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The Saga Continues – Trying to Find a Balance in CERCLA's PRP Liability Suits

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THE SAGA CONTINUES – TRYING TO FIND A BALANCE IN CERCLA'S PRP LIABILITY SUITS

ABSTRACT

This Note illustrates the enormous complexity and confusion circuit courts and potentially responsible parties face when attempting to determine liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Part II provides the reader with background information on CERCLA, its provisions, and its amendments. Part III analyzes the Supreme Court's unpopular decision in *Cooper Industries v. Aviall Services, Inc.*, and that decision's impact on CERCLA litigation. Part IV examines the Supreme Court's attempt to clarify the *Cooper Industries* decision in *United States v. Atlantic Research Corporation* and the gaps left open by that decision. Part V studies how the circuit courts have struggled with the gaps left open by the Supreme Court rulings, especially when parties are facing consent decrees or administrative orders. Lastly, Part VI brings the holdings of the cases discussed together in a manner that can hopefully provide some guidance to parties facing potential liability for a contaminated site.

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I. INTRODUCTION

With human health, environmental quality, and millions of dollars on the line, parties trying to determine their liability pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are forced to muddle through a perplexing piece of legislation combined with unsettling Supreme Court precedent. Two crucial provisions of CERCLA, section 107 and section 113, determine a potentially responsible party's (PRP's) ability to recover from other PRPs.

The Supreme Court in *Cooper Industries, Inc. v. Aviall Services*[1], turned years of precedent on its head, drastically narrowing a PRP's ability to recover under a section 113 contribution claim. The Supreme Court provided some guidance in *United States v. Atlantic Research Corp.*[2], but left many questions unanswered, leaving the daunting task of interpreting CERCLA's liability provisions to the circuit courts, and PRPs baffled when it comes to taking action upon discovering a contaminated site they may be found liable for. Although navigating through CERCLA's liability provisions may be extremely frustrating, there are some steps a PRP can take to minimize its liability while being able to recover some of its incurred costs from other PRPs.

II. CERCLA BACKGROUND

CERCLA, also known as Superfund, was enacted to fill a gap in environmental protection caused by our nation's abandoned and/or inactive hazardous waste sites.[3] Passed in 1980, CERCLA became law after the citizens of the United States witnessed the tragic events that unfolded in Love Canal, New York.[4] The passage of CERCLA is credited to the homeowners in Niagara Falls and the news coverage that brought the Love Canal incident and other hazardous waste sites around the nation into the national limelight.[5]

Love Canal was anything but an isolated incident. In fact, the United States Environmental Protection Agency (EPA) has suggested one in four Americans lives within three miles of a Superfund site.[6] The events at Love Canal and other locations not only showed the "industry's reckless

1. 543 U.S. 157 (2004).

2. Ronald E. Cardwell, *Comprehensive, Environmental, Response, and Liability Act*, *in* ENVIRONMENTAL LAW HANDBOOK 509 (Thomas F.P. Sullivan ed., 20th ed. 2009).

3. *Id.*

4. Veronica Eady Famira, *Cleaning Up Abandoned or Inactive Contaminated Sites*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 570 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008). From approximately 1942-1954, Hooker Chemical company deposited approximately 25,000 tons of chemical waste in a canal near a Niagara Falls community. ALLAN MAZUR, A HAZARDOUS INQUIRY: THE RASHOMON EFFECT AT LOVE CANAL 9 (1998). The canal was eventually filled and sold to the city to build an elementary school. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 120 n.5 (2d Cir. 2010). Families moved to the area not knowing of the tremendous amount of toxic waste abutting their backyards. *Id.* The citizens became plagued with numerous health problems and complained for years until President Carter declared a federal emergency over what had become an "environmental ghetto." *Id.* (citing S. REP NO. 96-848, at 8-10 (1980)).

5. MAZUR, *supra* note 4, at 217.

6. Famira, *supra* note 4, at 569.

disregard for environmental safety over the years,"[7] but also convinced Congress that public health and the environment were at risk from contaminant releases from uncontrolled or abandoned sites.[8] At its passage, CERCLA was viewed as an innovative tool to discover and clean up these nasty toxic sites.[9]

CERCLA is commonly known as "Superfund" because the law created a special tax on the petroleum and chemical industries to fund the cleaning of hazardous waste sites.[10] These funds are essential to ensure the prompt cleanup of the sites, as the EPA can take action without first determining who is liable for the contamination.[11] Under CERCLA, the EPA is authorized to take remedial action when "any hazardous substance is released or there is a substantial threat of such a release into the environment,"[12] or when "there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare."[13]

After the EPA cleans up a site, the agency can seek out those legally responsible for the contamination and recover its costs.[14] The EPA does not have to conduct the initial cleanup itself however, and may subsequently pursue a cost recovery action against those responsible. The EPA can also order the parties responsible for the hazardous site(s), known as PRPs, to clean up the site(s).[15] Historically, CERCLA also allows "PRPs that [have] incurred cleanup costs . . . to seek contribution from other parties through collateral litigation."[16]

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7. Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOLOGY L.Q. 59, 73 (2003).

8. Cardwell, *supra* note 2, at 509.

9. Famira, *supra* note 4, at 570.

10. *Id.* at 570. It is important to note that even though the petroleum industry was taxed to support Superfund, "CERCLA excludes crude oil or any of its refined fractions from the definition of hazardous substances." *Id.* Caving to industry pressure, a Republican-led Congress allowed the tax to expire in 2005, causing the funding for today's Superfund cleanups to come from the taxpayers. John M. Broder, *Without Superfund Tax, Stimulus Aids Cleanups: $600 Million for Work at Polluted Sites*, N.Y. TIMES, Apr. 26, 2009, at A16.

11. *See* 42 U.S.C. § 9604(a)(1) (2006).

12. *Id.* § 9604(a)(1)(A).

13. *Id.* § 9604(a)(1)(B). The release of a substance can mean many things, including "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." *Id.* § 9601(22).

14. *Id.* § 9607(a)(4)(A).

