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The Simultaneous Pursuit of Cost Recovery and Contribution under CERCLA: Making Sense of CERCLA's Private Party Remedies in the Aftermath of Atlantic Research

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**THE SIMULTANEOUS PURSUIT OF COST RECOVERY
AND CONTRIBUTION UNDER CERCLA: MAKING
SENSE OF CERCLA'S PRIVATE PARTY REMEDIES IN
THE AFTERMATH OF *ATLANTIC RESEARCH***

Eric A. DeGross*

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I. INTRODUCTION

Those who follow Supreme Court litigation know that the Court is prone to let issues percolate in state and lower federal courts before granting certiorari.¹ Environmental litigation is no exception. Knowing this, it seems only a matter of time before the Court revisits an intensely-litigated issue it

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¹ See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); see also Tom S. Clark & Jonathan P. Kastlelec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150 (2013).

last addressed twelve years ago²—the remedies available to private parties under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),³ and the relationship between those remedies. This matter is critical for those caught in the web of environmental cleanup because the two remedies available to them under CERCLA—cost recovery under § 107 and contribution under § 113—are entirely distinct.⁴ Whichever remedy a court affords plaintiffs will affect the litigants’ burden of proof, the standard of liability, the available defenses, the allocation of costs, and the applicable statutes of limitations—indeed, the entire proceeding.⁵ Furthermore, given the cost of environmental response actions, the effect on a party’s financial liability pursuant to a court’s decision on this issue can be staggering.⁶

This article suggests this issue is not only worthy of the Court’s attention but may now be ripe for consideration. First, there is a clear split of authority among the federal courts with respect to several questions left unresolved when the Court last addressed this issue in *Atlantic Research*.⁷ Second, the lower courts’ positions on these questions are becoming increasingly well-defined and articulated.⁸ Third, without further clarification, those exposed to liability under CERCLA face uncertainty and extremely high financial risks.⁹ Finally, if not addressed, some positions taken by lower courts have the capacity to be both unfair to the parties involved and counterproductive to CERCLA’s goals.¹⁰

² See *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (discussed at greater length in Part II of this article).

³ 42 U.S.C. §§ 9601 *et seq.* (1994 & Supp. III 2016) (commonly known as “Superfund”).

⁴ *Id.*

⁵ See Steven Ferrey, *Superfund Chaos Theory: What Happens When the Lower Federal Courts Don’t Follow the Supreme Court*, 6 MICH. J. ENVTL. & ADMIN. L. 151, 153–54 (2016). See also *infra* notes 28–36 and accompanying text.

⁶ See Ferrey, *supra* note 5, at 154 (suggesting that the cost of cleaning up the nation’s hazardous waste sites over the next 40 years could exceed \$250 billion, much of which would be borne by private parties). Ferrey cited U.S. EPA, *CLEANING UP THE NATION’S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS* viii (2004), and noted that the cost estimate included Resource Conservation and Recovery Act (“RCRA”) corrective action initiatives and the cleanup up of leaking underground storage tanks.

⁷ See *infra* Part III.

⁸ See *id.*

⁹ See *infra* Part IV.

¹⁰ As the courts have noted, CERCLA’s language may be “inartful,” but its goals are “straightforward”—to “promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination.” *Bernstein v. Bankert*, 733 F.3d 190, 200 (7th Cir. 2012).

It is not surprising that courts could disagree on the application of CERCLA. The statute has never been considered a “model of legislative clarity.”¹¹ It was, after all, hastily enacted by Congress as a “last-minute compromise”¹² during the waning days of a lame-duck session without the benefit of full technical revisions of the text.¹³ Although the House and Senate had considered related legislation for years, the bill that finally became law was hurriedly put together with little debate and finalized during the interim between the 1980 national election and the assumption of office by President Reagan. CERCLA’s provisions are complex, and its text has been described as “puzzl[ing]” and “cryptic”—even “indecipherable.”¹⁴ Given the haste with which the final bill was negotiated and drafted, its legislative history is also largely unhelpful, having been characterized as “vague,” “sparse,” and “self-contradictory.”¹⁵ The Supreme Court has provided some clarity from time to time, but the *Atlantic Research* opinion in 2007 was its last word on this issue, and, in that decision, the Court knowingly left a number of critical questions unresolved.¹⁶

Since the Court rendered the *Atlantic Research* decision, splits of authority have developed among the lower courts on several of the case’s unresolved questions, and the many disparities those courts have created suggest the need for Supreme Court intervention. This article focuses on just one of the issues on which the courts are divided: whether a party that is eligible to seek contribution under § 113 may simultaneously pursue a cost recovery claim under § 107 for unrelated expenses.

