CERCLA Past Cost, Peripheral, *De Minimis*, *De Micromis*, and Municipal Solid Waste Settlement Models (Sept. 26, 2014) [hereinafter 2014 EPA Revised Settlement Memo], <http://www2.epa.gov/sites/production/files/2014-09/documents/payment-models-2014-mem.pdf>.

Many of the changes have been in response to case law defining the elements required to constitute an approved section 113(f)(3)(B) settlement. See *infra* notes 201–22 and accompanying text.

34. CERCLA § 122, 42 U.S.C. § 9622; see also Timothy B. Atkeson et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 ENVTL. L. REP. 10,360, 10,410–12 (1986). The settlement incentives in SARA include contribution protection, see *infra* notes 53–54 and accompanying text, and government “covenants not to sue,” see CERCLA § 122(f), 42 U.S.C. § 9622(f).

35. CERCLA § 122(a), 42 U.S.C. § 9622(a) (authorizing the government to enter into an “agreement” with a person to perform any response action).

36. CERCLA § 122(h), 42 U.S.C. § 9622(h) (authorizing the government to settle a section 107 cost recovery claim for “costs incurred by the United States Government”).

37. Settlements requiring settling parties to undertake long-term “remedial” actions must be judicially approved and embodied in a consent decree. CERCLA §§ 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A). Other settlements involving parties who contribute relatively small amounts at a site (*de minimis* parties), CERCLA § 122(g), 122(d)(1)(A), 42 U.S.C. §§ 9622(g), 9622(d)(1)(A), or settlements involving preliminary actions at a site may be implemented through administrative settlements. Settlements that involve resolution of government financial claims must be published in the Federal Register for public comment. CERCLA § 122(i), 42 U.S.C. § 9622(i).

### C. *The Private Causes of Action Under CERCLA*

CERCLA, in its current incarnation, has three express causes of action that allow private parties to recover their response costs. First, section 107(a)(4)(B) authorizes private parties who have directly “incurred” response costs to recover these costs from the group of PRPs.<sup>38</sup> This section thus provides an incentive for voluntary cleanup by providing any person, including a PRP, with a mechanism to recover all or part of its cleanup costs from others.<sup>39</sup> Second, section 113(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607 (a) [107(a)] of this title, during or following any civil action under section 9606 [106] of this title or under section 9607 (a) [107(a)] of this title.”<sup>40</sup> At a minimum, this allows PRPs who have been held liable in a cost recovery action under section 107(a) to seek “contribution” from other PRPs for costs imposed in the civil action.<sup>41</sup> Third, section 113(f)(3)(B) provides:

A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).<sup>42</sup>

These two “contribution” causes of action under 113(f) provide an express method for allocating cleanup costs among PRPs.<sup>43</sup>

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38. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). Section 107(a)(4)(B) provides that, in addition to government response costs, PRPs shall be liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” *Id.* Although the language does not expressly create a cause of action, in *Key Tronic v. United States*, the Supreme Court noted that, despite its odd phrasing “§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs.” 511 U.S. 809, 818 (1994).

39. See H.R. REP. NO. 96-1016, pt. 1, at 17, 29 (1980) (“The legislation would also establish a Federal cause of action in strict liability to enable the [EPA] Administrator to pursue rapid recovery of the costs incurred for the costs of such [cleanup] actions undertaken by him from persons liable therefore and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.”) (emphasis added); see also *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990) (describing Congress’s “manifest legislative intent to encourage voluntary private cleanup action”).

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

41. See *United States v. Atl. Research Corp.*, 551 U.S. 128, 138–39 (2007).

42. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

43. See *infra* notes 48–50 and accompanying text for a discussion of the standard for allocation of costs in contribution actions under CERCLA.

#### D. CERCLA Provisions Affected by the Private Cause of Action

CERCLA is a complex statute with a variety of closely interrelated provisions, and, unfortunately, Congress does not appear to have crafted the private causes of action with an understanding of either these interrelations or the implications of the statutory language. Sadly, to understand the rationale and consequences of courts' interpretation of the relationship between sections 107(a)(4)(B) and 113(f), it is necessary to consider the following mind-numbing components of CERCLA.<sup>44</sup>

*Cost Allocation and the Standard of Liability.* CERCLA does not contain an express standard of liability for cost recovery under 107(a)(4)(B). Relying on legislative history, however, courts have universally held that liability under 107(a) is "joint and several."<sup>45</sup> Citing Restatement principles, courts, including the Supreme Court, have held that liability under section 107 is joint and several unless there is a discrete harm that provides a basis for allocating costs to parties.<sup>46</sup> This possibility of division based on harm is more theoretical than real. For a variety of reasons, most courts have found that liability under 107 is "joint and several" among PRPs.<sup>47</sup> This has led to a general acceptance of the proposition that a PRP suing under section 107(a)(4)(B) is entitled to recover one hundred percent of its costs unless a defendant can bring a counterclaim for contribution.

In contrast to section 107(a), the contribution provisions of section 113(f) are governed by an express statutory standard of "equitable allocation." Section 113(f)(1) states that: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."<sup>48</sup> This equitable allocation is conceptually different from "several" liability potentially available under 107;<sup>49</sup> equitable allocation under 113(f) allows the court to consider "appropriate factors," other than the divisibility of harm, which may include differ-

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44. As one court noted: "[W]ading through CERCLA's morass of statutory provisions can often seem as daunting as cleaning up one of the sites the statute is designed to cover." *Cadlerock Props. Joint Venture v. Schilberg*, No. 3:01CV896(MRK), 2005 WL 1683494, at \*5 (D. Conn. July 19, 2005).

45. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613–14 (2009) (discussing case law establishing joint and several liability under section 107(a)(4)(B)).

46. *Id.* at 613.

47. See JENNIFER L. MACHLIN & TOMME R. YOUNG, *MANAGING ENVIRONMENTAL RISK: REAL ESTATE AND BUSINESS TRANSACTIONS* § 4A:57 (West ed. 2014); Derek Wetmore, *Joint and Several Liability After Burlington Northern: Alive and Well*, 32 VA. ENVIL. L.J. 27, 59 (2014).

48. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2013).

49. See *Yankee Gas Serv. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 241–42 (D. Conn. 2012) (discussing conceptual differences between cost apportionment under "joint and several" principles and cost allocation under section 113(f)(1)).

ences in volume and toxicity, or the conduct, cooperation, and culpability of parties.<sup>50</sup>

*Statute of Limitations.* CERCLA contains several statutes of limitation applicable to cost recovery actions. Section 113(g)(2), entitled “Actions for Recovery of Costs,” provides up to six years from the initiation of certain cleanup activity.<sup>51</sup> This statute of limitations, applicable to claims under 107(a), is linked to the timing of physical activity in cleaning up property. Section 113(g)(3), entitled “Contribution,” provides a three-year statute of limitations starting from the date of a judgment or certain administrative settlements.<sup>52</sup> Thus, in contrast to actions under 107(a)(4)(B), the statute of limitations for contribution under 113(f) is linked to the date of judicial or administrative actions rather than the date in which the cleanup costs are incurred.

*Contribution Protection.* Settlements typically involve a limited number of PRPs, and following settlement there may be a group of non-settling parties who remain liable for cleanup costs. As an incentive to settle, CERCLA protects settling parties from subsequent actions for contribution by these non-settling parties.<sup>53</sup> As discussed below, the Supreme Court has

50. Although not enacted, many courts have referred to a list of equitable allocation factors, proposed by then Senator Al Gore, that include, among others, the contribution of each party, the amount and toxicity of the hazardous substances, the degree of care, and the cooperation with the government demonstrated by the party. *See, e.g.*, *United States v. Township of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998); *United States v. Hardage*, 116 F.R.D. 460, 466 (W.D. Okla. 1987); Steven Ferrey, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 60 (1994).

51. Section 113(g)(2) provides that “an initial action for recovery of costs referred to in section 107” must be commenced A) within 3 years after completion of certain short term cleanups referred to as “removal actions” or B) within 6 years of initiation of certain long term cleanups, referred to as “remedial actions.” 42 U.S.C. § 9613(g)(2).

52. Section 113(g)(3) provides that

[n]o action for contribution may be commenced more than 3 years after:

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622 (g) of this title (relating to *de minimis* settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(2).

53. Section 113(f)(2) specifically provides that “a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.” 42 U.S.C. § 9613(f)(2).

Section 122 also contains provisions specifically authorizing inclusion of “contribution protection” provisions in EPA settlements. 42 U.S.C. § 9622(h)(4), 9622(g)(5).

held that this contribution protection bars only contribution actions under 113(f) and not cost recovery actions under 107(a)(4)(B).<sup>54</sup>

*Declaratory Judgments.* The statute of limitations provisions in 113(g)(2) applicable to section 107(a) cost recovery actions contain another relevant component. Section 113(g)(2) expressly provides that a court in a section 107 cost recovery action may issue a “declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.”<sup>55</sup> No comparable provision providing for a declaratory judgment applies to actions for contribution.<sup>56</sup>

*Priority of Government Claims.* The federal government has a unique concern about the consequence of the private cause of action on the priority of government claims. Section 113(f)(3)(B) provides an express right of contribution for parties who have resolved their liability to the government through an approved agreement. Section 113(f)(3)(C) provides: “In an action under this paragraph [113(f)(3)], the rights of any person who has resolved its liability to the United States or the State shall be subordinate to the rights of the United States or the State.”<sup>57</sup> No comparable provision provides for the priority of government claims in actions brought under section 107(a)(4)(B) or 113(f)(1).<sup>58</sup>

## II. DEVELOPMENT OF THE PRIVATE CAUSES OF ACTION

The existence and scope of CERCLA’s private causes of action developed over time through the interplay between poorly drafted statutory provisions and judicial attempts to make sense of CERCLA’s language and structure. This history can be divided into three phases: (1) the period from the adoption of CERCLA in 1980 to the adoption of the SARA amendments in 1986; (2) the period from the SARA amendments to the Supreme Court cases of *Cooper Industries, Inc. v. Aviall Services, Inc.* and *United States v. Atlantic Research Corp.*; and (3) the current post-*Cooper/Atlantic Research* period, in which federal courts are struggling to clarify the issues left unresolved by *Cooper* and *Atlantic Research*.

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54. See *infra* notes 95–96 and accompanying text.

55. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).

56. See *infra* note 226.

57. CERCLA § 113(f)(3)(C), 42 U.S.C. § 9613(f)(3)(C).

58. This, among other reasons, gives the government a particular interest in advocating that section 113(f)(3)(B) provides an exclusive cause of action. See, e.g., Brief of the United States as Amicus Curiae Supporting Appellant at 10-14, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010) (No. 08-3843). This might also caution taking the government’s position on the relationship between sections 107(a)(4)(B) and 113(f)(3)(B) with a grain of salt.

## A. CERCLA to SARA

When adopted in 1980, CERCLA contained the ambiguously phrased 107(a)(4)(B), which provides that, under certain circumstances, PRPs “shall be liable” to “other persons.”<sup>59</sup> Whether this created a federal cause of action was the subject of dispute.<sup>60</sup> In the early 1980’s, however, courts universally held that 107(a)(4)(B) did create a cause of action for PRPs to recover response costs from other PRPs, even where the government had not supervised or approved the cleanup.<sup>61</sup> This initial identification of a private right of cost recovery under 107(a)(4)(B) created problems. How could PRPs who had reimbursed the government in a government cost recovery action under 107(a)(4)(A) sue other PRPs to recover a share of the costs they had paid? How could a court in a cost recovery action brought by a PRP under 107(a)(4)(B) allocate costs among plaintiff and defendant PRPs?

The creative answer found by most courts was an “implied” right of contribution either under 107 or federal common law.<sup>62</sup> Through this implied right of contribution, PRPs who had been subject to a cost recovery action could sue for contribution from other PRPs to recover some of their costs, and, presumably, PRPs sued by other PRPs under 107(a)(4)(B) could, during that action, file a counterclaim for contribution to allocate costs. This made sense. PRPs had been said to have “joint and several” liability based on “traditional and evolving principles of common law,” and courts

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59. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

60. See *supra* note 38. Other provisions, sections 111 and 112, suggested a different cost recovery mechanism under which PRPs could recover cleanup costs from Superfund. In the early years of CERCLA, much of the litigation focused on the relationship between section 107 and the other mechanisms of sections 111–12. See Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action under CERCLA*, 13 *ECOLOGICAL Q.* 181 (1986).

61. See, e.g., *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572–74 (5th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891–92 (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317–19 (6th Cir. 1985); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142–43 (E.D. Pa. 1982), *superseded by statute*, SARA, Pub. L. No. 99-499, 100 Stat. 1613, *as recognized in* *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 520 (3d Cir. 2006), *and abrogated by* *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007).

62. See, e.g., *United States v. New Castle County*, 642 F. Supp. 1258, 1265–68 (D. Del. 1986), *superseded by statute*, SARA, Pub. L. No. 99-499, 100 Stat. 1613, *as recognized in* *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 520 (3d Cir. 2006), *and abrogated by* *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1486–90 (D. Colo. 1985), *superseded by statute*, SARA, Pub. L. No. 99-499, 100 Stat. 1613, *as recognized in* *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 520 (3d Cir. 2006), *and abrogated by* *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007); *see also* *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985).

relied on common law rights of contribution among joint tortfeasors to justify an implied right of contribution among PRPs.<sup>63</sup>

The development of an “implied” right of contribution under 107 was, however, curtailed by two Supreme Court cases in the early 1980s that placed substantial limits on the development of such an “implied” federal cause of action for contribution.<sup>64</sup> It appeared that the implied right of contribution under CERCLA was in danger of being rejected in light of this new case law.