15. Famira, *supra* note 4, at 570.

16. *Id.*

A. CRITICISMS AND ACCOMPLISHMENTS OF CERCLA

CERCLA is one of the most complex and daunting pieces of environmental legislation.[17] "For those unfamiliar with CERCLA law and lore, finding, let alone understanding, CERCLA's provisions can often be difficult. Many of the procedures that apply in the typical CERCLA matter are set forth in layers of statutory, regulatory, and policymaking documents."[18] Such complexity logically leads to voluminous litigation.[19] In fact, CERCLA is famous for being subject to "more litigation than any other field of environmental law."[20]

Criticisms of CERCLA do not end with its complexity. Industry has criticized the law for being too strict and costly while many members of the American public criticize the law for its slow pace of cleanup.[21] Others have stated the law has not lived up to its expectations to set America's hazardous waste problems right.[22] Regardless of personal views regarding CERCLA, one criticism is shared by all: the cost of cleanup is tremendously expensive and intimidating.[23]

Even with all these criticisms, there is no doubt CERCLA has significantly affected environmental policy.[24] The EPA's analysis of CERCLA verifies its significant impact in cleaning up hazardous waste sites around the country, resulting in improved public health and a cleaner environment:

> •EPA [through CERCLA] obligated nearly $443 million in appropriated funds, state cost-share contributions, and potentially

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17. 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02[1][a], at 4A-23 (1998). "CERCLA is a very complex piece of legislation, cross-referencing to, and relying on, prior laws that deal with toxic and hazardous pollution. Moreover, the law had a stormy, contentious legislative history that left its mark on a hurried and technically imperfect draft of legislation." *Id.*; 4 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.1, at 470, 474 (1992). "CERCLA is filled with the half-laws, teasers, and sleepers for which the environmental statutes are famous." RODGERS, *supra*, note 17 at 474.; Richard G. Opper, *Managing Risk at Brownfield Sites*, 20 NAT. RESOURCES & ENV'T 32, 36 (2006). "We have seen CERCLA grow from its poorly drafted roots into a cost-recovery statute that is so burdened by its historic baggage that counsel for private cost-recovery plaintiffs have lost much of their enthusiasm for the remedy." Opper, *supra*, note 17.

18. Cardwell, *supra* note 2, at 512.

19. *See* JAMES T. O'REILLY, 1 SUPERFUND AND BROWNFIELDS CLEANUP § 3:6 (2009-2008) ("CERCLA has been a lawyer's full-employment opportunity act.").

20. GRAD, *supra* note 17, § 4A.01[5], at 4A-18.

21. Cardwell, *supra* note 2, at 510.

22. NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 749 (2008).

23. MAZUR, *supra* note 4, at 218. "Superfund almost certainly is the most expensive environmental program ever enacted." *Id.*; Cardwell, *supra* note 3, at 510. "To many on both sides of these issues, CERCLA has been an expensive failure." Cardwell, *supra* note 2, at 510.

24. ASHFORD & CALDART, *supra* note 22, at 749.

> responsible party settlement resources for construction and post-construction projects . . . .
>
> •EPA [through CERCLA] conducted 391 removal actions to address immediate and substantial threats to communities . . . .
>
> •[The EPA, through CERCLA] [p]laced 20 new sites on the NPL,[25] and proposed 8 sites to the NPL. The NPL had, at the end of FY 2010, 61 proposed sites and 1,627 final and deleted sites . . . .
>
> •EPA [through CERCLA] secured private party commitments of nearly $1.6 billion in FY 2010 to fund cleanup work . . . .[26]

The criticisms and impacts mentioned above are real and will drastically affect a party who becomes involved with a Superfund site.[27] Part of what makes CERCLA so complicated is determining who is going to be held liable for the cleanup of these sites and, when there are multiple PRPs at a contaminated site, how much each party is going to pay.[28] Understanding the interaction between the varying liability provisions in CERCLA is critical for all parties facing Superfund litigation.

B. THE LIABILITY PROVISIONS UNDER CERCLA

When determining liability and payment for the cleanup of hazardous sites, it is important to remember the purpose of CERCLA, which is known as the "polluter pays" principle.[29] The polluter pays principle is "the idea that those who benefited from their disregard [for the hazards posed by their pollution] should now pay to clean up the mess."[30] CERCLA has listed

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25. "The *National Priorities List* ("NPL") is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation." *National Priorities List (NPL)*, EPA, http://www.epa.gov/superfund/sites/npl/ (last visited Aug. 25, 2012).

26. *Superfund National Accomplishments Summary Fiscal Year 2010*, EPA, http://epa.gov/superfund/accomp/numbers10 htm (last updated Aug. 9, 2012). *See also Superfund Provides Communities with Significant Human Health, Environmental and Economic Benefits*, EPA, http://www.epa.gov/superfund/accomp/benefits htm (last updated Apr. 9, 2012) (explaining CERCLA's benefits "include reduction of threats to human health and ecological systems in the vicinity of Superfund sites, improvement of the economic conditions and quality of life in communities affected by hazardous waste sites, prevention of future releases of hazardous substances, and advances in science and technology").

27. *See generally* Opper, *supra* note 17, at 32, 36.

28. *See generally* Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 599 (8th Cir. 2011) (explaining how the EPA ascertained one site's contamination came from seven different source areas).

29. Whitney, *supra* note 7, at 73.

30. *Id.*

four broad categories of PRPs who can be found liable for the costs associated with Superfund sites:

> (1) the current owner or operator of a waste facility; (2) any previous owner or operator during any time in which hazardous substances were disposed at a waste facility; (3) any person who arranged for disposal or treatment of hazardous substances at the waste facility; and (4) any person who transported hazardous substances to a waste facility.[31]

Courts have found CERCLA imposes strict, joint, and several liability among this broad categorization of PRPs.[32] This means "[a]ny PRP may be held responsible for the entire cost of cleanup, even if the PRP's actual contribution to the contamination is limited."[33] This feature of CERCLA can have enormous significance to PRPs as the cost of cleaning up Superfund sites have considerably increased with each passing year,[34] often times costing millions of dollars.[35]

1. *CERCLA Section 106*

Section 106 of CERCLA[36] grants the EPA the authority to mitigate any "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility."[37] Section 106 also details the available penalties the EPA can levy on noncompliant parties.[38] What makes section 106 such a valuable tool for the EPA is that it allows the agency to issue "such orders as may be necessary to protect public health and welfare and the

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31. ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 456 (6th Cir. 2007) (citing Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 347 n.8 (6th Cir. 1998) (citing 42 U.S.C. § 9607(a)(1)-(4) (2006))).

32. Cardwell, *supra* note 2, at 530.

33. Famira, *supra* note 4, at 571.

34. Cardwell, *supra* note 2, at 524.

35. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 164 (2004) (explaining how one party "incurred approximately $5 million in cleanup costs; the total costs may be even greater"); Key Tronic Corp. v. United States, 511 U.S. 809, 811 (1994) (detailing a settlement where Key Tronic agreed to pay 4.2 million dollars to the EPA and the Air Force agreed to pay 1.45 million dollars); Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 215 n.19 (3d Cir. 2010) (listing the costs of five parties involved in the action, totaling $13,678,378.55); City of Emeryville v. Robinson, 621 F.3d 1251, 1255 (9th Cir. 2010) (citing two settlements for site cleanups totaling over thirty-eight million dollars).

36. Section 106 is codified at 42 U.S.C. § 9606 (2006). For better readability, this Note will refer to sections of CERCLA rather than the U.S. Code for the majority of the text. The footnotes will point to the appropriate codified section.