¹¹ *United States v. Consolidation Coal Co.*, 184 F. Supp. 2d 723, 741 (S.D. Ohio 2002).

¹² *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989).

¹³ See FRANK P. GRAD, 3 TREATISE ON ENVIRONMENTAL LAW § 4A.02[1][a] at 4A-23 (1998).

¹⁴ See, e.g., *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298 (3d Cir. 2005); *CP Holdings, Inc. v. Goldberg Zoino and Assocs., Inc.*, 769 F. Supp. 432, 435 (D.N.H. 1991); *United States v. Montrose Chem. Corp.*, 883 F. Supp. 1396, 1399 (C.D. Cal. 1995), *rev’d*, 104 F.3d 1507 (9th Cir. 1997).

¹⁵ See, e.g., *United States v. Cordova Chem. Co. of Michigan*, 59 F.3d 584 (6th Cir. 1995); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); *United States v. A & N Cleaners and Launderers, Inc.*, 854 F. Supp. 229, 238 (S.D.N.Y. 1994); *United States v. Akzo Coatings of Am., Inc.*, No. 85-CV-73764 (E.D. Mich. May 4, 1989); *United States v. New Castle Cty.*, 642 F. Supp. 1258, 1265 (D. Del. 1986). One author has described CERCLA’s legislative process as “peculiar,” noting that “there were no mark-up sessions, hearings, or other public processes.” See Alfred R. Light, *CERCLA’s Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?* 16 SE. ENVTL L.J. 245, 251 (2008).

¹⁶ The Court noted, for example, that it was “not decid[ing] whether . . . compelled costs of response [incurred directly by a PRP] are recoverable under § 113(f), § 107(a), or both”). *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007).

This article suggests that the answer to that question should be yes. A majority of courts that have considered this issue have taken that position, but some courts have diverged, creating both uncertainty and unfairness for the parties involved. Courts that have taken the minority position appear to have done so based upon a false dichotomy, i.e., a perceived choice that is unnecessary under the terms of the statute and uncalled for under the *Atlantic Research* decision. A minority of courts have suggested that: (1) a private plaintiff may only assert one type of claim—either a cost recovery claim or an action for contribution; (2) a determination as to which type of claim the plaintiff may assert is inherently based upon *either* the nature of the costs at issue *or* the procedural status of the party; and (3) of those two factors, the party's procedural status takes priority.¹⁷

The better position—followed by the majority of courts—is that *both* the nature of the costs *and* the procedural status of the party matter, and to ignore the nature of the specific costs claimed is neither necessary nor appropriate. Instead, the court should consider the procedural status of the party *with respect to* each specific cost claimed. Under that approach, a party might be limited to contribution as a remedy for some costs but, at the same time, be permitted to seek full cost recovery for other expenses. This approach would be consistent with the text and structure of CERCLA and with the Court's decision in *Atlantic Research*. It would, furthermore, encourage private-party cooperation and reinforce CERCLA's goal of promoting voluntary and timely cleanups. In support of this thesis, Part II of this article will discuss the *Atlantic Research* decision.¹⁸ For context, that part will briefly explain the alternatives for private cost allocation under CERCLA, discuss the historical interplay of §§ 107 and 113, and then summarize the decision itself. Part III will discuss the aftermath of *Atlantic Research* in terms of: (1) the substantial number and nature of issues still unresolved; (2) the current split among the courts on the question of simultaneous contribution and cost recovery claims; and (3) the ongoing South Dayton Landfill litigation, which provides a case in point.¹⁹ Finally, Part IV will address the article's suggested approach in permitting simultaneous claims under §§ 107 and 113 and discuss how such an approach would comport with the text and goals of CERCLA and with the Court's decision in *Atlantic Research*.²⁰

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part IV.