## B. SARA to Cooper/Atlantic Research

Congress responded to this threat by adding, in the 1986 SARA amendments, the express rights of contribution in section 113(f).<sup>65</sup> Following SARA, CERCLA thus contained both the original right of cost recovery under 107(a)(4)(B) and the two express rights of contribution in sections 113(f)(1) and 113(f)(3)(B). The language of SARA, however, created confusion about the applicability of the sections.<sup>66</sup> Particularly problematic was the language in section 113(f)(1), which created a right of contribution “during or following a civil action.”<sup>67</sup> A voluntary cleanup did not arise “during or following a civil action,” but allowing such an action to proceed under 107(a)(4)(B) created a number of problems relating to the application of “joint and several” liability, the statute of limitations, and contribution protection.<sup>68</sup>

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63. *New Castle County*, 642 F. Supp. at 1266.

64. The two cases that had undermined the basis for finding a federal implied statutory or common law right of contribution under CERCLA were *Texas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (rejecting an implied statutory or common law right contribution under the Sherman Act or Clayton Act) and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981) (rejecting implied statutory or common law right of contribution under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

65. Congress specifically acknowledged that section 113(f) was intended to “clarify and confirm” the existence of a right of contribution. *See* S. REP. NO. 99-11, at 44 (1985). SARA also contained the new statutes of limitation applicable to cost recovery and contribution claims, *see supra* notes 51–52 and accompanying text, the provisions providing for “contribution protection,” *see supra* note 53 and accompanying text, and other provisions relating to settlement agreements, *see supra* notes 34–37 and accompanying text.

66. In *Key Tronic Corp. v. United States*, the Court characterized the situation, stating: “[T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.” 511 U.S. 809, 816 (1994).

67. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2013).

68. *See, e.g.*, *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), *abrogated by* *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014); *Sun Co. Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997); *see also* Jeffrey M. Gaba, *United States v. Atlantic Research: The Supreme Court Almost Gets it Right*, 37 ENVT. L. REP. 10,810, 10,811–10,812 (2007).



Following SARA, courts of appeals, without exception, resolved the confusion by holding that any PRP seeking cost recovery from other PRPs must sue for contribution under 113(f).<sup>69</sup> Two basic rationales were used by courts of appeals to justify this conclusion. First, cost recovery among jointly liable PRPs involved a “quintessential claim for contribution” since they involved cost allocation among a class of “joint tortfeasors.”<sup>70</sup> Second, exclusive allocation of PRPs to 113(f) contribution claims protected important structural components of CERCLA, including contribution protection.<sup>71</sup> Although courts struggled to address the statute of limitations problems that this approach created,<sup>72</sup> all seemed well and CERCLA appeared coherent: non-PRPs could only sue under 107(a)(4)(B) and PRPs could only sue for contribution under 113(f).

### C. *The Supreme Court’s Resolution: Cooper and Atlantic Research*

#### 1. *Cooper Industries, Inc. v. Aviall Services, Inc.*

This apparent coherence proved to be temporary. The house of cards started falling following a U.S. district court opinion in *Aviall Services, Inc. v. Cooper Industries, Inc.*<sup>73</sup> The case involved a typical CERCLA action: the current owner of contaminated property, Aviall Services, had “voluntarily” cleaned up its property and was seeking “contribution” under section 113(f)(1) from the former owner, Cooper Industries.<sup>74</sup> Consistent with the array of then-existing court of appeals decisions, the plaintiff had based its

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69. See *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), *abrogated by* *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009); *Centerior*, 153 F.3d 344; *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998); *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *abrogated by* *City of Colton v. Am. Promotional Events, Inc.-W.*, 390 F. App’x 749 (9th Cir. 2010); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995); *United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994).

70. See, e.g., *Bedford Affiliates*, 156 F.3d at 423–24; *Colorado & E. R.R. Co.*, 50 F.3d at 1536; *Akzo*, 30 F.3d at 764.

71. See, e.g., *United Tech.*, 33 F.3d at 99–100; see also *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986), *superseded by statute*, SARA, Pub. L. No. 99-499, 100 Stat. 1613, *as recognized in* *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 520 (3d Cir. 2006), *and abrogated by* *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007).

72. See, e.g., *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997).

73. See *Aviall Serv., Inc. v. Cooper Indus., Inc.*, 2000 WL 31730 (N.D. Tex. 2000), *aff’d*, 263 F.3d 134 (5th Cir. 2001), *rev’d en banc*, 312 F.3d 677 (5th Cir. 2002), *rev’d and remanded*, 543 U.S. 157 (2004).

74. *Id.* at \*1.

claim for cost recovery on 113(f)(1).<sup>75</sup> The district court, however, dismissed Aviall's 113(f)(1) claim because it did not arise "during or following" a civil action.<sup>76</sup> A panel of the Fifth Circuit affirmed this result.<sup>77</sup> However, following rehearing en banc, the full Fifth Circuit reversed and held that a cost recovery action brought by one PRP against another was an action for contribution that should be brought under 113(f)(1).<sup>78</sup> In this, the Fifth Circuit joined other courts of appeals that had considered the issue.<sup>79</sup>

Despite the absence of a split among the circuits, the Supreme Court granted certiorari to determine if a PRP could sue under 113(f)(1) in the absence of a prior or pending civil action. In *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>80</sup> all nine members of the Court, in an opinion authored by Justice Thomas, agreed that a PRP who had not previously been subject to a civil action could not sue under 113(f)(1).<sup>81</sup> The Court relied on three rationales in reaching this conclusion. First, this was the "natural meaning" of the language of the statute: parties may, and thus may *only*, bring an action under 113(f)(1) "during or following" a civil action.<sup>82</sup> Second, allowing an action for contribution in the absence of a civil action would render "part of the statute entirely superfluous."<sup>83</sup> If parties could sue at any time, the phrase "during or following a civil action" would become meaningless.<sup>84</sup> Finally, the Court noted that the language of section 113(g)(3)(A) supported its interpretation; the statute of limitations for an action for contribution was triggered by a "judgment," something that would not exist if a party could sue for contribution without an underlying civil action.<sup>85</sup> The Court expressly eschewed reliance on arguments suggesting an interpretation that supported the "purpose" of CERCLA.<sup>86</sup> In the Court's view the issue was

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75. *Id.*

76. *Id.* at \*4.

77. *Aviall Serv., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001), *rev'd en banc*, 312 F.3d 677 (5th Cir. 2002), *rev'd and remanded*, 543 U.S. 157 (2004).

78. *Aviall Serv., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002), *rev'd and remanded*, 543 U.S. 157 (2004).

79. *See id.* at 688 n.21 (citing numerous cases from courts of appeals allowing contribution actions under section 113(f)(1) in the absence of a prior or pending civil action).

80. *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157 (2004).

81. *Id.* at 171. *But see id.* at 171 (Ginsburg and Stevens, J.J., dissenting) (concluding that PRPs could proceed in an action under section 107(a)(4)(B)).

82. *Id.* at 166 (majority opinion).

83. *Id.*

84. *Id.* In the Court's view, finding that a PRP could bring an action for contribution at any time would render a specific phrase in CERCLA totally devoid of content. *See infra* notes 135–37, 172–74 and accompanying text for an explanation of the role of "superfluity" in interpreting the relationship between sections 107(a) and 113(f).

85. *Cooper*, 543 U.S. at 167.

86. *Id.* at 167–68.

simple: “Section 113(f)(1) authorizes contribution claims only ‘during or following’ a civil action under § 106 or § 107(a), and it is undisputed that Aviall has never been subject to such an action. Aviall therefore has no § 113(f)(1) claim.”<sup>87</sup>

The Court, however, left several issues unresolved. Since Aviall had not been subject to an EPA Unilateral Administrative Order, the Court declined to consider whether such an order was a “civil action” for purposes of 113(f)(1).<sup>88</sup> Additionally, the Court expressly declined to address the issue of whether an “implied right of contribution” existed independent of 113(f).<sup>89</sup>

Most significantly, the Supreme Court left open the question of whether a PRP who had not previously been subject to a civil action could sue under 107(a)(4)(B).<sup>90</sup> The issue was critical. Pre-*Cooper* cases had said that PRPs could not sue under 107(a)(4)(B); they could sue only under 113(f).<sup>91</sup> Since *Cooper* took away the 113(f) claim, one possible conclusion was that, following *Cooper*, PRPs who voluntarily cleaned up property had

87. *Id.* at 168.

88. *Id.* at 168 n.5 (“Neither has Aviall been subject to an administrative order under § 106; thus, we need not decide whether such an order would qualify as a ‘civil action under section 9606 . . . or under section 9607(a)’ of CERCLA.”).

89. *Id.* at 170–71. Although the first sentence of 113(f)(1) provides a right of contribution “during or following” a civil action, the last sentence of 113(f)(1) states: “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [106] of this title or section 9607 [107] of this title.” CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2013).

This so-called “saving clause” has been the source of some confusion. In *Cooper*, the Court stated that the sole function of the sentence was

to clarify that § 113(f)(1) does nothing to “diminish” any cause(s) of action for contribution that may exist independently of § 113(f)(1) . . . [rebutting] any presumption that the express right of contribution provided by the enabling clause is the exclusive contribution cause of action available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought “during or following” a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1).

543 U.S. at 166–67.

This raises the possibility that some “implied” right of contribution exists independent of the statutory rights of contribution in section 113(f). The majority opinion in *Cooper* expressed doubt about the existence of such an implied right, but expressly declined to address the issue. *Id.* at 169. See *infra* notes 165–70 and accompanying text for a discussion of the continuing existence of an implied right of contribution.

90. *Cooper*, 543 U.S. at 169–70. Justices Ginsberg and Stevens, in their dissent, would have allowed the action to proceed under section 107(a)(4)(B). *Id.* at 171–74 (Ginsberg and Stevens, J.J., dissenting).

91. *Id.* at 169 (citing numerous decisions of courts of appeals precluding PRPs from suing under section 107(a)(4)(B)).

no cause of action under CERCLA—either under 113(f) or under 107(a)(4)(B).

## 2. *United States v. Atlantic Research Corp.*

Following *Cooper*, a flurry of courts addressed the issue of whether PRPs who voluntarily clean up property could sue for cost recovery under 107(a)(4)(B).<sup>92</sup> Within three years, the issue was back to the Supreme Court. In *United States v. Atlantic Research Corp.*, the Supreme Court unanimously held that a PRP who had voluntarily cleaned up property in the absence of a prior or pending civil action could sue under section 107(a)(4)(B).<sup>93</sup> Again, the Court found the answer in the “natural reading” and “plain language” of the text of CERCLA. Section 107(a)(4)(B) allowed cost recovery by “any other person” who incurred response costs. The structural relationship between sections 107(a)(4)(A) (the section authorizing cost recovery by government entities) and (a)(4)(B) (authorizing cost recovery by “any other person”), suggested that section 107(a)(4)(B) authorized cost recovery by any person other than the government entities.<sup>94</sup> Nothing in the language justified a conclusion that PRPs, who were themselves within the definition of “persons,” could not bring a 107 action.

The Court reached this conclusion in full recognition that this could potentially upset a critical structural component of CERCLA. Allowing a PRP to bring a direct claim under 107(a)(4)(B), rather than a contribution claim under 113(f)(1), meant that settling PRPs would effectively lose contribution protection. In other words, a PRP who settled with the government could now be subject to a 107(a)(4)(B) cost recovery action from non-settling PRPs for costs addressed in the settlement, and a major incentive for settlement was potentially threatened. Acknowledging the loss of contribution protection, the Court minimized the implications. According to the Court, the contribution bar still provided “significant protection” in certain circumstances.<sup>95</sup> Further, if a settling PRP was sued under 107, the settling

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92. See, e.g., *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007); *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006), *vacated*, *E.I. du Pont de Nemours & Co. v. United States*, 551 U.S. 1129 (2007); *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005).

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

94. The Court wrote:

In light of the relationship between the subparagraphs, it is natural to read the phrase “any other person” by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase “any other person” therefore means any person other than those three.

*Id.* at 135.

95. Although non-settling PRPs could sue under section 107(a)(4)(B), in the Court’s view, the contribution protection still “continues to provide significant protection from con-

PRP could counterclaim under 113(f) for contribution since this was “during” a civil action.<sup>96</sup> Through the counterclaim the court could allocate costs, and, according to the Court, the court hearing the claims would undoubtedly take into account the amounts previously paid by the defendant in the settlement.<sup>97</sup>

Critically, the unanimous opinion addressed the relationship between sections 107 and 113. According to the Court, the availability of an action under 107(a)(4)(B) did not mean that PRPs had the choice of proceeding under either 107(a) or 113(f).<sup>98</sup> The court expressly stated that, in the context of PRPs who voluntarily clean up property, 107(a)(4)(B) and 113(f) simply did not overlap: a PRP who voluntarily cleans up property could only sue under 107; a PRP who pays money following a civil action or an approved settlement can only sue under 113(f)(1).<sup>99</sup> In the Court’s words, “[t]he choice of remedies simply does not exist.”<sup>100</sup>

The Court relied on two bits of statutory language to reach this conclusion. First, the Court relied on the meaning of the word “contribution.” Citing Black’s Law Dictionary, the Court stated that contribution refers to a “tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.”<sup>101</sup> The Court further stated “a PRP’s right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties.”<sup>102</sup> In the context of 113(f)(1), the court observed that this “common liability” stemmed “from an action instituted under § 106 or § 107(a).”<sup>103</sup>

Second, the Court stated that PRPs who reimburse other parties do not “incur” cleanup costs.<sup>104</sup> According to the Court, “[w]hen a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred,”<sup>105</sup> and parties who were reimbursing costs incurred by other parties did not satisfy the statutory prerequisite of imposing liability

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tribution suits by PRPs that have inequitably reimbursed the costs incurred by another party.” *Id.* at 141.