37. 42 U.S.C. § 9606(a). Section 106 actions are available only to the EPA and are not available to private parties. Cardwell, *supra* note 2, at 551. Although section 106 is only available to the EPA, it is the "second major cause of action available under CERCLA." *Id.*

38. 42 U.S.C. § 9606(b).

environment."[39] This means the EPA can direct a PRP, through a legally binding administrative order, to abate a release of hazardous substances.[40]

The fines for willful noncompliance with an administrative order under section 106 are steep – up to twenty-five thousand dollars per day.[41] Further, if a party fails to comply with a section 106 administrative order, that party may be subject to putative damages of three times the cleanup costs incurred from the failure to take action.[42] Given the power of the order and the magnitude of the fees, it is no surprise section 106 is viewed as "a valuable tool to commence cleanups promptly."[43]

2. *CERCLA Section 107*

The most litigious portion of CERCLA,[44] section 107, categorizes the four kinds of PRPs (listed above) and "permits the United States, individual states, or private parties to bring an action [against a PRP] to recover costs they have incurred in responding to a release or a threatened release of a hazardous substance."[45] "Section 107(a) has a six-year statute of limitations, and allows a plaintiff to recover 100% of its response costs from all liable parties, including those which have settled their CERCLA liability with the government."[46] Courts traditionally have applied section 107 to "innocent parties" who may have not taken part in the contamination, but clean up the site anyway.[47]

Section 107 does not have an express right to contribution, which is a different remedy than cost recovery.[48] Contribution is defined as "[o]ne

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39. *Id.* § 9606(a).

40. Famira, *supra* note 4, at 580.

41. 42. U.S.C. § 9606(b)(1).

42. *Id.* § 9607(c)(3).

43. Famira, *supra* note 4, at 581.

44. Cardwell, *supra* note 2, at 537.

45. *Id.*

46. Atl. Research Corp. v. United States, 459 F.3d 827, 831 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007). A "response cost" is any cost associated with a removal or remedial action. Cardwell, *supra* note 2, at 547.

> Specific examples of recoverable response costs include costs associated with sampling and monitoring to assess and evaluate the extent of a release or threatened release; costs associated with detecting, identifying, controlling, and disposing of hazardous substances; and costs associated with investigating the extent of danger to the public or environment.

Id. at 548. Costs that have been found not to be recoverable as response costs are "medical monitoring costs, road repair and snow removal costs, and lost profits and general damages." *Id.*

47. Randy J. Sutton, *Innocent Owner Status under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, Annotation, 12 A.L.R. Fed. 2d 161, 161 (2006).

48. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 n.3 (2004). "The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a

tortfeasor's right to collect from joint tortfeasors when – and to the extent that – the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined as percentages of causal fault."[49] Initially, courts filled this gap in the law by recognizing a common law right to contribution claims between PRPs.[50] Theoretically, without recognizing a right to contribution, a PRP could be held liable for the cleanup of an entire site (remember, courts have found CERCLA imposes strict, joint, and several liability)[51] and not be able to recover some of the costs from other PRPs.[52]

3. *SARA Amendments and Section 113*

In 1986, Congress recognized the hazardous sites around the country were a larger problem than initially anticipated.[53] It amended CERCLA in the Superfund Amendments and Reauthorization Act (SARA), adding 168 pages to the already complex CERCLA structure.[54] The passage of SARA "solidifie[d] the reputation of the field for complexity, obscurity, and mind-numbing detail."[55] Prior to the passage of SARA, courts read section 107(a)(4)(B) as creating "an implied right of action for contribution for PRPs who had been sued under § 107, but had incurred response costs in excess of their pro rata share."[56] SARA explicitly gave PRPs the right of contribution:

> Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or under section [107(a)] of this title . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of

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general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct." *Id.*

49. BLACK'S LAW DICTIONARY 378 (9th ed. 2009).

50. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 121 (2d Cir. 2010).

51. Cardwell, *supra* note 2, at 530.

52. *See Niagara Mohawk*, 596 U.S. at 121 n.8.

53. GRAD, *supra* note 17, § 4A.02[1][a], at 4A-23.

54. RODGERS, *supra* note 17, at 483. An interesting note for North Dakotans is that SARA was signed by President Ronald Reagan on Air Force One over Grand Forks, North Dakota on October 17, 1986. *Id.* at 484.

55. *Id.*

56. ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 456-57 (6th Cir. 2007) (quoting Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 348 (6th Cir. 1998)).

> a civil action under section [106] of this title or section [107] of this title.[57]

Section 113(f)(3)(B) also gave an explicit right of contribution to a party who has "resolved its liability to the United States . . . 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."[58] In other words, if a party enters into an administratively or judicially approved settlement with the EPA regarding the cleanup of a site resolving its liability to the United States, that party may pursue a contribution claim against other PRPs.[59] The right of contribution is limited to a three-year statute of limitations,[60] which is considerably shorter than section 107's six-year statute of limitations.[61] Section 113(f)(2) also gave parties an incentive to enter into an administratively or judicially approved settlement: by entering into such settlements, a PRP cannot be held "liable for claims for contribution regarding matters addressed in the settlement."[62]

Although explicitly inserting the right of contribution into CERCLA may have been well intentioned, it added complexity and opaqueness to the law.[63] Numerous questions arose with the newly passed legislation; specifically, one major question arose as to whether a PRP can seek contribution from another PRP for cleanup costs when no civil action has been brought under section 106 or section 107.[64] "Most courts of appeals [initially] interpreted section 113(f)(1) broadly and allowed PRPs to sue other PRPs to recover cleanup costs at any time after cleanup costs were incurred."[65]

III. *COOPER INDUSTRIES* CHANGES THE LANDSCAPE

Cooper Industries, Inc. v. Aviall Services, Inc. drastically limited the ability of PRPs to bring section 113 contribution claims against other PRPs.[66] *Cooper Industries* involved contaminated aircraft engine maintenance sites in Texas.[67] In 1981, Cooper Industries (Cooper), who

57. 42 U.S.C. § 9613(f)(1) (2006).
58. *Id.* § 9613(f)(3)(B).
59. *See id.*
60. *Id.* § 9613(g)(1).
61. *Id.* § 9613(g)(2)(B).
62. *Id.* § 9613(f)(2).
63. RODGERS, *supra* note 17, at 484-86.
64. Cardwell, *supra* note 2, at 567.
65. *Id.*
66. Cardwell, *supra* note 2, at 567.
67. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 (2004).

had previously operated the sites, sold them to Aviall Services (Aviall).[68] After years of operation, Aviall discovered some facilities were contaminated by petroleum and other hazardous substances leaking "into the ground and ground water through underground storage tanks and spills."[69]