II. THE *ATLANTIC RESEARCH* DECISION

A. *Private Party Cost Allocation Under CERCLA*

From the beginning of the Superfund program in 1980, private party remediation has been the “backbone” of the CERCLA process.²¹ The government itself is authorized to clean up contaminated sites with funds provided by Congress and then recover its costs from “potentially responsible parties” (“PRPs”) under CERCLA § 104.²² Federal funds, however, are inadequate to finance the vast majority of cleanups.²³ CERCLA’s success, therefore, depends upon the cooperation of private parties to finance the remediation of most sites.²⁴

Whether a private party conducts a cleanup itself, reimburses the government for its response costs, or engages in a combination of the two, CERCLA provides private parties two alternative mechanisms for recovering all or part of their costs: an action for contribution or a cost recovery claim. CERCLA § 113(f)(1) authorizes a PRP that has been sued by either the government or another private entity under § 106 or § 107,

²¹ Ferrey, *supra* note 5, at 200.

²² Liability under CERCLA falls upon four classes of potentially responsible parties (“PRPs”) identified in § 107(a) of the Act: (1) the current owners and operators of a contaminated site; (2) anyone who owned or operated the site at the time hazardous substances were disposed of; (3) any party that arranged for the disposal of hazardous substances at the site; and (4) any transporter who was involved in selecting the site for disposal. The broad scope of liability reflected in these four categories has been further expanded by the courts’ liberal construction. Liability may further extend to corporate parents or subsidiaries of those entities, corporate successors, corporate officers and shareholders, trustees, guardians and receivers, and, in some cases, secured creditors. *See, e.g.*, *United States v. USX Corp.*, 68 F.3d 811, 814–15 (3d Cir. 1995); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 489 (8th Cir. 1992); *United States v. Amtreco, Inc.*, 809 F. Supp. 959, 966 (M.D. Ga. 1993); *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 367 (N.D. Cal. 1994); *In re Tutu Wells Contamination Litig.*, Nos. 1989-107, 89-220, 89-224 (consol.), 1993 U.S. Dist. LEXIS 19167 (D. V. Sept. 2, 1993, as amended).

²³ *See, e.g.*, Katherine N. Probst, *Superfund 2017: Cleanup Accomplishments and the Challenges Ahead* 1–29 (ACEC 2017) (noting the inadequacy of EPA’s funding to accomplish the agency’s goals); *see also* Ferrey, *supra* note 5, at 200–01 (asserting that “for every site on which EPA traditionally leads the cleanup, private parties clean up one hundred sites”).

²⁴ *See, e.g.*, ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND SITE CLEANUP WORK THROUGH ENFORCEMENT AGREEMENTS AND ORDERS, <https://www.epa.gov/enforcement/superfund-site-cleanup-work-through-enforcement-agreements-and-orders> [perma.cc/R3DK-W3YN] (noting that roughly 69 percent of all cleanup work underway at Superfund sites around the nation is being funded by private parties through the enforcement process, and that for every dollar the Superfund enforcement program spends, private parties invest eight dollars in cleanup work).

and has paid an inequitable portion of the cleanup costs, to seek contribution from other responsible parties.²⁵ Section 113(f)(3)(B) also provides a right of contribution to any party that has “resolved its liability to the United States or a State” by “satisfy[ing] a settlement agreement or a court judgment” and, in doing so, has paid more than its share of the costs.²⁶ Alternatively, a party may bring a direct cost recovery action under § 107(a)(4)(B) if: (1) it has not been sued; and (2) it has incurred costs of its own in performing an environmental response.²⁷

Given a choice between the two alternatives, parties normally choose cost recovery for several reasons.²⁸ First, a § 107 cost recovery claim entitles a plaintiff to full recovery of expenses with defendants held jointly and severally liable, unless defendants can prove that the harm they caused is “divisible.”²⁹ In a contribution action under § 113, by contrast, defendants are severally liable, and a plaintiff bears the burden of proving each defendant’s proportional share of responsibility.³⁰ Second, given the

²⁵ 42 U.S.C. § 9613(f)(1) (2019) provides: “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, *during or following any civil action under section 9606 . . . or [] 9607(a) of this title.*” (emphasis added). As originally enacted in 1980, CERCLA did not include an express provision for contribution, but a number of district courts held that such a right existed by implication under CERCLA’s cost recovery provision in § 107 or as a matter of right under federal common law. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004).

²⁶ *United States v. Atl. Research Corp.*, 551 U.S. 128, 140 (2007). Congress amended CERCLA in 1980 through the Superfund Amendments and Reauthorization Act (“SARA,” 100 Stat. 1613) to provide an express right to contribution in § 113(f)(1) as well as this previously unrecognized contribution right through § 113(f)(3)(B). The provision reads as follows: “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” 42 U.S.C. § 9613(f)(3)(B) (2019) (emphasis added).