96. *Id.* at 140.

97. *Id.* at 140–41.

98. *Id.* at 139–40.

99. *Id.*

100. *Id.* at 140.

101. *Id.* at 138 (citing *Contribution*, BLACK’S LAW DICTIONARY (8th ed. 2004)).

102. *Id.* at 139.

103. *Id.*

104. *Id.*

105. *Id.*

under 107(a)(4)(B).<sup>106</sup> Thus, as a matter of statutory construction, private causes of action under sections 107(a)(4)(B) and 113(f)(1) are mutually exclusive, arising under distinct “procedural circumstances.”<sup>107</sup>

The Court, however, recognized the possibility that in other circumstances sections 107(a)(4)(B) and 113(f) might overlap. The Court noted that a PRP may directly “sustain expenses” pursuant to a consent decree “following a suit under § 106 or § 107,” and “[i]n such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party.”<sup>108</sup> The Court stated: “We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both.”<sup>109</sup> The Court went on to say: “For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f).”<sup>110</sup> In the Court’s words, “neither remedy swallows the other.”<sup>111</sup>

### 3. Lessons from *Cooper* and *Atlantic Research*

*Cooper* and *Atlantic Research* clearly set boundaries to sections 107(a)(4)(B) and 113(f)(1): costs incurred undertaking a voluntary cleanup are exclusively recoverable under 107(a)(4)(B); costs that are reimbursed following a “civil action” or certain approved “settlements” are exclusively recoverable under 113(f)(1). In addition to these specific holdings, however, it is also important to understand the process the Court used to reach these results. Understanding the “lessons” of *Cooper* and *Atlantic Research* provides guidance on how to address the unresolved issues of the relationship among CERCLA’s private causes of action.

*Reliance on the Plain Reading of the Text.* Perhaps the most surprising element of the *Cooper* and *Atlantic Research* decisions was the Court’s almost exclusive reliance on the plain language of CERCLA to resolve the complex relationship among the sections. In *Cooper*, the plain language of “during or following” guided its decision about the appropriate role for section 113(f)(1).<sup>112</sup> A reference to language in the statute of limitations provision

106. *Id.*

107. *Id.* (quoting *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 99 (2d Cir. 2005)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 166 (2004); *supra* notes 80–84 and accompanying text.

of CERCLA was used only to bolster the Court's interpretation of the "during or following" language.<sup>113</sup>

Similarly, in *Atlantic Research*, the availability to PRPs of a right of cost recovery under 107(a)(4)(B) was clear from the express language of the section: 107(a)(4)(B) allows cost recovery by "any other person." Contrasting the phrase with the language of section 107(a)(4)(A), the Court concluded that the language clearly allowed a right of cost recovery by "any" person other than the government entities specified in 107(a)(4)(A).<sup>114</sup> Nothing fancy; the words mean what they mean.

The Court was also guided by the words "incur" and "contribution" to determine the relationship between 107(a)(4)(B) and 113(f).<sup>115</sup> In the Court's view, parties who reimburse others for cleanup costs do not "incur" response costs and thus have no right of cost recovery under 107(a)(4)(B). Common law "contribution" includes parties who reimburse other parties for a share of a common liability. The specific words define the allocation.

*Rejection of Structural or Policy Arguments.* Another striking aspect of the opinions in *Cooper* and *Atlantic Research* is the extent to which the Court was unconcerned with interpreting the sections to foster the goals of CERCLA. In other words, the Court did not interpret the sections to promote some desired end or coherent structure to CERCLA. This is apparent from a number of aspects of the decisions. Perhaps most telling is the Supreme Court's decision to grant certiorari in *Cooper* in the first place. When the Court considered *Cooper*, there was a coherent and consistent approach to the relationship between 107(a)(4)(B) and 113(f)—PRPs suing other PRPs for cost recovery were suing in contribution and were limited to an action under 113(f). Indeed, there was no split among the circuits on this conclusion. Despite this coherence, the Court granted certiorari to consider the inconsistency of this approach with the plain "during or after" language of 113(f)(1).

Further, the Court in *Atlantic Research* concluded that the plain language of CERCLA authorized a PRP to bring an action under 107(a)(4)(B) notwithstanding the potentially significant impact this conclusion would have on "contribution protection" available in CERCLA settlements.<sup>116</sup> Language trumped coherence.

*Role of "Traditional" Contribution.* One of the more confusing elements of *Atlantic Research* was its focus on the "traditional" meaning of contribu-

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113. *Supra* notes 85–86 and accompanying text.

114. *Supra* note 94 and accompanying text.

115. *Supra* notes 101–07 and accompanying text.

116. *See supra* notes 95–96 and accompanying text.

tion to interpret the scope of 113(f).<sup>117</sup> A few things seem clear. The Court's analysis cannot mean that all costs falling within the traditional meaning of contribution are recoverable under 113(f) even if they do not arise following a "civil action" or judicial or administrative settlement. Whatever the status of an "implied" right of contribution in CERCLA, it does not originate in the text of 113(f). Nor can it mean that there is no right of contribution for costs arising following a "civil action" or judicial or administrative settlement unless the costs also fall within the traditional meaning of contribution. This would make the express textual language of 113(f)(1) and 113(f)(3)(B) truly surplusage.

Although the Court's analysis of "traditional" contribution does not define the class of costs recoverable under 113(f), it nonetheless has important implications for the scope of 113(f).<sup>118</sup> The Court's analysis of the meaning of contribution provides an important interpretative tool to determine the class of costs that fall within the textual scope of 113(f).

The Court's analysis of the "traditional" meaning of contribution in *Atlantic Research* is, however, quite limited. The Court simply quoted Black's Law Dictionary which defines contribution as a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."<sup>119</sup>

The Court also observed that a PRP's right to contribution under section 113(f)(1) is "contingent upon an inequitable distribution of common liability among liable parties."<sup>120</sup>

Although all actions by one PRP against another PRP involve persons with a common liability, the Supreme Court specifically rejected the view that all actions by one PRP to apportion costs with another PRP constitute

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117. *Infra* note 120 and accompanying text.

118. As discussed below, there has been confusion, for example, over which costs incurred following a civil action or settlement are recoverable under section 113(f). *See infra* notes 225–26, 251 and accompanying text.

119. *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007) (quoting *Contribution*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

120. *Id.* at 139. The United States, in its briefs in *Atlantic Research*, advocated a different characterization of "traditional" contribution. In the government's view, traditional contribution requires that the payments for which a party seeks contribution have "extinguished" or "resolved" some or all of a common liability. *See generally* Brief for the United States at 24–26, *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (No. 06-562). The Supreme Court in *Atlantic Research* did not, however, allude either to the government's argument or to the Restatement and other authorities the Government cited in support of its position. The Court relied solely on the Black's Law Dictionary definition of traditional contribution. *Atl. Research*, 551 U.S. at 138 (citing *Contribution*, BLACK'S LAW DICTIONARY (8th ed. 2004)).



an action for contribution.<sup>121</sup> Rather, the Court stated that an action under 113(f)(1) met the definition of “traditional” contribution because those costs were recoverable “during or following” a civil action in which a “common liability” was established.<sup>122</sup> In contrast, the Court held that recovery of costs under 107(a)(4)(B) did not fall within the concept of contribution since “[a] private party may recover under 107(a) without establishment of a liability to a third party.”<sup>123</sup>

Neither the Black’s Law Dictionary definition nor the Court’s description provides very clear guidance on the elements that distinguish cost recovery from “traditional” contribution. Certainly, an element of a cost recovery action under 107(a) is proof that the defendant is a PRP.<sup>124</sup> What apparently is lacking is the requirement that the plaintiff also establish that it is a PRP that shares a common liability with the defendant. In contrast, in an action for recovery of costs imposed “during or following” a civil action, the plaintiff must prove that the defendant is a PRP, and the plaintiff’s status as a jointly liable PRP will, presumably, have been established in the predicate civil action or in the defendant’s counterclaim for contribution.<sup>125</sup> Thus, the Court’s analysis suggests that the traditional meaning of contribution is satisfied, for purposes of CERCLA, if the process that led a party to directly incur costs involved a determination that the party is a PRP that shares a common liability with the defendant in any subsequent contribution action.

*Rationale for Mutual Exclusivity.* In *Atlantic Research*, the Court found that 107(a) and 113(f)(1) provided mutually exclusive remedies in certain contexts.<sup>126</sup> This determination of “mutual exclusivity” was not based on the Court’s assessment of the best way either to promote the objectives of

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121. *Id.* at 139. Prior to *Cooper*, courts of appeals had characterized any action by one PRP to recover costs from another PRP as a “quintessential” action for contribution. *See supra* note 70 and accompanying text.

122. *Id.* at 138.

123. *Id.* at 139.

124. *See* CERCLA § 107(a), 42 U.S.C. § 9617(a) (2013); *Cyprus Amax Minerals Co. v. TCI Pac. Commc’ns*, No. 11–CV–0252–JED–PJC, 2013 WL 6238485, at \*4 (N.D. Okla. 2013) (“Under both §§ 107 and 113, a plaintiff must prove, among other things, that the defendant is a party that should be held responsible.”).

125. The Court’s reference notwithstanding, this does not require proof of common “liability to a third-party,” only that the plaintiff and defendant are jointly liable to one another for costs of cleanup. *See Cyprus*, 2013 WL 6238485, at \*4. Consider the situation in *Cooper*, where a current landowner sued a former landowner for contamination partially caused by each. Following *Atlantic Research*, the plaintiff has an action under 107(a)(4)(B) and the defendant has a contingent counterclaim under 113(f)(1). Although both parties will be required to establish that the other is a PRP, neither is required to establish a common liability with any third party.

126. *See supra* note 107 and accompanying text.

CERCLA or to integrate various interrelated sections of CERCLA. Nor was it based on a conclusion that 113(f), adopted in SARA, in some way superseded the direct right of cost recovery under 107 originally adopted in CERCLA.

The reason that the Court held that the causes of action were mutually exclusive was simple: in the circumstances addressed by the Court, they simply did not overlap.<sup>127</sup> Critically, the Court acknowledged the potential that the sections might overlap in other circumstances, but nothing in *Cooper* or *Atlantic Research* directly addresses an approach to resolving such a situation.

#### 4. The “Unresolved” Cause of Action Issues

After *Cooper* and *Atlantic Research*, it is clear that section 107(a)(4)(B) exclusively applies for recovery of voluntarily incurred cleanup costs and 113(f) exclusively applies for recovery of costs reimbursed to others following a civil action or approved CERCLA settlement. The opinions, however, left several unresolved issues regarding recovery of costs incurred in the following important and common situations:

- 1) costs that are directly incurred to comply with a “unilateral administrative order”;
- 2) costs that are directly incurred under obligations in an “administrative or judicially approved settlement” satisfying the requirements of 113(f)(3)(B);
- 3) costs that are directly incurred under obligations assumed in administrative settlements that do not satisfy the requirements of 113(f)(3)(B);
- 4) costs that are directly incurred under judicial settlements that do not satisfy the requirements of 113(f)(3)(B); and
- 5) costs that are reimbursed pursuant to a non-judicial or administrative agreement.

Two critical questions arise in determining the available causes of action in these circumstances. First, are causes of action under sections 107(a)(4)(B) and 113(f) “mutually exclusive”? In other words, is a party limited to cost recovery under only one section or are multiple, alternative, causes of action available? Second, if the causes of action are mutually exclu-

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127. United States v. Atl. Research Corp., 551 U.S. 128, 139 (2006).

sive, which statutory section applies? Since *Cooper* and *Atlantic Research*, courts have been struggling to resolve these issues.

### III. THE ISSUE OF “MUTUAL EXCLUSIVITY”

As discussed above, the Supreme Court expressly held that sections 107(a)(4)(B) and 113(f) were mutually exclusive in certain circumstances where they did not “overlap.”<sup>128</sup> The Court acknowledged that there might be situations in which they might overlap but expressly declined to address the consequence if this occurred.<sup>129</sup> Situations in which the causes of action “overlap,” not addressed by the Supreme Court, raise the unresolved issue of exclusivity: if both sections 107(a)(4)(B) and 113(f) apply, should both be available to a party or should they be construed as mutually exclusive?

#### A. Current Judicial Approach to Exclusivity

Nothing in *Cooper* or *Atlantic Research* requires exclusivity. The Court never held that in case of overlap, sections 107(a)(4)(B) and 113(f) might not both apply. Indeed, one court, characterizing *Atlantic Research*, stated: “As the Supreme Court suggested, it may well be that a party who sustains expenses pursuant to a consent decree following a suit under [CERCLA] may have a cause of action under either section 113(f), section 107(a), or both.”<sup>130</sup> Nothing in the express language or legislative history of SARA indicates that Congress intended that 113(f) preempt or exclude application of section 107(a).<sup>131</sup> Nor is there anything inherently improper or unusual about the existence of alternative causes of action with differing elements.

Nonetheless, since *Atlantic Research*, the seven courts of appeals that have explicitly addressed this issue have concluded that the causes of action under 107 and 113(f) are mutually exclusive.<sup>132</sup> The primary focus of the

128. See *supra* notes 107–11 and accompanying text.

129. *Id.*

130. *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 93 n.7 (2d Cir. 2009).