Aviall contacted the Texas Natural Resource Conservation Commission, who informed Aviall it was in violation of state environmental laws and directed Aviall to clean up the site.[70] The Commission threatened action if Aviall did not clean up the site, but neither it nor the EPA brought any action compelling cleanup.[71] In 1997, Aviall brought suit against Cooper, seeking to recover its cleanup costs.[72] The question before the Court was whether a party who has not been sued under section 106 or section 107 is able to pursue a contribution claim against another party pursuant to section 113.[73]

Writing for the majority, Justice Thomas doggedly stuck to a textualist approach in his interpretation of the CERCLA provisions.[74] Justice Thomas evaluated the enabling clause of section 113(f), which states, "[a]ny person *may* seek contribution . . . *during or following* any civil action under" either section 106 or section 107 of CERCLA.[75] Instead of following the judicial canon norm of reading the word "may" as granting discretion to the aggrieved party,[76] Justice Thomas declared the word "may" authorizes action only when it has satisfied "the subsequent specified condition."[77] Put another way, the only way a PRP (Aviall) could seek a section 113

68. *Id.*

69. *Id.* at 163-64.

70. *Id.* at 164.

71. *Id.*

72. *Id.* "[The] claim alleged that, pursuant to § 113(f)(1), Aviall was entitled to seek contribution from Cooper, as a PRP under § 107(a), for response costs and other liability Aviall incurred in connection with the Texas facilities." *Id.*

73. *Id.* at 160-61.

74. Textualism is roughly defined as a method of statutory interpretation in which a judge looks to the statute's literal text to interpret the law, as opposed to looking into the legislative history, legislative implications, or equitable considerations in interpretation. *See* BLACK'S LAW DICTIONARY 1614, 356 (9th ed. 2009).

75. *Cooper Indus.*, 543 U.S. at 166 (emphasis in original) (quoting 42 U.S.C. § 9613(f)(1) (2006)).

76. ROBERT J. MATINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH 49 (2005). If there is to be a limitation on the discretionary act, then the limitation should include the world "only." *Id.* For example, if Congress intended to limit the availability of section 113, it would have looked like this: "A person may *only* seek contribution . . . during or following any civil action." *See id.*

77. *Cooper Indus.*, 543 U.S. at 166.

contribution claim from another party (Cooper) is if that PRP (Aviall) has already been sued under section 106 or section 107.[78]

Justice Thomas limited the decision by choosing not to address whether a party who is subject to a judicial order under section 106 constitutes a PRP being subject to a "civil action" to which it can bring section 113 contribution claims against other PRPs.[79] Justice Ginsburg, joined by Justice Stevens, dissented from the Court's majority holding, stating "[f]ederal courts, prior to the enactment of § 113(f)(1), had correctly held that PRPs could recover [under § 107] a proportionate share of their costs in actions for contribution against other PRPs [and] nothing in § 113 retracts that right."[80]

Before *Cooper Industries*, the long-standing practice across the country was to allow a party who was not subject to section 106 or section 107 litigation to bring a claim for contribution under section 113(f)(1) against other PRPs to recover the costs it voluntarily undertook to clean up a contaminated site.[81] The decision in *Cooper Industries* was roundly criticized by commentators because it essentially discouraged parties from voluntarily cleaning up these sites until getting sued to do so,[82] which goes against CERCLA's goal of "facilitat[ing] the prompt cleanup of hazardous waste sites."[83] The decision was also criticized for leaving open many unanswered questions, particularly whether a PRP can bring a section 107 cost recovery action against another PRP at the same site,[84] as pointed out in Justice Ginsburg's dissent.[85] These questions remained unanswered for years, leaving PRPs with a difficult decision: voluntarily clean up the site and hope a court allows a section 107 cost recovery action, or wait to get sued and potentially face the increased costs and penalties of delaying the cleanup.[86]

78. *Id.* at 160-61.

79. *Id.* at 168 n.5.

80. *Id.* at 174 (Ginsburg, J., dissenting) (internal citations and quotations omitted).

81. Cardwell, *supra* note 2, at 567.

82. Famira, *supra* note 4, at 580; Joseph Ferrucci, *No Contribution Claims for Voluntary Cleanup of Superfund Sites: The Troubling Supreme Court Decision in Cooper Industries v. Aviall Services*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 73, 95 (2005); Armand M. Perry, *Will the Legislative Branch Please Stand Up: Ending Three Years of Uncertainty in a Post-Cooper World*, 20 TUL. ENVTL. L.J. 407, 421 (2007).

83. OHM Remediation Servs. v. Evans Cooperage Co., Inc., 116 F.3d 1574, 1578 (5th Cir. 1997).

84. Cardwell, *supra* note 2, at 568.

85. *Cooper Indus.*, 543 U.S. at 173 (Ginsburg, J., dissenting).

86. *See* Perry, *supra* note 82, at 421-22.

IV. *UNITED STATES V. ATLANTIC RESEARCH'S* GUIDANCE

Prior to the Supreme Court's opinion in *United States v. Atlantic Research Corp.*, courts were struggling with understanding the relationship between section 113(f) contribution and section 107(a) cost recovery caused by the *Cooper Industries* decision.[87] Nearly three years after *Cooper Industries*, the Supreme Court had an opportunity to clarify its prior decision.

Atlantic Research involved a site where the Atlantic Research Corporation (Atlantic Research) retrofitted rocket motors for the United States government.[88] Wastewater and burned fuel from the operation contaminated the soil and groundwater at the site.[89] Atlantic Research voluntarily cleaned up the site (without being subject to section 106 or section 107 litigation) and brought suit against the United States under section 107(a) to recover its costs for cleanup.[90]

Justice Thomas, this time writing for a unanimous Court, explained how "§§ 107(a) and 113(f) provides two 'clearly distinct' remedies:"[91]

> Section 113(f) explicitly grants PRPs a right to contribution . . . . By contrast, § 107(a) permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under § 107(a) without any establishment of liability to a third party. Moreover, § 107(a) permits a PRP to recover only the costs it has "incurred"[92] in cleaning up a site. When 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.[93]

Justice Thomas further explained that it is the procedural circumstances of the parties involved that will determine whether section 107(a) or section

87. GRAD, *supra* note 17, § 4A.02[1][g-1], at 4A-78.24(5)-(6).

88. United States v. Atl. Research Corp., 551 U.S. 128, 133 (2007).

89. *Id.*

90. *Id.* Atlantic Research amended its complaint, after the Supreme Court's *Cooper Industries* decision, from seeking relief under sections 107(a) and 113(f) to seeking relief under section 107(a) and the federal common law. *Id.* "The United States moved to dismiss, arguing that § 107(a) does not allow PRPs (such as Atlantic Research) to recover costs." *Id.* at 133-34.