²⁷ *See* HOBERT, KELSEY-HAYES & NCR, PETITION FOR A WRIT OF CERTIORARI, HOBART V. WASTE MANAGEMENT OF OHIO at 16–17 (2015).

²⁸ *See, e.g., Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014) (suggesting that, “[g]iven the choice, a rational PRP would prefer to file an action under § 107(a)(4)(B) in every case” (emphasis added)).

²⁹ *United States v. Colorado & E. Ry. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (“It is . . . well settled that [CERCLA] § 107 imposes joint and several liability”); *accord* Pinal Creek Grp. v. Newmont Mining Corp., 926 F. Supp. 1400, 1404 (D. Ariz. 1996); *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 629 (E.D. Mo. 1996); *Dartron Corp. v. Uniroyal Chem. Co.*, 917 F. Supp. 1173, 1181 (N.D. Ohio 1996); *see also* Steven Ferrey, *Toxic “Plain Meaning” and “Moonshadow”: Supreme Court Unanimity and Unexpected Consequences*, 24 VILL. ENTVL. L.J. 1, 8 (2013).

³⁰ *See, e.g., Reynolds Metals Co. v. Ark. Power & Light Co.*, 920 F. Supp. 991, 994 (E.D. Ark. 1996) (“CERCLA . . . imposes joint and several liability upon [responsible parties] and/or [potentially responsible parties] in § 107(a) cost recovery actions, . . . and several

differences between several and joint-and-several liability, defendants generally bear the costs allocated to “orphan shares” in a cost recovery claim, while a plaintiff absorbs those costs in a contribution action.³¹ Finally, the statute of limitations for a cost recovery claim is six years for a remedial action,³² while the statute of limitations for a contribution action under § 113 is only three years.³³ Unfortunately, private plaintiffs do not get to choose their remedy. The Court has made it clear “that §§ 107(a) and 113(f) provide two ‘clearly distinct’ remedies”³⁴ and that a “choice of remedies simply does not exist” for private plaintiffs.³⁵ The courts, however, have consistently wrestled with determining the precise boundary between the two.³⁶

B. The Historical Interplay of §§ 107 and 113

A detailed discussion of CERCLA’s early history—and precisely how the contribution/cost recovery line was drawn by the courts before SARA³⁷—is beyond the scope of this article. However, the development of contribution as a remedy for private plaintiffs has played a key role in CERCLA’s statutory scheme. The 1986 SARA amendments made explicit what many courts had previously inferred: that parties who were liable under CERCLA could seek contribution from other PRPs.³⁸ In fact, after SARA, courts began funneling private parties increasingly toward § 113 and away

liability in § 113(f) contribution actions.”); *accord* *Fresno v. NL Indus.*, No. CV-F93-5091, 1995 U.S. Dist. LEXIS 15534 (E.D. Cal. July 12, 1995). As a reflection of how established the presumption of joint and several liability is, the *Atlantic Research* Court noted, in passing, that “[w]e assume without deciding that § 107(a) provides for joint and several liability.” *Atl. Research*, 551 U.S. at 140 n.7.

³¹ *See, e.g.*, *DMJ Assocs., L.L.C. v. Capasso*, No. 97-CV-7285 (DLI)(RML), 2015 U.S. Dist. LEXIS 177460, at *72 (E.D.N.Y. July 7, 2015) (explaining that “orphan shares” are “the share[s] of cleanup costs at a contaminated site equitably attributable to a PRP that is unable to pay” and that they “typically arise when a PRP cannot be located or is insolvent, deceased, dissolved, or bankrupt”).

³² 42 U.S.C. § 9613(g)(2)(B). A remedial action is a response designed to provide a permanent remedy at a site, and typically includes one or more specific actions that are listed in the statute. 42 U.S.C. § 9601(24).

³³ *Id.* at § 9613(g)(3).

³⁴ *Atl. Research*, 551 U.S. at 138 (quoting the Court’s previous decision in *Cooper Industries v. Aviall Servs.*, 543 U.S. 157, 163 n.3 (2004)).

³⁵ *Id.* at 140.

³⁶ *See infra* Section II.B.

³⁷ Pub. L. 99-499, Superfund Amendments and Reauthorization Act of 1986.