131. See *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236 (11th Cir. 2012).

132. See *e.g.*, *Hobart Corp. v. Waste Mgmt., Inc.*, 758 F.3d 757 (6th Cir. 2014); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014); *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013); *Solutia, Inc.*, 672 F.3d at 1230; *New York v. Solvent Chem. Co.*, 664 F.3d 22 (2d Cir. 2011); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594 (8th Cir. 2011); *Agere Sys., Inc. v. Advanced Env’tl. Tech. Corp.*, 602 F.3d 204 (3d Cir. 2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *W.R. Grace & Co.-Conn.*, 559 F.3d at 85; *Kotrous v. Goss-Jewett Co. of N. Cal.*, 523 F.3d 924 (9th Cir. 2008).

Two other circuits have also indicated that a claim under 113(f) precludes an action under 107(a)(4)(B). The Fourth Circuit, in *AVX Corp. v. United States*, expressed “doubt” that a party may sue under 107(a)(4)(B) for costs it directly incurred through a government consent decree. 518 Fed. Appx. 130, 135 n.3 (4th Cir. 2013). The Fifth Circuit, in *Lyondell*

courts' analysis has been the structural consequences of non-exclusive causes of action. Courts have been concerned that if parties could choose between sections 107(a) and 113(f), they would invariably choose 107(a)(4)(B) since it provides a more favorable "joint and several" standard of liability, a longer statute of limitations, and is not subject to the "contribution protection" bar.<sup>133</sup> Thus, allowing plaintiffs to elect a cause of action would "undermine" the structure of CERCLA.<sup>134</sup>

The logic employed in these cases to avoid this consequence has, however, been confused and inadequate. Each court has held that section 113(f)(3)(B) provides the exclusive remedy for at least one of the following reasons:

*Nullity or Superfluity.* Most of the courts have reasoned that the remedies must be exclusive since allowing a party to proceed under either 107(a)(4)(B) or 113(f)(3)(B) would render 113(f)(3)(B) "superfluous" or a "nullity."<sup>135</sup> As one court stated: "If § 9607(a) already provided the rights of action contemplated by the SARA amendments, then the amendments were just so many superfluous words."<sup>136</sup>

This argument is clearly invalid on its face. Finding mutual remedies for recovery of costs directly incurred under an approved 113(f)(3)(B) settlement would simply not render 113(f) superfluous. In *Atlantic Research*, the Supreme Court held that section 113(f)(3)(B) provides a right of contribution for costs *reimbursed* to the government in a settlement agreement.<sup>137</sup> Prior to the adoption of section 113(f) this right of contribution was uncertain; section 113(f)(3)(B) uniquely confirms this right. In other words, allowing mutual remedies for recovery of costs *directly incurred* under such a

*Chemical Co. v. Occidental Chemical Corp.*, declined to address the District Court's "implicit" conclusion that plaintiffs who had incurred costs pursuant to a consent decree were limited to an action for contribution under 113(f)(3)(B). 608 F.3d 284, 291 n.19 (5th Cir. 2010).

This is also the conclusion urged by the Department of Justice in amicus briefs on the issue. See, e.g., United States' Brief as Amicus Curiae in Support of Defendants-Appellees, *Hobart*, 758 F.3d 757 (No. 13-3273); Brief of the United States as Amicus Curiae Supporting Appellant, *Niagara Mohawk Power*, 596 F.3d 112 (No. 08-3843).

133. See, e.g., *Hobart*, 758 F.3d at 767.

134. See, e.g., *Solutia*, 672 F.3d at 1236; see also *Morrison Enters.*, 638 F.3d at 603; *Niagara Mohawk Power*, 596 F.3d at 128.

135. See *Hobart*, 758 F.3d at 767. There would be no reason to limit 113(f)'s availability if PRPs have section 107(a)(4)(B) as a fallback option, and we generally do not interpret congressional enactments to render certain parts of these enactments superfluous. Therefore, it is sensible and consistent with the text to read 113(f)'s enabling language to mean that if a party is able to bring a contribution action, it must do so under 113(f), rather than 107(a). See *Solutia*, 672 F.3d at 1236; *Bernstein*, 733 F.3d at 205-06; *Niagara Mohawk Power*, 596 F.3d at 128.

136. *Bernstein*, 733 F.3d at 206.

137. *United States v. Atl. Research Corp.*, 551 U.S. 128, 139-40 (2006).

settlement would not render 113(f)(3)(B) meaningless or superfluous since section 113(f)(3)(B) would still have a unique, and necessary, role in providing an exclusive right of contribution for *reimbursed* costs.

As discussed below, a detailed reading of 113(f)(3)(B) suggests a role for “superfluity” in interpreting the relationship among these sections.<sup>138</sup> But it is simply incorrect to conclude that mutual remedies would render 113(f)(3)(B), as a whole, superfluous.

*Statutory Interpretation Doctrines: Later in Time, Specific over General.* Several courts have relied on statutory interpretation rules to conclude that 113(f)(3)(B) is the exclusive remedy for recovery of costs incurred under an approved CERCLA settlement.<sup>139</sup> The logic is simple. Congress enacted 113(f) after 107, and 113(f) deals more specifically with the issue of contribution of costs incurred under a settlement agreement. Thus, 113(f)(3)(B) must govern.

As discussed below, these doctrines may constitute a critical means of resolving the fundamental issue of the relationship between 107(a)(4)(B) and 113(f)(3)(B),<sup>140</sup> but the mere fact that 113(f) was adopted after 107(a) simply cannot mean that 113(f) always governs. Nowhere in the Supreme Court’s analysis of the relationship between 107(a) and 113(f) in either *Cooper* or *Atlantic Research* did the Court rely on these doctrines. Something other than “later/more specific” drives the issue.

*Procedural Distinctness.* Several courts noted that, in *Atlantic Research*, the Supreme Court indicated the remedies under 107(a)(4)(B) and 113(f)(1) arose in “procedurally distinct” contexts.<sup>141</sup> Certainly costs directly incurred following a settlement agreement and costs directly incurred by parties following a voluntary cleanup can be viewed as arising in procedurally distinct circumstances, but that is an observation, not an argument.

The Supreme Court’s statement that claims under sections 107(a)(4)(B) and 113(f)(1) were procedurally “distinct” arose in connection with the Court’s assessment of the nature of the claim; costs that were directly and voluntarily “incurred” did not fall within the common law concept of “contribution,” while money spent to reimburse the response costs of other PRPs following a civil action or settlement fell within the meaning of contribution.<sup>142</sup> Distinctness itself was not the issue; rather it was the nature of

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138. See *infra* note 174 and accompanying text.

139. See, e.g., *Niagara Mohawk Power*, 596 F.3d at 128; see also Brief of the United States as Amicus Curiae Supporting Appellant, *Niagara Mohawk Power*, 596 F.3d 112 (No. 08-3834).

140. See *infra* notes 175–77 and accompanying text.

141. See *Bernstein*, 733 F.3d at 205; see also *Morrison Enters. LLC v. Dravo Corp.*, 638 F.3d 594, 602 (8th Cir. 2011).

142. See *supra* notes 101–07 and accompanying text.

the distinction that drove the Supreme Court's conclusion. In fact, the Court acknowledged the possibility of "overlap" for claims arising under other circumstances.<sup>143</sup>

*Unfairness to Non-Settling Parties.* For most courts, a critical factor was the "unfairness" that would result if parties to a government settlement were allowed to recover their response costs under section 107(a)(4)(B).<sup>144</sup> In the absence of a settlement, a plaintiff suing under section 107(a)(4)(B) seeks to recover all of its costs under the "joint and several" liability standard,<sup>145</sup> but the defendant can counterclaim for contribution under 113(f)(1). It is through this counterclaim that the court can assure equitable allocation of costs.<sup>146</sup> If, however, a settling party were allowed to sue under 107(a)(4)(B), the defendant would be barred from asserting a counterclaim by the "contribution protection" afforded the plaintiff in the settlement. This would potentially allow settling parties to recover all of their costs without providing an opportunity for equitable allocation by the court.<sup>147</sup> In some courts' view, this would unfairly allow settling parties to "exploit" contribution protection to "shift full liability onto the target of his suit, a result antithetical to the purpose of the statute."<sup>148</sup>

This conclusion, even if correct, does not necessarily suggest that CERCLA precludes settling parties from suing under section 107(a)(4)(B). It could also be said that this result is consistent with Congress' intent to encourage settlement and penalize non-settling parties. But the policy concern itself seems somewhat beside the point. The issue is whether CERCLA, in this context, establishes 113(f) as the exclusive remedy. In neither *Cooper* nor *Atlantic Research* did the Supreme Court suggest that policy reasons should drive interpretation of the statute. As noted above, the Court in

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143. *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2006).

144. *See, e.g., Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1237 (11th Cir. 2012); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 228–29 (3d Cir. 2010).

145. According to one court, "[s]ection 107 allows for complete cost recovery under a joint and several liability scheme; one PRP can potentially be accountable for the entire amount expended to remove or remediate hazardous materials." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 121 (2d Cir. 2010).

146. *See Atl. Research*, 551 U.S. at 140.

147. *See, e.g., Solutia*, 672 F.3d at 1236–37; *Agere Systems*, 602 F.3d at 228. One court did not agree, suggesting that the joint and several liability standard of section 107(a)(4)(B) would allow cost allocation by the court. *See Bernstein v. Bankert*, 733 F.3d 190, 205 (7th Cir. 2012).

The problem, of course, is that section 107(a) does not always impose joint and several liability. Apportionment is proper on a cost recovery claim where there is a reasonable basis for determining the contribution of each cause to a single harm.

148. *Bernstein*, 733 F.3d at 205 (citing *Solutia*, 672 F.3d at 1237 and *Agere Systems*, 602 F.3d at 228–29).

*Cooper* was willing to sacrifice “contribution protection” on the altar of plain meaning and textual fidelity.<sup>149</sup>

*Voluntary/Involuntary.* Some courts, noting language from *Cooper* and *Atlantic Research*, have suggested that the allocation of claims under sections 107(a) and 113(f) is based on whether costs were “voluntarily” or “involuntarily” incurred.<sup>150</sup> But allocation between 107 and 113 cannot simply be based on some “voluntary/involuntary” distinction. In *Atlantic Research*, the Court held that response costs that were “voluntarily” incurred could not be recovered under section 113(f)(1), in part because they did not fall under the common law concept of contribution.<sup>151</sup> The Court simply did not discuss whether costs that were involuntarily incurred, such as those incurred under a UAO, can only be recovered through contribution. Indeed, the Court in *Cooper* suggested the issue of cost recovery following a UAO would depend on whether the order was a “civil action” for the purposes of section 113(f)(1).<sup>152</sup> Further, the Court never suggested that costs that were “voluntarily” incurred pursuant to a negotiated settlement agreement could only be recovered under 107(a)(4)(B). In other words, the Supreme Court never relied on the voluntary/involuntary distinction as the basis for allocation. The issue of whether a payment was “voluntary” was relevant only to an assessment of whether reimbursed costs were recoverable under common law concepts of contribution, not because of any inherent significance of a voluntary/involuntary distinction under CERCLA.<sup>153</sup>

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149. See *supra* notes 95–97 and accompanying text.

150. See *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014); *Morrison Enters. v. Dravo Corp.*, 638 F.3d 594, 604 (8th Cir. 2011). But see *Bernstein*, 733 F.3d at 209 (rejecting involuntary/voluntary distinction as basis for distinguishing claims under sections 107(a)(4)(B) and 113(f)); *Whittaker Corp. v. United States*, No. CV 13–1741 FMO, 2014 WL 631113 (C.D. Cal. Feb. 10, 2014) (discussing and rejecting or distinguishing cases allegedly relying on voluntary/involuntary distinction).

In *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, the district court stated that, following *Cooper/Atlantic Research*, “[c]osts incurred involuntarily (e.g., as the result of adverse litigation or Government order) must be recovered through a contribution action under § 113(f).” 572 F. Supp. 2d 1034, 1041 (E.D. Wis. 2008) *aff’d in part, rev’d in part sub nom.*, *NCR Corp. v. George A. Whiting Co.*, 768 F.3d 682 (7th Cir. 2014). As discussed above, this statement is wrong in almost all of its particulars. The Supreme Court did not rely on any voluntary/involuntary distinction in discussing the relationship of 107(a) and 113(f). Nor did the Court address the issue of the cost recovery following a government Unilateral Administrative Order.

151. See *supra* notes 101–07 and accompanying text.

152. See *supra* note 88 and accompanying text.

153. This is consistent with language in *Morrison Enterprises*. There the court held that payments made pursuant to a consent decree were “involuntary,” and thus within the common law concepts of contribution, since the consent decree was entered following an initial action by the government under 107(a)(4)(A) that addressed an underlying common liability. *Morrison Enters.*, 638 F.3d at 604.

*Enforcement Action.* Some courts have also suggested that a relevant factor in determining the appropriate cause of action is whether the costs are incurred pursuant to an “enforcement action.”<sup>154</sup> The court in *Morrison Enterprises*, for example, suggested that parties “subject to 106 or 107 enforcement actions are still required to use 113.”<sup>155</sup> This reference to “enforcement actions” is, however, based on an improper citation to *Atlantic Research*. The reference in *Atlantic Research* to “enforcement actions” refers to a statement in a lower court opinion not endorsed by the Supreme Court.<sup>156</sup> The issue of what constitutes an “enforcement action” under CERCLA is complex and involves the related issue of UAOs.<sup>157</sup> The Supreme Court did not, in either *Cooper* or *Atlantic Research*, base its holdings on the existence of an “enforcement action.”