91. *Id.* at 138 (quoting Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 n.3 (2004)).

92. Justice Thomas focused on the express language in section 107(a)(4)(B), which states that a PRP shall be liable for "any other necessary costs of response *incurred* by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (2006) (emphasis added). The national contingency plan is the federal government's plan for responding to releases of hazardous substances. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 121 (2d Cir. 2010).

93. *Atl. Research*, 551 U.S. at 138-39 (internal citations omitted).

113(f) will apply.[94] If a party is subject to section 106 or section 107 litigation, then section 113(f) is that party's vehicle for bringing a contribution action.[95] On the other hand, if a party is not subject to section 106 or section 107 litigation, then section 107(a) is that party's vehicle to bring an action against a PRP for the costs it incurred from the cleanup.[96]

Of particular relevance, Justice Thomas then distinguished (presumably innocent) parties who voluntarily clean up a site from parties who are paying money to satisfy a settlement agreement or a court judgment.[97] Those parties who enter into settlement agreements are not in the same procedural posture as those who voluntarily clean up a site. "[B]y reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a)," leaving them to only pursue a section 113 contribution claim.[98] However, Justice Thomas acknowledged that entering into a consent decree or administrative order under section 106 and section 107 is not the same as entering into a settlement agreement. "In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party."[99] Even though the opinion recognizes this gap in the law, it inexplicably states in a footnote it will not decide the issue.[100]

Although *Atlantic Research* resolves some of the issues created by *Cooper Industries*, it leaves a massive gap in the law for those parties incurring costs stemming from administrative orders and settlements, which is a common scenario at Superfund sites.[101] It is the commonality of consent decrees and administrative orders under CERCLA that makes this decision so odd. "The EPA has issued more than 1,700 orders [compelling environmental cleanup] since CERCLA's enactment in 1980. That large number is not surprising given that [administrative orders] are 'one of the most potent administrative remedies available to the [EPA] under any existing environmental statute.'"[102] The issue has not been revisited by the

94. *Id.* at 139.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 139 n.6.
100. *See id.*
101. Aselda Thompson, *Exposing a Gap in CERCLA Case Law: Is there a Right to Recover Costs Following Compliance with an Administrative Order after Atlantic and Aviall?*, 46 HOUS. L. REV. 1679, 1699-1700 (2010).
102. *Id.* at 1688-89 (quoting EPA, *Guidance Memorandum on Use and Issuance of Administrative Orders under Section 106(a) of CERCLA* 1 (Sept. 8, 1983)).

Supreme Court, leaving the circuit courts to wade through the mud that is CERCLA liability.[103]

V. CIRCUIT COURTS SORT THROUGH THE MESS

A. SIXTH CIRCUIT

One of the first cases to reach the appellate level dealing with administrative orders after *Atlantic Research* was *ITT Industries, Inc. v. BorgWarner, Inc.*[104] *ITT Industries* dealt with two sites contaminated with trichloroethylene (TCE) in Michigan, which the EPA placed on the National Priorities List.[105] ITT Industries, Inc. (ITT) voluntarily entered into an Administrative Order by Consent (AOC) with the EPA to conduct a study to determine the source of TCE at one site (NBFF site).[106] ITT incurred approximately two million dollars in costs in connection with the NBFF site.[107]

Without admitting liability, ITT entered into a Consent Decree at another site (NBIA site) with other parties to perform the required remedial actions necessary to clean up the site.[108] ITT incurred approximately $1.6 million in costs in connection with the NBIA site.[109] ITT brought suit against BorgWarner and other defendants for cost recovery under section 107(a) and contribution under section 113(f)(3)(B).[110]

The Sixth Circuit discussed the tenuous history of section 107 and section 113 claims and reiterated that "the appropriateness of a § 107(a) cost recovery or § 113(f) contribution action varies depending on the circumstances leading up to the action, not the identity of the parties."[111]

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103. "[N]avigating the interplay between § 107(a) and § 113(f) remains a deeply difficult task. '[R]ecent rulings have done little to provide the lower courts with useful guidance in determining which subsection of CERCLA provides a cause of action for parties seeking reimbursement of response costs in differing situations.'" Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 218 (3d Cir. 2010) (internal citation omitted) (quoting New York v. Solvent Chem. Co., 685 F. Supp.2d 357, 425 (W.D.N.Y. 2010)).

104. 506 F.3d 452 (6th Cir. 2008). Technically, the Third Circuit heard a case dealing with administrative orders and section 107 and section 113 recovery first, but that case was not selected for publication in the Federal Reporter. Montville Township v. Woodmont Builders, LLC, 244 F. App'x 514 (3d Cir. 2007).

105. *ITT Indus.*, 506 F.3d at 454. The contamination stemmed from the manufacture of fishing reels. *Id.*

106. *Id.* at 455.

107. *Id.*

108. *Id.* "The NBIA Site consists of a series of lagoons, an industrial sewer, and a country drain located approximately one-half mile from the NBFF site." *Id.*

109. *Id.* ITT claimed BorgWarner was responsible for some of the response costs for discharges of hazardous substances into the lagoons and a country drain. *Id.*

110. *Id.* at 454.

111. *Id.* at 458.

Citing *Atlantic Research*, the Sixth Circuit noted a section 107 claim may be pursued when a PRP has "incurred" the cleanup costs on its own (and is not reimbursing other parties), whereas a section 113 claim may be pursued when a PRP has been subject to a section 106 or section 107 action, or has "entered into a judicially or administratively approved settlement."[112] At first glance, this would make one think the AOC constitutes a judicially or administratively approved settlement, allowing ITT to bring its section 113 claim.

However, after reviewing the AOC, the Sixth Circuit determined ITT did not resolve its liability with the United States, as is required to move forward on a section 113(f)(3)(B) claim.[113] ITT did voluntarily enter into the AOC with the EPA, but that agreement expressly reserved the EPA with the "rights to legal action to adjudicate [ITT's] liability for failure to comply with the AOC, for costs of response (past, present, or future), for costs of injunctive relief or enforcement, criminal liability, and other damages."[114] Further, ITT repeatedly made clear that its entering into the AOC in no way was an indication of liability on its behalf.[115] The availability of a contribution claim hinges on a party resolving its liability;[116] therefore, by repeatedly denying liability, ITT essentially closed the door for its section 113 contribution claim.[117]

The Sixth Circuit remanded the case to the district court to determine if ITT could pursue a section 107 cost recovery action.[118] Looking again to *Atlantic Research*, the Sixth Circuit stated "CERCLA provides PRPs with a cause of action to recover costs incurred from remedial action regarding a contaminated site under § 107(a)."[119] Punting the issue, the Sixth Circuit stated it had "no opinion as to how [ITT's] cost recovery action ultimately should be resolved. Rather, we leave it to the district court to entertain this question in light of *Atlantic Research*."[120]

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112. *Id.* (citing United States v. Atl. Research Corp., 551 U.S. 128, 139 (2007)).

113. *Id.* at 459.

114. *Id.*

115. *Id.* at 460.

116. 42. U.S.C. § 9613(f)(3)(B) (2006).

117. *ITT Indus.*, 506 F.3d at 460. The Sixth Circuit also stated the AOC in this case was entered into under section 122(a), which essentially gives the EPA the right to allow a PRP to perform a response action if the agency determines that party will do the action appropriately. *Id.* (citing 42 U.S.C. § 9622(a)). In order for a settlement to be considered "an administratively or judicially approved settlement," ITT would have had to enter into the AOC pursuant to section 122(h) or section 122(g), which relate to *de minimus* settlements and cost recovery settlements, respectively. *Id.* The Sixth Circuit came to this conclusion by evaluating how the Supreme Court used those sections to discern the applicability of section 113. *Id.*

118. *Id.*

119. *Id.* at 458.

120. *Id*. at 460.

B. SECOND CIRCUIT

In 2010, the Second Circuit decided *Niagara Mohawk Power Corp., v. Chevron U.S.A., Inc.*,[121] a case that is "yet another in a series of cases that attempt to chart the contours of liability" of PRPs under section 107 and section 113.[122] This case involved Niagara Mohawk Power Corporation (NiMo) voluntarily entering into an AOC with New York's Department of Environmental Conservation (DEC).[123] Unlike the AOC in *ITT Industries*, NiMo's AOC explicitly stated it had "resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2)."[124] NiMo brought suit against numerous defendants to recoup its costs.[125]

The Second Circuit determined section 113 is the only available claim for NiMo.[126] The factual background behind the AOC agreement supports a section 113 claim, as NiMo accepted responsibility and paid for the response costs associated with the cleanup.[127] Recognizing Congress explicitly added section 113 contribution claims in SARA, the Second Circuit stated that allowing "NiMo to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113."[128]

The opinion then explained the rationale behind letting PRPs, such as NiMo, have a right to contribution:

> Congress sought to further incentivize PRPs to pay for their role in the creation of a hazardous waste site regardless of when they polluted. To that end, parties seeking contribution-by definition PRPs who have already been charged with liability and resolved their exposure . . . -must be granted sufficient opportunity to pursue other PRPs and have the costs of cleanup borne equitably with others liable under the statute.[129]

The rule of law that emerges from *Niagara Mohawk* is that when a PRP sustains remediation costs under an AOC with a State, that PRP may pursue a section 113 contribution action against other PRPs as long as the AOC contains explicit language releasing the section 113 action bringing

121. 596 F.3d 112 (2d Cir. 2010).
122. *Niagara Mohawk*, 596 F.3d at 117-18.
123. *Id.* at 119.
124. *Id.*
125. *Id.* at 118-19.
126. *Id.* at 124.
127. *Id.* at 127-28.
128. *Id.* at 128.
129. *Id.* at 132 (internal citations omitted).

PRP from CERCLA liability.[130] Comparing this case to *ITT Industries*, it is clear how crucial the language of an AOC can be. Without such language, the client can be stuck without a claim as in *ITT Industries*;[131] however, when explicit language in the AOC resolves liability, like it did in *Niagara Mohawk*, the client can move forward on a section 113 contribution claim,[132] potentially recovering millions of dollars.

C. THIRD CIRCUIT

In a case that dealt with "the disposal of millions of gallons of toxic waste, over a six year time period, by more than twenty parties, with millions of dollars of cleanup costs at stake," the Third Circuit came to a slightly different conclusion regarding PRP recovery suits in *Agere Systems, Inc. v. Advanced Environmental Technology Corp*.[133] After the EPA determined the contaminated site, the Boarhead Site, was to be a Superfund site, it commenced a section 107 cost recovery suit against multiple parties.[134] That litigation ended in a Consent Decree where the PRPs were to do the cleanup work and reimburse the EPA for the costs connected with the cleanup.[135] Agere was neither a party to the section 107 action nor the Consent Decree, but it did enter into a private settlement with the parties of the Consent Decree.[136] At the time the case was decided, Agere had contributed $902,152.49 towards the cleanup.[137] Agere and the members of the Consent Decree brought suit against twenty-three other defendants seeking to recoup the costs of the cleanup at the Boarhead Site.[138]

The Third Circuit recognized Agere's unique position, as it had not been subject to section 106 or section 107 proceedings, nor had it entered into an administratively or judicially approved settlement, which would technically bar Agere from pursuing a section 113 contribution claim

130. *Id.* at 124-25, 140. *Cf.* W.R. Grace & Co-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 91 (2d Cir. 2009) (ruling that a PRP cannot bring a section 113 contribution claim when its settlement with the DEC made no reference to CERCLA, stated the settlement only handled state law claims, and left open the possibility that the DEC or the EPA could bring CERCLA or other claims).

131. ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 460 (6th Cir. 2007).

132. *Niagara Mohawk*, 596 F.3d at 125-26.

133. 602 F.3d 204, 210 (3d Cir. 2010).

134. *Agere Sys., Inc.*, 602 F.3d at 211-12.

135. *Id*. at 212-13.

136. *Id.* at 213.

137. *Id.* at 224.

138. *Id.* at 213-14. Agere and the other plaintiffs brought suit for both cost recovery and contribution. *Id.*

pursuant to *Cooper Industries*.[139] Relying on the precedent in *Atlantic Research*, the Third Circuit determined Agere had "incurred" costs in cleaning up the site.[140]

> Agere . . . 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.[141]

The Third Circuit explained if it were to hold Agere did not have a section 107 claim, it would be completely barred from seeking recovery, which would go against CERCLA's goal of encouraging parties to promptly clean up hazardous sites and later be able to recover from other parties for the cleanup.[142] "When a company in the position of Agere . . . has not yet been sued by the EPA but appreciates that it bears some responsibility for cleaning up hazardous waste, the language of CERCLA, which is intended to encourage cleanup, ought not be interpreted to discourage participation in cleanup."[143] Allowing parties like Agere to recover the costs it incurred to help pay for a cleanup from other parties encourages participation in environmental cleanups, even if those costs are associated with a private party settlement obligation.[144]

The Third Circuit also ruled the other plaintiffs in the case, those who entered into the consent decrees with the EPA, were not able to pursue a section 107 cost recovery claim.[145] Section 113(f)(2) shields parties who enter into settlements with the government from other contribution claims over issues relating to the settlement.[146] If the court allowed a section 107 claim in such a circumstance, the defendant PRP would be unable to bring a contribution claim and would be held fully liable under CERCLA's joint and several liability.[147] The Third Circuit says such an outcome would be

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139. *Id.* at 225-26. *Cooper Industries* held a party can only seek a contribution claim from other PRPs if it has been subject to section 106 or section 107 litigation. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 160-61 (2004).