*Consistency with Cooper and Atlantic Research.* Courts have indicated that a finding of “mutual exclusivity” is “consistent” with the holdings of *Cooper* and *Atlantic Research*.<sup>158</sup> As discussed, however, *Atlantic Research* held that sections 107(a)(4)(B) and 113(f), in the specific circumstances discussed by the court, do not overlap and thus provide the exclusive remedies in distinct procedural settings.<sup>159</sup> The Court did not, however, address the relationship between these sections in other contexts. Consistency with both *Cooper* and *Atlantic Research* requires adherence to the Court’s approach and logic, not its specific conclusions simply transferred to other contexts.

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154. See *NCR Corp.*, 768 F.3d at 690; *Morrison Enters.*, 638 F.3d at 603; *Lyondell Chem. Co. v. Albemarle Corp.*, No. 1:01-CV-890, 2007 WL 5517453, at \*209 (E.D. Tex. Mar. 12, 2007) (“PRPs may only seek contribution for costs during or following an enforcement action.”).

155. *Morrison Enters.*, 638 F.3d at 603.

156. In an amicus brief, the government suggested that the fact that the Supreme Court quoted the lower court “immediately before its statement of affirmance” is somehow relevant in interpreting the actual analysis the Supreme Court provided. See United States’ Brief as Amicus Curiae Addressing Issues Raised by Motions to Dismiss Certain Claims in Plaintiffs’ Third Amended Complaint at 24, *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034 (E.D. Wis. 2008) (No. 08-00016), 2008 WL 2463726.

157. See *infra* notes 178–97. To the extent that an “enforcement action” seeks to impose liability for violation of a statutory requirement, only actions to enforce CERCLA reporting requirements, see CERCLA § 103(b), 42 U.S.C. § 9603(b) (2013), and actions to enforce previously issued administrative orders, CERCLA § 106(b), 42 U.S.C. § 9606(b), constitute “enforcement actions.” Government litigation under section 107(a)(4)(A) seeks to recover previously incurred government response costs, and a PRP is liable for those costs based on its status as a PRP. There is no requirement that the government establish that the PRP violated any law, including CERCLA.

158. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 768 (6th Cir. 2014). See generally Brief of the United States as Amicus Curiae Supporting Appellant, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010) (No. 08-3843).

159. See *supra* notes 98–107 and accompanying text.



## B. *A Proper Basis for Exclusivity*

Despite the consistency of the holdings of the courts of appeals, the logic and textual analysis of these opinions seem unconvincing. Reliance on the Supreme Court's commitment to textual fidelity and means of analysis suggests a simpler and more coherent approach to resolving the tangle of unresolved issues. The approach involves three elements. First, it involves determining whether the express rights of contribution found in 113(f) textually "overlap" with the direct right of cost recovery under 107(a)(4)(B). Second, if there is textual overlap, the later and more specific provisions of 113(f) govern and provide the exclusive cause of action. Third, no implied right of contribution exists for contribution claims that are not expressly provided for in 113(f). This approach limits the contested issues to a textual analysis of whether a claim falls under the provisions of 107(a)(4)(B) and either 113(f)(1) or 113(f)(3)(B). Although policy or preference is not an element of the allocation, application of these steps in fact produces a coherent structure to CERCLA.

### 1. Textual Overlap

The Supreme Court has defined situations in which sections 107(a) and 113(f) do *not* overlap.<sup>160</sup> Following *Cooper* and *Atlantic Research*, the task is to determine what class of claims "overlap" and thus potentially fall under the terms of both sections 107(a)(4)(B) and 113(f).

The scope of 107(a)(4)(B) seems clear: all costs that are "directly incurred" by a party fall under the textual scope of 107(a)(4)(B).<sup>161</sup> This suggests that all response costs directly spent by a party to clean up a site fall within the scope of 107(a)(4)(B) whether such costs were voluntarily incurred, involuntarily incurred pursuant to a UAO, or spent pursuant to an obligation in a judicial or administrative settlement. In fact, only costs spent to reimburse would not fall under section 107(a)(4)(B).

The more difficult issue is determining whether costs "directly incurred" following a civil action, settlement, or UAO also fall under section 113(f). At one level, the answer to this question is simple. Costs directly incurred during or following a "civil action" fall within the scope of 113(f)(1). Further, costs that have been directly incurred by parties to an "approved" judicial or administrative settlement fall within the scope of 113(f)(3)(B). Critically, the text addresses the issue. Section 113(f)(3)(B) provides a right of contribution to persons who have resolved liability for "a

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160. See *supra* notes 98–107 and accompanying text.

161. As the Supreme Court noted in *United States v. Atlantic Research Corp.*, "§ 107(a) permits a PRP to recover only the costs it has 'incurred' in cleaning up a site." 551 U.S. 128, 139 (2007) (citing 42 U.S.C. § 9607(a)(4)(B)).

response action” or “the costs of such actions.”<sup>162</sup> This disjunctive language suggests that Congress provided a right of contribution in two distinct situations: (1) costs directly incurred in undertaking a response action; and (2) costs incurred reimbursing the government for its “costs of such action.”<sup>163</sup> In other words, the text supports a conclusion that 113(f)(3)(B) provides an express right of contribution both for reimbursed and directly incurred costs for those settlements that satisfy its requirements.

Although the Supreme Court’s discussion of “traditional” contribution potentially confuses the scope of section 113(f), the Court’s analysis provides an important tool for determining the class of costs that falls within the textual scope of 113(f). The Court has suggested that “directly incurred” costs fall within the traditional concept of contribution if they arose as part of a process (such as a civil action or settlement) that establishes that the plaintiff shares common liability with the defendant in any subsequent contribution action.<sup>164</sup>

## 2. The Implied Right of Contribution

Although section 113(f) defines when statutory “contribution” is available, the situation is complicated by the fact that courts have found an implied “non-statutory” right of contribution in CERCLA that does not arise under 113(f).<sup>165</sup> Indeed, the Supreme Court expressly left unresolved the issue of an implied right of contribution under CERCLA.<sup>166</sup> Thus, it is possible to imagine a situation in which costs falling outside of scope of section 113(f), such as costs incurred pursuant to a UAO or costs incurred following a non-approved settlement, could be recovered under some “implied” cause of action for contribution. If such an implied cause of action exists, there would be a new overlap issue: are costs recoverable under an implied right of contribution also recoverable under a direct cost recovery action under section 107(a)(4)(B)?

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162. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (emphasis added).

163. This is also consistent with the settlement provisions of section 122 that contain separate and distinct authority to enter settlements to undertake work, authorized by 122(a), and settlements to resolve government cost claims, authorized in 122(h). See CERCLA § 122, 42 U.S.C. § 9622.

164. See *supra* notes 117–25 and accompanying text.

165. Indeed the court of appeal’s decision from which Supreme Court granted certiorari in *Atlantic Research* had relied on the existence of an implied right of contribution to provide the then uncertain right of cost recovery by PRPs. See *Atl. Research Corp. v. United States*, 459 F.3d 827, 835–36 (8th Cir. 2006). The Supreme Court in *Atlantic Research* held that PRPs could rely on the express right of cost recovery under 107(a)(4)(B) and declined to resolve the issue of an implied cause of action. 511 U.S. at 141 n.8.

166. See *id.*; see also *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (“[W]e decline to decide whether Aviall has an implied right to contribution under § 107.”).

Identification of such an implied right of contribution is, however, neither warranted nor necessary. In other contexts, the Supreme Court has expressly indicated its reluctance to infer private rights of contribution arising from federal statute.<sup>167</sup> Indeed, the need for adoption of the express rights of contribution in 113(f) arose because Supreme Court jurisprudence suggested that an implied right was not authorized.<sup>168</sup> Further, although the Court in *Cooper* and *Atlantic Research* declined to resolve the issue, a majority of the Court in *Cooper* strongly suggested that there was not a separate implied right of contribution under CERCLA.<sup>169</sup> Thus, there is a strong basis for concluding that the Supreme Court would reject identification of any independent implied right of contribution in CERCLA.

Further, such an implied right of contribution is not necessary. Courts initially construed CERCLA as containing an implied right of contribution as a means to provide for allocation of costs among PRPs.<sup>170</sup> Section 113(f) now creates the mechanisms to allow both for cost recovery and allocation of response costs among PRPs in appropriate circumstances. There simply is no need to invoke an implied right of contribution.

### 3. Treating Overlapping Causes of Action in CERCLA

Two conclusions follow from the preceding discussion: (1) the text of sections 107(a) and 113(f) defines the exclusive causes of action for cost recovery under CERCLA; and (2) they overlap where parties “directly incur” costs in situations that fall under the express provisions of 113(f)(1) and 113(f)(3)(B). But if the causes of action in 107(a) and 113(f) overlap, how does one allocate between them? It is perfectly plausible that in the event of overlap, both causes of action are available.<sup>171</sup>

But principles of statutory construction suggest that, in the face of directly overlapping statutory provisions, section 113(f) should provide the exclusive cause of action. First, the Court has expressed a strong presumption that texts should be construed to avoid making provisions “superflu-

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167. See *Cooper*, 543 U.S. at 162 (discussing refusal of the Court to find implied or common-law rights to contribution in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981)).

168. See *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002), *rev'd*, 543 U.S. 157 (2004). The rights of contribution established in the 1986 SARA amendments were adopted to “clarif[y] and confirm[ ]” the implied right of contribution threatened by Supreme Court jurisprudence. See H.R. REP. NO. 99-253, pt. I, at 79 (1985), as reprinted in 1986 U.S.C.C.A.N. 2835, 2861.

169. See *Cooper*, 543 U.S. at 170–71.

170. *Id.* at 162.

171. See *supra* notes 120–21 and accompanying text.

ous.”<sup>172</sup> As mentioned above, courts have referred to this canon, but have applied it incorrectly.<sup>173</sup> The issue is not whether 113(f)(3)(B) will be rendered superfluous as a whole—113(f)(3)(B) would still have a unique role in authorizing contribution for reimbursed costs even if 107(a) were also available for directly incurred costs.

The issue of “superfluity” is more nuanced. As discussed above, section 113(f)(3)(B) provides for a right of contribution in two situations: where a party has resolved its liability for some or all “of a response action” or “of the costs of such action.”<sup>174</sup> If 107(a) provides a cause of action for recovery of the direct costs of a response action, the separate authorization of contribution for costs “of a response action” was unnecessary when SARA was adopted, and it is this specific phrase, not 113(f)(3)(B) as a whole, that would become surplusage if an alternative cost recovery action under 107(a)(4)(B) is available.

Second, canons of construction suggest that, in the context of “overlapping” statutory provisions, the provision that was adopted “later in time” and which contains more “specific” elements should be treated as impliedly repealing application of the earlier and less specific statute.<sup>175</sup> Section 113(f) was adopted in the SARA amendments of 1986 and contains Congress’ specific statement of the requirements governing “contribution” claims; it defines both the scope and mechanisms of contribution under CERCLA. Although “implied repeal” is not favored,<sup>176</sup> these later and more specific authorizations of contribution for “directly incurred” costs justify a conclusion that they operate to replace any overlapping cause of action in

172. See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35–36 (1992), *superseded by statute*, Bankruptcy Reform Act of 1994, Pub. L. No. 109-8, 119 Stat. 23, *as recognized in In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 749 (7th Cir. 2014); N. SINGER & S. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 46.06, at 181–86 (rev. 6th ed. 2000) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”).

173. See *supra* notes 135–38 and accompanying text.

174. See *supra* notes 162–63 and accompanying text.

175. See, e.g., *Sorenson v. Sec. of Treasury*, 475 U.S. 851 (1986); *Smith v. Robinson*, 468 U.S. 992 (1984), *superseded by statute*, Handicapped Children’s Protection Act of 1986, Pub. L. No. 90-538, 82 Stat. 901, *as recognized in Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973); see also ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 327–33 (2012).

176. See *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.”); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (holding that repeal by implication requires that the later and earlier statutes be “irreconcilable”); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 141–42 (2001) (citing *Mancari*, 417 U.S. at 550).

107(a)(4)(B).<sup>177</sup> Indeed, they make little sense unless Congress intended that they replace the broader pre-existing right of cost recovery.

The result is that reimbursed costs or costs that are directly incurred following a judicial or administratively approved settlement that falls under the text of 113(f) are exclusively recoverable through statutory contribution under 113(f). All other directly incurred costs are recoverable exclusively through an action for cost recovery under 107(a)(4)(B).

#### IV. TEXTUAL ALLOCATION OF CAUSES OF ACTION

Based on the premises discussed above, determination of the proper cause of action under CERCLA becomes an exercise of statutory construction of the textual scope of sections 113(f)(1) and 113(f)(3)(B).

##### A. Costs Incurred Under a Unilateral Administrative Order

As discussed above, response costs may be incurred under the compulsion of a Unilateral Administrative Order. Clearly, such costs are “directly incurred” and thus fall within the express scope of 107(a)(4)(B). The only issue is whether such costs arise during or following a “civil action” and thus also fall within the scope of 113(f)(1).<sup>178</sup> If a UAO does not arise during or following a “civil action,” the only available cause of action for recovery of costs incurred is 107(a)(4)(B).

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177. The provisions of section 113(f) constitute what Justice Scalia and Bryan Garner, citing *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936), have characterized as a “Type 2” basis for an implied repeal: a later act that covers the whole subject of the earlier one and is clearly intended as a substitute. See SCALIA & GARNER, *supra* note 175.

178. Such costs do not arise from a “judicial or administratively approved settlement” and thus section 113(f)(3)(B) does not apply.

Further, an additional reason exists for not construing costs incurred under a UAO as falling within the scope of section 113(f)(1): these costs do not satisfy the Court’s conception of traditional contribution. See *supra* notes 117–25 and accompanying text. EPA’s authority to impose cleanup obligations through a UAO under section 106(a) is not limited to PRPs: it may be issued to anyone if “necessary to protect the public health, welfare or the environment.” CERCLA § 106(a), 42 U.S.C. § 9606(a) (2013). In general, EPA does direct UAOs to the class of PRPs defined in section 107(a). But EPA has stated:

[S]ection 106 does not limit issuance of orders to these PRPs. In appropriate cases, unilateral orders may be issued to parties other than those specified in section 107(a), if actions by such parties are necessary to protect the public health, welfare, or the environment. For example, a unilateral order may be issued to the owner of land adjoining the site, to obtain site access. A unilateral order also may be issued to prevent a non-PRP from interfering with a response action.

U.S. ENVTL. PROT. AGENCY, OSWER DIRECTIVE NO. 9833.0-1A, GUIDANCE ON CERCLA 106(A) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGNS AND REMEDIAL ACTIONS 12–13 (1998), <http://www2.epa.gov/sites/production/files/documents/cerc106-uaor-rpt.pdf>. Thus, compliance with a UAO does not inherently involve a determination that the recipient is a PRP.

Most, but not all, of the courts to address this issue have concluded that UAOs are not “civil actions.” In *Pharmacia Corporation v. Clayton Chemical Acquisition LLC*, the court held that a UAO is not a civil action since “the natural meaning of ‘civil action’ is a non-criminal judicial proceeding.”<sup>179</sup> In the court’s view, this natural reading was consistent with the use of the phrase in the Federal Rules of Civil Procedure, Black’s Law Dictionary, and treatises.<sup>180</sup> In contrast, the court held that the phrase “administrative order” is not synonymous with “civil action” and that it applies to an administrative and not a judicial order.<sup>181</sup> The court also noted that treatment of a UAO as a civil action would not “harmonize” with other sections of CERCLA.<sup>182</sup> The court also noted that its conclusion was consistent with section 106(a), which gives EPA the option of compelling cleanup through either an administrative or judicial process.<sup>183</sup> The court found “that the distinction made by the drafters demonstrates they saw a distinction between a civil action and administrative actions and orders.”<sup>184</sup> Finally, the court noted that the provisions of 113(g)(3)(B), providing the statute of limitations applicable to contribution actions, were consistent with this construction. Section 113(g)(3)(B) measures the limitation period from the date of “judgment,” and thus “supports this Court’s finding that an administrative order does not qualify as a civil action as no judgment exists as to an administrative order.”<sup>185</sup>

Other courts have reached the same conclusion. In *Blue Tee Corp. v. Asarco Inc.*, the court discussed competing arguments and simply held that a UAO was not a civil action.<sup>186</sup> In two other cases, *Raytheon Aircraft Co. v. United States*<sup>187</sup> and *Emhart Industries v. New England Container Co.*,<sup>188</sup> the courts largely relied on the plain meaning and the precedents of *Pharmacia* and *Blue Tee* to conclude that a UAO was not a civil action.<sup>189</sup>

These cases arose after *Cooper* but before *Atlantic Research*. One court, in an opinion written after *Atlantic Research*, has “indirectly” addressed the

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179. *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1087 (S.D. Ill. 2005).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 1088.

184. *Id.* at 1087.

185. *Id.* at 1088.

186. *Blue Tee Corp. v. Asarco Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at \*3-4 (W.D. Miss. June 27, 2005).

187. *Raytheon Aircraft v. United States*, 435 F. Supp. 2d 1136, 1143 (D. Kan. 2006).

188. *Emhart Indus. v. New Eng. Container Co.*, 478 F. Supp. 2d 199, 203 (D.R.I. 2007).

189. *Emhart*, 478 F. Supp. 2d at 203; *Raytheon Aircraft*, 435 F. Supp. 2d at 1143.

issue. In *American Premier Underwriters v. General Electric Co.*, the court, resolving a statute of limitations issue, concluded that a UAO was not a “judgment” as the term was used in section 113(g)(3)(A) and that the effective date of the UAO did not trigger the running of the statute of limitations.<sup>190</sup> In a footnote, the court noted that it was “aware that indirectly it is concluding that the issuance of a UAO itself is not a ‘civil action’ as that term is used in section 9613(f)(1).”<sup>191</sup>

Only one court has held that a UAO is a “civil action” for purposes of 113(f)(1).<sup>192</sup> In *Carrier Corp. v. Piper*, the court found that a UAO should be treated as a civil action.<sup>193</sup> This conclusion was based, in part, on a pre-*Cooper/Atlantic Research* Sixth Circuit case that had “suggested that the issuance of an administrative order under § 106 satisfies the requirements of § 113(f)(1).”<sup>194</sup> In addition, the court in *Carrier Corp.* noted that compliance with a UAO places a burden comparable to that imposed by a judicial order.<sup>195</sup>

Nothing beyond the most straightforward textual reading is necessary to conclude that UAOs are not civil actions and thus not within the scope of 113(f)(1). Limiting the cause of action to 107(a)(4)(B) would also, as it happens, result in a largely coherent structure to CERCLA. The statute of limitations for cost recovery would be governed by section 113(g)(2), and the “trigger date” for the statute of limitations would arise from the date of the response action, not from the date of the UAO.<sup>196</sup> It would also ensure equitable allocation of costs among PRPs. Although an action under 107(a)(4)(B) would allow a plaintiff to assert “joint and several” liability, the defendant in such an action could assert a counterclaim under the express

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190. *Am. Premier Underwriters Inc. v. Gen. Elec. Co.*, 866 F. Supp. 2d 883, 905 (S.D. Ohio 2012).

191. *Id.* at 905 n.24.

192. Since *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) and *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2006), other courts have suggested that costs incurred “involuntarily” or following an “enforcement action” are recoverable through contribution. See *supra* notes 150–57 and accompanying text. This would also suggest that costs incurred following a UAO are recoverable under 113(f)(1). But as discussed above, a focus on these elements is not based on any text in 113(f) or the rationale employed by the Supreme Court in *Cooper* or *Atlantic Research*. See *supra* notes 130–59 and accompanying text.

193. *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 841 (W.D. Tenn. 2006).

194. *Id.* at 840. In the prior case, *Centerior Serv. Co. v. Acme Scrap & Metal Corp.*, the Sixth Circuit had held that contribution under § 113(f)(1) is available where a PRP “has been compelled to pay for response costs for which others are also liable, and who seeks reimbursement for such costs.” 153 F.3d 344, 352 (6th Cir. 1998), *abrogated by* *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014).

195. *Carrier Corp.*, 460 F. Supp. 2d at 841 (“In terms of the burden it places on a party, a UAO is similar to a judgment issued pursuant to a court proceeding.”).

196. See *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192–94 (10th Cir. 1997).

provisions of 113(f)(1) (right of contribution “during or following” a civil action under 107). Through this counterclaim, the court could undertake an “equitable allocation” of the costs. The key to this equitable allocation is that parties responding to a UAO will not, themselves, have received contribution protection.

The only problem with allowing a party to a UAO to proceed through 107(a)(4)(B) is that it limits the significance of “contribution protection” provided to settling parties. In other words, parties who avoided a UAO by settling with the government will still be subject to a 107(a)(4)(B) action by non-settling parties. This, however, is a concern that the Supreme Court in *Atlantic Research* both acknowledged and accepted as a permissible consequence of application of the plain terms of the statute.<sup>197</sup>

### B. *Costs Directly Incurred Under an Approved Section 113(f)(3)(B) Settlement*

As discussed above, the text of section 113(f)(3)(B) specifically provides a right of contribution for costs directly incurred pursuant to an approved settlement.<sup>198</sup> If costs were incurred pursuant to such a settlement, they would be recoverable exclusively through an action for contribution under 113(f)(3)(B).<sup>199</sup>

Limiting recovery of costs incurred under an appropriate 113(f)(3)(B) settlement to an action for contribution creates, for the most part, a coherent structure to CERCLA. Settling parties suing for contribution would only be allowed recovery based on a standard of equitable allocation. No counterclaim for contribution by defendants, a counterclaim presumably barred by the terms of the settlement, is necessary to ensure such allocation. It is the plaintiff's initial contribution claim that triggers equitable allocation.<sup>200</sup>

Three issues do arise, however, when considering the scope of contribution under 113(f)(3)(B): (1) what settlements fall within 113(f)(3)(B); (2)

197. See *supra* note 95 and accompanying text.

198. See *supra* notes 162–63 and accompanying text.

199. Costs reimbursed to the government in a civil action or settlement are recoverable exclusively in an action under 113(f) since they are not “directly incurred.” A typical CERCLA settlement will, however, also require the settling party to reimburse the government for “future costs” incurred by the government after entry of the settlement agreement. Reimbursement of these future government costs does not, however, involve the issue of “overlap,” and the exclusive cause of action for their recovery would be an action for contribution under 113(f).

200. The problem created by providing a right of contribution for costs directly incurred pursuant to a settlement is determining the appropriate statute of limitations. See *infra* notes 228–40 and accompanying text.



what costs are recoverable following such a settlement; and (3) what is the applicable statute of limitations?

### 1. Elements of a Section 113(f)(3)(B) Settlement

Although courts of appeals have uniformly concluded that 113(f)(3)(B) constitutes the exclusive vehicle for recovery of costs incurred under an approved administrative or judicial settlement, they have differed as to what elements are necessary to satisfy the requirements of section 113(f)(3)(B).<sup>201</sup> These required elements include both substantive and procedural components, but, as one court noted, the “defining feature” of an administrative settlement is that the agreement “resolve[s] [the PRP’s] liability to the United States or a State for some or all of a response action or for some or all of the costs of such action.”<sup>202</sup>

Several issues have arisen in determining whether a settlement falls under 113(f)(B).

*Settlement of CERCLA Liability.* Several courts have held that an approved settlement must specifically resolve liability under CERCLA.<sup>203</sup> In *Consolidated Edison, Inc. v. UGI Utilities, Inc.*, the court held that settlements that resolved state, but not CERCLA, cost recovery claims do not constitute approved 113(f)(3)(B) settlements.<sup>204</sup> Other courts have held otherwise.<sup>205</sup> The Third Circuit, in *Trinity Industries v. Chicago Bridge & Iron Co.*, expressly rejected this position and held that the express language of 113(f)(3)(B) applied to settlements by “States” that resolved the settling

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201. This issue, critical to determining the availability of an action for contribution under section 113(f)(3)(B), can also be relevant for determining both “contribution protection” under section 113(f)(2), *see, e.g.*, Pa. Dep’t of Env’tl. Prot. v. Lockheed Martin Corp., No. 1:09-CV-0821, 2015 WL 412324, at \*5-7 (M.D. Pa. 2015), and the appropriate statute of limitations under section 113(g), *see* *Asarco LLC v. Atl. Richfield Co.*, 73 F. Supp. 3d 1285, 1293-95 (D. Mont. 2014). As discussed below, the statute of limitations issue raises distinct questions. *See infra* notes 230-40 and accompanying text.

202. *See* *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 768 (6th Cir. 2014).

203. *See* *Consol. Edison, Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 95 (2d Cir. 2005); *Asarco, Inc. v. Union Pac. R.R.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662, at \*1 (D. Ariz. Jan. 24, 2006).

204. *Consol. Edison of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d at 96; *see also* *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009). The Second Circuit raised some doubt about the continuing validity of the holding in these cases in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010).

205. *See, e.g.*, *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013); *Exxon Mobil Corp. v. United States*, No. H-10-23862015, 2015 WL 3513949, at \*20 (S.D. Tex. June 4, 2015); *Asarco LLC v. Atl. Richfield Co.*, 73 F. Supp. 3d 1285, 1291 (D. Mont. 2014).

party's liability for "response costs."<sup>206</sup> This, in the court's view, included state settlements that did not expressly resolve CERCLA claims.<sup>207</sup>

*Contingent Covenant Not to Sue.* Under 113(f)(3)(B), a settlement must "resolve some or all" of the settling party's liability. Resolution of liability with the United States is generally expressed in CERCLA settlements by inclusion of a "covenant not to sue" stating that the government will not sue a settling party for additional relief for the matters addressed within the scope of the settlement.<sup>208</sup> Most courts have indicated that the inclusion of an express "covenant not to sue" satisfies the requirement that the settlement resolve the settling parties' liability.<sup>209</sup>

However, several courts have held that settlements that expressly condition the "covenant not to sue" on completion of the actions required under the settlement do not "resolve" liability. In *ITT Industries v. BorgWarner, Inc.*, for example, the court said that an AOC did not "resolve" liability where the government retained the power to terminate the covenant if the settling party did not satisfactorily comply with the requirements of the AOC.<sup>210</sup> In *Bernstein v. Bankert*,<sup>211</sup> the court held that an AOC that made the "covenant not to sue" effective only upon completion of the requirements of the settlement did not "resolve" liability.<sup>212</sup> Thus, costs incurred under such a settlement would not be recoverable under 113(f)(3)(B) until

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206. *Trinity Industries*, 735 F.3d at 135–37.

207. *Id.* at 136.