140. *Agere Sys., Inc.*, 602 F.3d at 225. "[Section] 107(a) permits a PRP to recover only the costs it has 'incurred' in cleaning up a site." United States v. Atl. Research Corp., 551 U.S. 128, 139 (2007).

141. *Agere Sys., Inc.*, 602 F.3d at 225.

142. *Id.* at 226.

143. *Id.*

144. *Id.*

145. *Id.* at 229.

146. 42 U.S.C. § 9613(f)(2) (2006).

147. *Agere Sys., Inc.*, 602 F.3d at 229.

perverse, stating, "while joint and several liability allows a plaintiff to collect from a single defendant the collective liability of all defendants, it does not permit a plaintiff to recover from a defendant the costs to undo what the plaintiff itself has done."[148] Therefore, the proper action for plaintiffs who have entered into administrative or judicially approved settlements is a section 113 contribution claim.[149]

D. EIGHTH CIRCUIT

One of the more recent cases involving CERCLA liability under section 107 and section 113 was heard by the Eighth Circuit in *Morrison Enterprises, LLC v. Dravo Corp*.[150] After the EPA discovered a contaminated water production well in Nebraska, it contacted Morrison Enterprises (Morrison), the City of Hastings (City), and the Dravo Corporation (Dravo) to inform them they were potentially liable for the contamination.[151]

The EPA "determined that three of the sources for the contamination were a grain elevator operated by one of Morrison's predecessors, a manufacturing plant run by Dravo, and a city landfill."[152] The EPA entered into a series of AOCs and consent decrees with the City and Morrison that ultimately led to the parties extracting and treating groundwater that was contaminated with their contaminants of concern (COCs) as well as TCE, even though Morrison claimed to have never used or released TCE.[153] The EPA also entered into a consent decree with Dravo to clean up its TCE contamination at another sub-site.[154] Morrison and the City brought suit under both section 107 and section 113 against Dravo to recover their costs of cleaning up the TCE.[155]

The Eighth Circuit determined neither Morrison nor the City can pursue a section 107 cost recovery claim.[156] The court stated that unlike the voluntary plaintiff in *Atlantic Research*, who had not been subject to section 106 or section 107 litigation, both Morrison and the City had been subject to such litigation.[157] "Response costs incurred pursuant

148. *Id.* at 229.
149. *Id.*
150. 638 F.3d 594 (8th Cir. 2011).
151. *Morrison Enters. LLC*, 638 F.3d at 599.
152. *8th Circuit Rejects Cost-Recovery Action for Involuntary Cleanup*, 31 No. 21 WJENV 2 (2011).
153. *Morrison Enters. LLC*, 638 F.3d at 599-601.
154. *Id.* at 601.
155. *Id.*
156. *Id.* at 604-05.
157. *Id.* at 604.

to . . . administrative settlements following a suit under § 106 or § 107(a) are not incurred voluntarily."[158]

The court acknowledged the TCE at Dravo's site migrated to the other sites, but held Morrison and the City were still liable for the entire cleanup:

> Under CERCLA, if a responsible party . . . releases hazardous materials into the environment, and that release causes the incurrence of response costs, then the party is liable . . . for any other necessary cost of response incurred by *any* other person . . . . When multiple parties are liable for response costs, the focus then shifts to allocation.[159]

The Eighth Circuit reasoned Morrison, the City, and Dravo all shared liability for contaminating the groundwater with various contaminants, and therefore, all three shared liability for cleaning up the contamination, both theirs and others.[160] Although the Eighth Circuit definitively ruled entering into AOCs bars cost recovery under section 107, it clearly allowed for plaintiffs who have entered into AOCs to use section 113, as "[t]his shared liability is sufficient to support a § 113(f) contribution claim."[161]

VI. LOOKING BACK, LOOKING FORWARD

A. THE CURRENT STATUS OF THE LAW

If the reader is confused about exactly where the line is drawn between section 107 and section 113, he or she should not be surprised. Judges and commentators openly admit understanding the relationship between section 107 and section 113 is extremely difficult.[162] However, after evaluating all the cases discussed above, legal practitioners and scholars can potentially understand the evolution of CERCLA liability under section 107 and section 113.

The Supreme Court, in *Cooper Industries*, stated a PRP who has not been subject to a section 106 or section 107 suit may not bring a contribution claim under section 113, changing years of lower court precedent and practice.[163] It followed that ruling three years later with

158. *Id.*

159. *Id.* at 605 (emphasis in original) (internal citations and quotations omitted).

160. *Id.* at 606-07.

161. *Id.* at 607.

162. Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 218 (3d Cir. 2010). "[N]avigating the interplay between § 107(a) and § 113(f) remains a deeply difficult task." *Id.*

163. Cooper Indus. v. Aviall Servs., 543 U.S. 157,160-61 (2004).

Atlantic Research, which stated a party who voluntarily cleans up a site can pursue a cost recovery action under section 107.[164]

The Sixth Circuit, in *ITT Industries*, stated a party who enters into an AOC without admitting or resolving liability cannot bring a section 113 contribution claim.[165] The Second Circuit, in *Niagara Mohawk*, ruled a settlement agreement that explicitly states a party has resolved its liability to the State (or the EPA) qualifies that PRP to bring section 113 contribution claims against other PRPs.[166] The Third Circuit, in *Agere Systems*, determined that allowing a party who has entered into private settlement agreements (not with the government) to pursue section 107 cost recovery actions promotes the goals of CERCLA.[167] Finally, the Eighth Circuit, in *Morrison Enterprises*, ruled that entering into an AOC essentially bars a PRP from pursuing a section 107 cost recovery action, and the only action available is a section 113 contribution claim.[168]

B. WHAT CAN BE DONE?

Most commentators agree that although the Supreme Court has been placed in a tough spot of interpreting a poorly drafted statute, it has failed "to clarify the statute and thereby give direct guidance to [PRPs]."[169] This leaves the circuit courts and PRPs to discern the proper interpretation of the statute in allocating liability. For the time being, it is the circuit courts who bear the responsibility to determine the interplay between section 107 and section 113.

1. *(Lack of) Legislative Response Potential*

Unfortunately, any hope of fixing the statutory language of CERCLA, as amended by SARA, through the legislative branch is unrealistic. What was supposed to be a quick passage of SARA in 1986 turned into a dramatic storyline involving "prolonged bouts of stalemate, gamesmanship, bluffs, threats," threats of pocket veto, and Congress pledging to stay in

164. United States v. Atl. Research Corp., 551 U.S. 128, 135-36 (2007).

165. ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459-60 (6th Cir. 2007).

166. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 126-28, 140 (2d Cir. 2010).

167. *Agere Sys., Inc.*, 602 F.3d at 225-26.

168. Morrison Enters., LLC, v. Dravo Corp., 638 F.3d 594, 604 (8th Cir. 2011). "[A] PRP can bring a claim under § 107(a) if it is foreclosed from bringing a claim under § 113(f), but that, conversely, a PRP must proceed under § 113(f) if § 113(f) is available to it." Morrison Enters., LLC v. Dravo Corp., No. 4:08CV3142, 2009 WL 4330224 at *8 (D. Neb. Nov. 24, 2009).

169. Thompson, *supra* note 101, at 1706-07; O'REILLY, *supra* note 19, § 3:6. "Two Supreme Court opinions by Justice Clarence Thomas have been the source of much of the worst confusion and, to be frank, have caused years of wasted effort in the evolution of Superfund law." *Id.*

session to override any veto.[170] Furthering the Congressional drama, in 1995, the Republican-led Congress discontinued the tax on the petroleum and chemical industries, leaving taxpayers to foot the bill for the Superfund cleanups.[171] CERCLA's stormy past combined with the American public's extremely low opinion of Congress today,[172] leaves little hope the legislative branch will do anything to bring clarification to the law.

2. *Using Circuit Court Precedent*

Easier said than done, a PRP needs to take a hard look at its past, its predecessors' past, and determine the plausibility that it may have contributed to the contamination. If it has contributed, it should immediately take actions to abate such contamination. Not only is this the morally superior thing to do, it makes business and financial sense for the PRP. Taking prompt action avoids steep statutory penalties and will allow that PRP to have some recourse against other PRPs, either through section 107 or section 113.

Although each case regarding CERCLA liability will undoubtedly be filled with complexities in both the facts and the law, and there is no guarantee of action by Congress or the Supreme Court, a PRP can take affirmative steps in the light of some circuit court precedent. If a PRP recognizes it bears some responsibility for the contamination at a site, yet is lucky enough to not be subject section 106 or section 107 litigation, it may still enter into private settlements with PRPs who are subject to such litigation.[173] That PRP may pursue cost recovery actions against those parties who have not entered into such agreements, while the parties subject to section 106 or section 107 litigation can bring contribution claims against those PRPs who decided not to engage in the settlements or the cleanup.[174]

If a PRP finds itself subject to section 106 or section 107 action brought by either the State or the EPA and determines it will make good business sense to enter into a settlement or AOC, admitting liability and expressly stating the liability has been resolved allows a party to bring a section 113 claim against other parties and shields those parties from other section 113 claims.[175] Although entering into an AOC will close the

170. RODGERS, *supra* note 17, at 483-84.

171. Broder, *supra* note 10, at A16.

172. Chris Cillizza, *Congress' Approval Problem in One Chart*, WASH. POST (Nov. 15, 2011, 12:09 PM ET), http://www.washingtonpost.com/blogs/the-fix/post/congress-approval-problem-in-one-chart/2011/11/15/gIQAkHmtON_blog.html.

173. Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 225-26 (3d Cir. 2010).

174. *Id.* at 228-29.

175. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 126-28, 140 (2d Cir. 2010). Although there is some concern a party who enters into an administratively or

possibility to recover one hundred percent of the costs incurred by the PRP, it allows that PRP to pursue contribution claims against other PRPs, potentially being able to recover millions of dollars.[176]

If a PRP is found subject to litigation under section 106 or section 107, it behooves that PRP to enter into a settlement to avoid further liability (the prompt cleanup). The current state of the law does not allow for a one hundred percent recovery of cleanup costs if a party has been subject to section 106 or section 107 litigation, as that would defeat the "polluter pays" principle.[177] Instead, the proper course is for that PRP to seek out other PRPs under a section 113 contribution claim, ensuring all parties who are liable pay for their fair share of the contamination.

For the most part, the holdings of the circuit courts, while bound to the textualist precedent of the Supreme Court, have been able to utilize CERCLA's goals of promoting the prompt cleanup of hazardous waste sites and the "polluter pays" principle.[178] Until common sense at the Supreme Court or Congressional level returns an implied right of contribution under section 107, as Justice Ginsburg suggests,[179] circuit courts should take an extra effort to follow, to the extent they can, CERCLA's goals of ensuring parties responsible for the contamination clean up the contamination as quickly as possible while ensuring that all parties liable for the contamination pay their fair share in the cost of remediation.

VII. CONCLUSION

The landscape surrounding CERCLA liability is constantly in a state of flux. Supreme Court precedent in *Atlantic Research* and *Cooper Industries*

judicially approved settlement may still be subject to a section 107 cost recovery claim, that settling party can counterclaim with section 113 for contribution. Elizabeth E. Mack & Angela D. Hodges, LAW 360, *Settling CERCLA Section 107 Claims* (Feb. 3, 2009), http://www.lockelord.com/files/News/d5a8d743-f590-423d-b45b-29502cc6042f/Presentation/NewsAttachment/5f943a19-9f75-425f-96ac-2b35f9b105d4/2009-02_SettlingCERCLASection107Claims_MackHodges.pdf. Odds are that since the EPA has already calculated the settling PRP's fair share in its settlement that a section 107 plaintiff is going to have a very difficult time showing the settling party should pay more. *Id.* "Accordingly, if the settlement otherwise makes good business sense, the gap in contribution protection should not be a disincentive to settlement. . . . The imperfect world of contribution protection after *Atlantic Research* should not deter settlements that otherwise make good business sense." *Id.*

176. Morrison Enters., LLC, v. Dravo Corp., 638 F.3d 594, 604 (8th Cir. 2011).

177. *Agere Sys., Inc.*, 602 F.3d at 229.

178. *Niagara Mohawk*, 596 F.3d at 130-31 (using the two main goals of CERCLA in its analysis: "remediation of sites that present a clear and present danger to the health and well-being of the communities in which they are located and identification of the source, or sources, of [the] hazardous materials."); *Agere Sys., Inc.*, 602 F.3d at 225 (stating the thought that "the Supreme Court did not intend to deprive the word 'incurred' of its ordinary meaning" in its decision in *Atlantic Research*).

179. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 174 (Ginsburg, J., dissenting).

changed the contours of PRP liability suits significantly. The current status of determining CERCLA liability under section 107 and section 113 is anything but clear or ideal, but if Congress or the Supreme Court were to embark on transforming the current statutory landscape, history warns that they may well make things worse. PRPs, while stuck in a difficult situation regarding action upon the discovery of a contaminated site, can take some action under circuit court precedent to minimize its liability to other parties and, if the facts support their position, seek out either section 107 cost recovery claims or section 113 contribution from PRPs.

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