208. See CERCLA § 122(f), 42 U.S.C. § 9622(f) (2013).

209. See, e.g., *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 692 (7th Cir. 2014). In *NCR Corp.*, for example, the court found that a consent decree that contained an immediately effective "covenant not to sue" satisfied section 113(f)(B) even though the agreement provided that the government conditioned the covenant on "satisfactory performance" of the settling party's obligations. *Id.* The court stated that this constituted

a standard arrangement that is consistent with the fact that neither the EPA nor Wisconsin could sue NCR if it complied with its obligations. The agreement resolved NCR's liability, and so the district court correctly held that it limited NCR to proceeding under section 113(f). To hold otherwise would mean that no consent order could resolve a party's liability until the work under it was complete. Such a rule would be contrary both to the analysis in *Bernstein* and to common sense.

*Id.*

210. *ITT Indus. v. BorgWarner Inc.*, 506 F.3d 452 (6th Cir. 2008).

211. *Bernstein v. Bankert*, 733 F.3d 190 (2d Cir. 2012).

212. *Id.* at 220–21. The court considered, but rejected, the argument that a conditional "covenant not to sue" still "resolves" liability in a meaningful sense. *Id.* at 210–14. This seems an odd conclusion: even a conditional settlement defines the requirements that must be met to obtain a covenant not to sue, and it thus converts a party's "joint and several" liability to a discrete set of requirements that define the totality of the obligation of the settling party with respect to the matters addressed in the settlement. Presumably a party who has entered into an enforceable agreement to pay a defined portion of the government's prior cleanup costs has "resolved" its liability even before it has actually paid the amount.

all of the actions required under the settlement are completed and the covenant not to sue becomes effective.

This seems an odd requirement for determining whether a settlement resolves liability for purposes of 113(f)(3)(B). CERCLA itself provides that a covenant not to sue “shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned.”<sup>213</sup> Indeed, at least for remedial action settlements, CERCLA provides that a covenant not to sue “shall not take effect” until completion of the remedial action.<sup>214</sup> A settlement agreement, conditional or not, places limits on the liability of the settling party and thus, to that extent, “partially resolves” the defendants’ liabilities. For the most part, however, this is a drafting issue. The court in *Bernstein* itself suggested that this issue could be addressed by revised drafting of the agreement. If the settlement provides that the covenant not to sue is immediately effective it will effectively “resolve” liability even if a subsequent breach subjects a settling party to liability.<sup>215</sup> In 2014, EPA revised its model settlement language to ensure that the covenants were effective on the date of the effective date of the settlement.<sup>216</sup>

*Admission of Liability.* Some courts have indicated that a settlement agreement cannot “resolve” liability as required by section 113(f)(3)(B) if it does not include an admission of liability.<sup>217</sup> Thus, a provision stating that execution of the settlement does not constitute an admission of liability by the settling party does not satisfy 113(f)(3)(B).<sup>218</sup> Again, this seems an odd requirement. CERCLA expressly provides that a CERCLA settlement may include a provision stating that it “shall not be considered an admission of liability for any purpose,”<sup>219</sup> and it is hard to understand why an administrative settlement in which the settling party satisfies all of its CERCLA obligations has not resolved its liability simply because it has not confessed its sins.

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213. CERCLA § 122(f)(5), 42 U.S.C. § 9622(f)(5). The court in *Bernstein* itself suggested that this issue can be addressed by revised drafting of the agreement: if the settlement provides that the “covenant not to sue” is immediately effective it will “resolve” liability even if a subsequent breach subjects a settling party to liability. 733 F.3d at 213.

214. CERCLA § 122(f)(3), 42 U.S.C. § 9622(f)(3).

215. *Bernstein*, 733 F.3d at 213.

216. See 2014 EPA Revised Settlement Memo, *supra* note 33, at 5–6. EPA stated that “to forestall any argument that liability is not resolved as of the effective date for purposes of Section 113(f)(1), (f)(2), or (f)(3)(B), we are revising all of our settlement models to make the covenant effective on the effective date of the settlement.” *Id.* at 5.

217. See *ITT Indus. v. BorgWarner*, 506 F.3d 452, 460 (6th Cir. 2008); *Bernstein*, 733 F.3d at 212.

218. See *ITT Indus.*, 506 F.3d at 460.

219. CERCLA § 122(d)(1)(C), 42 U.S.C. § 9622(d)(1)(C).

*Procedural Issues.* Section 122 establishes specific procedures for approval of certain settlement agreements executed by the federal government, including an opportunity for public notice and comment.<sup>220</sup> Several courts have held that an administrative settlement, even if executed by a state, that was entered without some opportunity for comment cannot constitute an approved settlement under 113(f)(3)(B).<sup>221</sup> Since an approved settlement can extinguish the contribution claims of non-settling parties, courts have indicated that due process requires some procedural protections.<sup>222</sup>

## 2. Costs Recoverable Under a Section 113(f)(3)(B) Settlement

Parties to a 113(f)(3)(B) settlement may be required to incur costs under the terms of the settlement, but they also may incur response costs not mandated or otherwise falling within the scope of the settlement. Do costs that are incurred subsequent to an approved settlement, but outside the terms of the settlement, fall within the scope of section 113(f)(3)(B)?

EPA's earlier model settlement agreements expressly provided that a right of contribution under 113(f)(3)(B) was limited to "matters addressed" in the settlement agreement.<sup>223</sup> But there was, in EPA's later view, a problem with this provision. Although 113(f)(2) limits "contribution protection" to "matters addressed" in a settlement, no such language limits the right of contribution in 113(f)(3)(B).<sup>224</sup> Therefore, in 2014, EPA revised its model settlement agreements to remove language that limited the right of contribution to matters addressed in the settlement.<sup>225</sup>

However, there must be some nexus between the costs that a settling party seeks to recover through contribution and the matters addressed in the settlement. Settlement with the government for some costs at a particular site is not a "golden ticket" that gives the settling party a right to contribution for any costs incurred anywhere else at any time.

220. See CERCLA § 122(d)(2), (i), 42 U.S.C. § 9622(d)(2), 9622(i).

221. Pa. Dep't of Env'tl. Prot. v. Lockheed Martin Corp., No. 1:09-CV-0821, 2015 WL 412324, at \*6 (M.D. Penn. Jan. 30, 2015); *Litgo N.J., Inc. v. Bob Martin*, No. 06-2891 (AET), 2010 WL 2400388, at \*29 (D.N.J. June 10, 2010), *aff'd in part, rev'd in part sub nom.*, *Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Env'tl. Prot.*, 725 F.3d 369 (3d Cir. 2013); *CPC Intern. Inc. v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269, 1283 (W.D. Mich. 1991).

222. See, e.g., *Am. Special Risk Ins., Co. v. City of Centerline*, 180 F. Supp. 2d 903, 909 (S.D. Mich. 2001); *Litgo N.J.*, 2010 WL 2400388, at \*33.

223. 2014 EPA Revised Settlement Memo, *supra* note 33.

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

225. 2014 EPA Revised Settlement Memo, *supra* note 33.

There are several ways to resolve this issue. First, and perhaps most plausibly, the right of contribution under section 113(f)(3)(B) should be limited to the matters addressed in the settlement.<sup>226</sup> Although there is a difference in language between 113(f)(2) and 113(f)(3)(B), nothing else suggests that Congress intended the scope of contribution protection for settling parties to be narrower than the scope of contribution granted these same parties.

Alternatively, the text of 113(f)(3)(B) suggests a limitation. Section 113(f)(3)(B) creates a right of contribution for persons who have resolved liability for “a response action.”<sup>227</sup> Thus, it is possible that the right of contribution extends to costs incurred in the same response action at a site, whether or not those costs were included within the settlement. The Supreme Court’s focus on “traditional” contribution may also help resolve this issue.<sup>228</sup> To the extent that a settlement agreement establishes that the settling party is a PRP at a specific site, it should also justify a right of contribution for any costs incurred by that party at the same site since the settlement will have established the settling party’s “common liability” with the defendant in any subsequent contribution action.

### 3. The Applicable Statute of Limitations

There is one particular problem created by limiting settling parties to an action for contribution. The statute of limitations for such claims is governed by section 113(g)(3) which starts the three-year limitations period from “the date of” the administrative settlement or “entry” of a judicially approved settlement.<sup>229</sup> Many courts have strictly applied this three-year limitations period to contribution actions for recovery of costs incurred under a 113(f)(3)(B) administrative or judicial settlement.<sup>230</sup>

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226. In *City of Waukegan v. National Gypsum Co.*, the court refused to dismiss claims under 107(a)(4)(B) for costs incurred that were allegedly outside the scope of actions required under a consent decree with EPA and the state. No. 07 C 5008, 2009 WL 4043295, at \*7 (N.D. Ill. Nov. 20, 2009).

227. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

228. See *supra* notes 118–24 and accompanying text.

229. CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3).

230. See, e.g., *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 772–73 (6th Cir. 2014); *Bernstein v. Bankert*, 733 F.3d 190, 206–07 (7th Cir. 2013); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 607–10 (8th Cir. 2011); *Chitayat v. Vanderbilt Assoc.*, 702 F. Supp. 2d 69, 81–83 (E.D.N.Y. 2015); *Florida Power Corp. v. First Energy Corp.*, 54 F. Supp. 3d 860, 867 (N.D. Ohio 2014), *rev'd*, No. 14-4126, 2015 WL 6743513 (6th Cir. Nov. 5, 2015).

Although these dates make sense if recovery is for reimbursed costs identified in the settlement,<sup>231</sup> they are more problematic when applied to recovery of costs that may be directly incurred long after the date of the settlement. Strict application of the three-year limitations period in 113(g)(3) would mean that subsequently incurred costs could never be recovered.

Prior to *Cooper*, many courts of appeals, construing all cost recovery by PRPs as actions for contribution, had nonetheless applied the 107(a)(4)(B) statute of limitations to directly incurred costs.<sup>232</sup> In *Cooper*, however, the Supreme Court rejected characterization of recovery for the costs of voluntary cleanups as contribution, and courts have, since *Cooper*, rejected the application of the statute of limitations applicable to 107(a)(4)(B) to actions for contribution under 113(f).<sup>233</sup>

There are at least two ways to resolve this potential concern. First, if the claim arises under section 113(f)(3)(B), courts could simply apply the three-year statute of limitations specified in 113(g)(3) from the date of the settlement. This may not preclude a contribution claim for subsequently incurred response costs. Plaintiffs subject to a 113(f)(3)(B) settlement could file a contribution claim within three years of the date of the settlement agreement both to recover any costs incurred at that point and to obtain a judgment establishing the liability of non-settling parties.<sup>234</sup> Costs subse-

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231. A distinct issue is raised when a settling party agrees to reimburse the government for costs subsequently incurred by the government. *See Am. Premier Underwriters Inc. v. Gen. Elec. Co.*, 866 F. Supp. 2d 883, 905 (S.D. Ohio 2012).

232. *See Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 923–24 (5th Cir. 2000), *abrogated by Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312 (5th Cir. 2015); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), *abrogated by Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193–94 (10th Cir. 1997). In *Exxon Mobil Corp. v. United States*, the court stated that it would continue to apply the statute of limitations rule from *Geraghty & Miller* until reversed by the Fifth Circuit. No. H–10–23862015, 2015 WL 3513949, at \*20 (S.D. Tex. June 4, 2015).

233. *See Hobart*, 758 F.3d at 733.

234. Under CERCLA, the specific authorization in section 122(g)(2) to obtain a declaratory judgment applies only to an action under 107(a). *See supra* notes 55–56 and accompanying text. The general federal Declaratory would, however, authorize a party to seek a declaration of a party's liability in the context of a 113(f) action. 28 U.S.C. §§ 2201–2202 (2013); *see United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001) (holding that nothing precludes a finding that a declaratory judgment is available in both a cost recovery and contribution action); *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000) (holding that although section 113(g)(3) does not expressly provide for a right to a declaratory judgment in a contribution action, neither does it forbid them); *see also Whittaker v. United States*, No. CV 13–1741 FMO (JCx), 2014 WL 631113 (C.D. Cal. Feb. 10, 2014) (addressing claims by plaintiff seeking declaratory judgment under both 113(g)(2) and the Declaratory Relief Act). Ironically, this raises the issue of whether the subsequently adopted

quently incurred should be recoverable through amendment to the original complaint even if incurred more than three years from the date of the settlement.<sup>235</sup>

Second, courts could apply the three-year statute of limitations in section 113(g)(3) but apply a “triggering” event other than the date of entry of the settlement. Section 113(g)(3)(B) triggers the start of the limitations period only for administrative settlements issued under section 122(g) (*de minimis* settlements) and 122(h) (settlement of government financial claims).<sup>236</sup> Authority to enter settlements requiring work by settling parties is, however, found in section 122(a).<sup>237</sup> In *Hobart Corp.*, the court concluded that the triggering events in section 113(g)(3)(B) did not apply to an administrative settlement issued under section 122(a). But, rather than conclude that there was no applicable statute of limitations period, the court elected to “borrow” a triggering event. It concluded that the “most logical and convenient” triggering event would be the effective date of the section 122(a) settlement.<sup>238</sup>

Thus, courts might determine that a distinct “trigger” applies to the three-year statute of limitation for settlement agreements issued under section 122(a) that require subsequent expenditure of costs by settling parties. Although the court in *Hobart* applied the effective date of a section 122(a) settlement agreement,<sup>239</sup> a more “logical and convenient” place to borrow a triggering event is section 113(g)(2). This section, applicable to actions under 107(a), establishes a limitation period triggered by actual on-site cleanup activity.<sup>240</sup> Alternatively, a court might determine that the “triggering event” for subsequently incurred costs is the date the costs were incurred.<sup>241</sup>

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and more specific provisions of CERCLA should be construed to impliedly repeal the application of the Declaratory Judgment Act. *See supra* notes 175–77 and accompanying text.

235. *See* FED. R. CIV. P. 15(c)(1)(B); *Asarco, LLC, v. Union Pac. Co.*, 765 F.3d 999, 1005–07 (9th Cir. 2014); *see also Asarco LLC v. Goodwin*, 756 F.3d 191, 202–03 (2d Cir. 2014) (rejecting “relation back” of new CERCLA claim for response costs arising from “different conduct, in a different location, and attributable to different entities”).

236. CERCLA § 113(g)(3)(B), 42 U.S.C. § 9613(g)(3)(B) (2013).

237. CERCLA § 122(a), 42 U.S.C. § 9622(a).

238. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 775 (6th Cir. 2014); *see also N. States Power Co. v. City of Ashland*, No. 12–cv–602–bbc, 2015 WL 1243597, at \*9–10 (W.D. Wis. Mar. 18, 2015).

239. *See supra* note 238 and accompanying text.

240. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).

241. The critical justification for establishing a differing trigger event was that section 113(g)(3) is silent as to the triggering event for section 122(a) settlements. There are, however, two situations where a party will be required to pay costs arising long after the date of settlement for which there is no “void” in the triggering language. First, there is no textual void with respect to costs incurred following a judicial settlement; 113(g)(3)(B) provides that

### C. Costs Incurred Under a Non-113(f)(3)(B) Government Settlement

In most cases, judicial or administrative settlements with the federal or state governments should satisfy section 113(f)(3)(B). Courts have given a sufficient indication of the necessary elements of an approved settlement, and EPA has revised its model settlement language accordingly.<sup>242</sup> But if the settlement does not meet the requirements, the applicable cause of action may hinge on the process through which the settlement is implemented.

If a non-113(f)(3)(B) settlement arises solely through an administrative process, such as an ASAOC, the resolution seems clear. The costs are “directly incurred” and do not arise during or following a civil action or through an approved settlement. There is no overlap between 107(a) and 113(f) and the only available cause of action is cost recovery under 107(a)(4)(B).<sup>243</sup>

But many government settlements are implemented through “consent decrees.”<sup>244</sup> In these cases, the government files a civil action and the court incorporates the settlement in a judicial consent decree.<sup>245</sup> In EPA’s view, it is “self-evident” that any CERCLA settlement with the United States embodied in a judicially approved consent decree satisfies the requirements of section 113(f)(3)(B).<sup>246</sup> Perhaps. But not all administratively approved set-

the statute of limitations is triggered by “the entry of a judicially approved settlement with respect to such costs or damages.” CERCLA § 113(g)(3)(B), 42 U.S.C. § 9613(g)(3)(B). The only possible void is to construe this section as only applying to that portion of a judicially approved settlement that requires reimbursement of previously incurred costs. Second, a typical settlement agreement will require settling parties to reimburse the government for costs subsequently incurred by the government. Section 112(h) provides the authority to enter such an agreement that settles a government cost claim, and these settlements are expressly addressed in 113(g)(3)(B). CERCLA § 112(h), 42 U.S.C. § 9612(h). The ability to “borrow” a triggering event for these situations is unclear.

242. See *supra* note 33.

243. As the court in *Bernstein v. Bankert* stated, “[a]s soon as the settling PRP incurs response costs consistent with the national contingency plan, and until liability is resolved [through an approved section 113(f)(3)(B) settlement], that settling PRP has access to a cost recovery action.” 733 F.3d 190, 214 (7th Cir. 2013); see also *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 553 F.3d 85, 91–92 (2d Cir. 2009) (holding that costs incurred under a settlement with the state that did not qualify under section 113(f)(3)(B) were recoverable under section 107(a)).

244. These include, at a minimum, federal settlements involving performance of a long-term “remedial” action. See CERCLA § 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A).

245. See *id.*

246. 2009 EPA Revised Settlement Memo, *supra* note 33, at 6. In its 2014 Memo revising model language, EPA apparently had second thoughts. Although not rejecting the language in the 2009 Memo (“[w]e still do not believe this language is legally necessary”), EPA



lements satisfy 113(f)(3)(B), and the same elements that are necessary to ensure that an administrative settlement “resolves” liability may be required to constitute an approved 113(f)(3)(B) consent decree.<sup>247</sup>

Nonetheless, costs directly incurred under a “non-approved” judicial consent decree would still be recoverable through contribution. Costs directly incurred pursuant to a consent decree, even if the consent decree does not satisfy the requirements under 113(f)(3)(B), could be construed as arising “during or following” a “civil action.” In that case, there is overlap between 107(a)(4)(B) and 113(f)(1), and such costs would be recoverable exclusively through the action for contribution under 113(f)(1).<sup>248</sup> This, of course, applies only if the “civil action” arises under 107(a); costs incurred under a judicial settlement in state court would not fall under the terms of 113(f)(1).<sup>249</sup> If the state settlement did not satisfy the requirements of 113(f)(3)(B), any costs incurred under its provisions would only be recoverable under 107(a)(4)(B).

#### D. Costs Incurred Under a Judicial Settlement Among Private Parties

Private settlements reached during or following a civil action under 107(a)(4)(B) raise their own difficult questions. To the extent that a judicial settlement to such a “civil action” involves reimbursement of a plaintiff’s previously incurred response costs, *Atlantic Research* indicates that the exclusive vehicle for cost recovery by the settling party is section 113(f)(1). In other words, if Party B agrees, in a judicially approved settlement, to reimburse Party A, Party B has a right of contribution under 113(f)(1) against Party C for recovery of these reimbursed costs.

The treatment of response costs “directly incurred” by a party pursuant to a judicially approved private settlement raises more complex issues. On the one hand, such costs are directly incurred and fall under section

has now added language in its model consent decree stating that the consent decree satisfies 113(f)(3)(B). 2014 EPA Revised Settlement Memo, *supra* note 33, at 5.

247. See *supra* notes 201–22 and accompanying text.

248. See 2009 EPA CERCLA Settlement Memo, *supra* note 33, at 6. This, of course, creates an anomaly; both 113(f)(1) and 113(f)(3)(B) create a separate right of contribution following a judicial settlement. See *Bernstein*, 733 F.3d at 201 n.7. If any costs incurred following a civil action are recoverable under 113(f)(1), then the provisions of 113(f)(3)(B) that authorize contribution following a “judicially approved” settlement become superfluous. This problem is avoidable by drafting settlements that satisfy 113(f)(3)(B).

249. Jurisdiction for cost recovery under section 107(a) is exclusively in federal district court. CERCLA § 113(b), 42 U.S.C. § 9613(b) (“Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter.”).

107(a)(4)(B).<sup>250</sup> On the other hand, since they arise “during or following” a civil action, they may also fall within the scope of section 113(f)(1).<sup>251</sup> Determining whether such costs are recoverable under sections 107(a)(4)(B) or 113(f) depends on whether the causes of action overlap in these cases. If the sections overlap, presumably the exclusive cause of action for recovery of such costs would be 113(f)(1).

But do all cleanup costs incurred following a civil action fall within the scope of 113(f)(1)?<sup>252</sup> The answer lies in the Supreme Court’s analysis in *Atlantic Research*. As discussed above, the Supreme Court stated that a right of contribution exists under 113(f)(1) because the plaintiff, in a prior or pending civil action, was found to share a “common liability” with the defendant in the subsequent contribution action.<sup>253</sup> This suggests that a prior civil action will trigger a right of contribution under section 113(f)(1) only if the prior action established that the plaintiff was jointly liable with the defendant for the costs it seeks to recover in the action for contribution.<sup>254</sup>

Since PRPs share joint and several liability for costs arising at a site, this will involve a determination, not that the prior litigation involved the same costs, but that the prior litigation involved the same site. In other words, if the prior civil action established that the plaintiff seeking contribution was a PRP at the same site as the defendant PRP, then sections 113(f)(1) and 107(a)(4)(B) overlap and the only available remedy is under

250. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

251. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

252. The court in *Whittaker v. United States* addressed a variation of this issue: whether costs directly incurred *prior* to a civil action could only be recovered in a subsequent contribution action under section 113(f)(1). No. CV 13-1741, 2014 WL 631113, at \*1-2 (C.D. Cal. Feb. 10, 2014). The facts were somewhat unusual. The case at issue involved an action to recover cleanup costs at a specific “Site.” The predicate civil action, previously brought under section 107(a)(4)(B), involved a judicial settlement of the clean-up costs at an off-site location. *Id.* Citing *United States v. Atl. Research Corp.*, 551 U.S. 128 (2006), the court concluded that the prior civil action established the plaintiff’s “common liability” at the Site, and thus the current action could proceed only under section 113(f)(1). *Whittaker*, 2014 WL 631113, at \*7-10.

253. This situation would fall within the Court’s statement of the “traditional” meaning of contribution. See *supra* notes 118-25 and accompanying text (discussing the “traditional” meaning of contribution).

254. The court in *Whittaker* correctly observed:

The scope of a contribution claim under § 113(f)(1) is not limited to the liability resolved in an administrative or judicially approved settlement. As the Supreme Court stated in *Atlantic Research*, “§ 113(f)(1) permits suit before or after the establishment of common liability.” *In other words, the availability of a contribution claim under § 113(f)(1) does not depend on what liability might ultimately be resolved in s [sic] settlement, but on whether there are other PRPs who share common liability for the contaminated site at issue.*

2014 WL 631113, at \* 7 (emphasis added) (citing *Atl. Research*, 551 U.S. at 138-39).

113(f)(1). If the prior litigation did not establish that the plaintiff was a PRP at the same site, there is no overlap and only 107(a)(4)(B) is available.

### E. *Costs Incurred or Reimbursed Pursuant to a Non-Judicial Agreement Among Private Parties*

Private parties may reach agreement among themselves both to reimburse response costs and to directly incur response costs through agreements that do not arise “during or following” a civil action. Reimbursement and cleanup obligations may arise, for example, through an indemnity agreement or other private agreement to contribute to the costs of a cleanup. Cleanup costs that are “directly incurred” pursuant to non-judicial settlements would only fall under the express language of 107(a)(4)(B) and, following *Cooper* and *Atlantic Research*, there should be no doubt that this is the exclusive cause of action for recovery of these costs.

Payments to reimburse others or provide money for others to undertake a cleanup pursuant to a non-judicial settlement raise different issues. Such payments are not, in an obvious sense, “directly incurred,” nor are they imposed pursuant to a judicial or administrative settlement. One court has resolved this issue by holding that such costs are, in fact, “incurred” for purposes of section 107(a)(4)(B). In *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*, the court held that a party who, pursuant to a private settlement, had contributed money to a common fund used to pay for a cleanup had “incurred” cleanup costs.<sup>255</sup> The Third Circuit stated:

We do not think the Supreme Court intended to deprive the word “incurred” of its ordinary meaning. Agere and TI put their money in the pot right along with the money from the signers of the consent decrees. The costs they paid for were incurred at the same time as the costs incurred by the signers of the consent decrees and for the same work. Those costs were incurred in the ordinary sense that a bill one obligates oneself to pay comes due as a job gets done.<sup>256</sup>

Thus, these payments, although not directly used by the party to undertake a cleanup, were nonetheless recoverable in an action under 107(a)(4)(B).

Courts have also relied on an alternative basis for concluding that costs reimbursed under a non-judicial settlement may be recovered under 107(a)(4)(B). Parties who have reimbursed costs directly incurred by others

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255. *Agere Sys., Inc. v. Advanced Envntl. Tech. Corp.*, 602 F.3d 204, 225 (3rd Cir. 2010).

256. *Id.*

can be assigned the claims of those parties.<sup>257</sup> As one court stated: “Common sense dictates that § 107(a) is the appropriate vehicle for a party that, as an assignee, ‘stands in the shoes’ of the true plaintiff in a § 107(a) claim.”<sup>258</sup> Thus, parties reimbursing others through a settlement are entitled to assert the 107(a)(4)(B) claim as an assignee of the party who directly incurred by the reimbursed party.<sup>259</sup>

### CONCLUSION

Congress, through CERCLA, has created mechanisms to ensure that contaminated property is cleaned up and that the polluter pays. Among these mechanisms are three distinct private causes of action that allow responsible parties to share the costs of cleanup with other responsible parties. Unfortunately, Congress did a poor job drafting the relevant provisions. In trying to ensure the availability of a right of contribution by adding sections 113(f)(1) and 113(f)(3)(B), Congress created uncertainty as to the application of these rights of contribution and their relationship to the pre-existing right of cost recovery under 107(a)(4)(B).

Courts have expended much time, ink, and effort in resolving this uncertainty. The Supreme Court has twice addressed the issue, but the uncertainty has remained. Reliance on the plain text of CERCLA and fidelity to the Supreme Court’s opinions produces a clear approach to resolving the relationship between these sections. Where sections 107(a) and 113(f) textually overlap, the specific language of CERCLA and basic canons of construction require that section 113(f) provide the exclusive cause of action for cost recovery. Ambiguity regarding the scope of 113(f) is resolved through strict application of its text guided by the “traditional” meaning of contribution as described by the Supreme Court. The private causes of action are a critical component of CERCLA. It is time for a measure of certainty and stability regarding the application of the private causes of action under CERCLA.

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257. See *Am. Premier Underwriters Inc. v. Gen. Elec. Co.*, 866 F. Supp. 2d 889, 903–04 (S.D. Ohio 2012).

258. *Moraine Properties, LLC v. Ethyl Corp.*, No. 3:07-CV-229, 2008 WL 4758692, at \*4 (S.D. Ohio Oct. 27, 2008).

259. Some courts have rejected the argument that insurance companies can assert section 107(a)(4)(B) claims as a “subrogee” of the insured party. See, e.g., *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946 (9th Cir. 2013).