³⁸ *See, e.g.*, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 215 (W.D. Mo. 1985).

from § 107 as a means of recovering cleanup costs.³⁹ By 2003, at least ten of the federal circuits—every circuit court that had considered the issue—held that contribution was the *only* form of recovery available to liable parties under the statute.⁴⁰ The practical effect of this position was to preclude almost all private parties from asserting cost recovery claims or counterclaims.⁴¹ Hence, it became generally accepted that government entities had much freer access to cost recovery under § 107 than did private parties.⁴²

³⁹ David Fotouhi & Michael K. Murphy, *Do CERCLA Cost Recovery and Contribution Rights Overlap?*, LAW360 (Aug. 7, 2015) at 1 (suggesting that “[t]raffic-directing [by the courts] dramatically narrowed Section 107 by judicial fiat” after SARA as “courts gradually steered liable parties away from Section 107 and required them to use Section 113”).

⁴⁰ By 2003, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits had all held that liable parties other than government entities were precluded from suing or countersuing for cost recovery under § 107. *See, e.g.*, *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Bedford Affiliates v. Sills*, 156 F.3d 416, 432 (2d Cir. 1998); *New Castle Cty. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1126 (3d Cir. 1997); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 420 (4th Cir. 1999); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 791 (7th Cir. 2000); *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 532 (8th Cir. 2003); *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Young v. United States*, 394 F.3d 858, 865 (10th Cir. 2005); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996). Although the Fifth Circuit Court of Appeals discussed the question in *OHM Remediation Serv. v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir. 1997), the court was not faced with that issue and did not directly address it. At least some district courts within the Fifth Circuit, however, followed the majority. *See, e.g.*, *United States v. Friedland*, 152 F. Supp. 2d 1234, 1249 (D. Colo. 2001) (holding that § 107 counterclaims could be asserted only by federal, state or tribal governments or by a non-liable parties).

⁴¹ The *Atlantic Research* Court correctly observed that, “if PRPs do not qualify as ‘any other person’ for purposes of § 107(a)(4)(B), it is unclear what private party would.” *Atl. Research*, 551 U.S. at 136.

⁴² *See, e.g.*, *United States v. Chrysler Corp.*, 157 F. Supp. 2d 849, 860 (N.D. Ohio 2001) (noting that a number of courts had “distinguished between federal and private PRPs as to whether they may bring cost recovery actions under § 107”); *Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1036 (C.D. Cal. 2002) (holding that a government entity could bring a cost recovery claim under § 107(a) even if it was itself a liable party); *Alabama v. Ala. Wood Treating Corp., Inc.*, Civ. No. 85-0642-CG-C, 2006 U.S. Dist. LEXIS 37372, at *13–*17 (S.D. Ala. June 6, 2006) (noting a split of authority among the courts, but finding persuasive the “majority” of courts holding that private parties who are PRPs may recover response costs only under CERCLA § 113, while government entities that are PRPs may sue for cost recovery under § 107(a)); *Friedland*, 152 F. Supp. 2d at 1249.

That thinking began to change in 2004 with the Supreme Court's decision in *Cooper Industries v. Aviall Services*.⁴³ In *Cooper Industries*, the Court suddenly and significantly narrowed access to § 113.⁴⁴ The case stemmed from the discovery of contamination at several industrial sites in Texas.⁴⁵ Aviall Services bought four aircraft engine maintenance facilities from Cooper Industries in 1981.⁴⁶ After operating the plants for some years, Aviall discovered that both it and Cooper had contaminated the sites with petroleum and other hazardous substances.⁴⁷ When Aviall reported the contamination to state authorities, the authorities threatened to take enforcement action, but neither the state nor EPA actually took any measures to compel cleanup. Instead, Aviall cleaned up the sites "voluntarily" under state supervision and sued Cooper for contribution under CERCLA § 113(f)(1).⁴⁸

Cooper moved for dismissal of the claim on the basis that Aviall itself had not been sued under either §§ 106 or 107.⁴⁹ Section 113(f)(1), under which Aviall had brought its claim, provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [CERCLA] . . . during or following any civil action under [§§ 106 or 107]."⁵⁰ Cooper argued that Aviall could claim contribution under this section only if enforcement action had first been brought against Aviall.⁵¹ The district court agreed with Cooper's argument and granted its motion to dismiss.⁵² The Fifth Circuit Court of Appeals initially affirmed that decision, but on rehearing *en banc*, it reversed the lower court's ruling, holding that "§ 113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the plaintiff has been sued under §§ 106 or 107."⁵³

The Supreme Court reversed the Fifth Circuit's ruling by essentially reading the word "may" to mean "may only" and holding that § 113(f)(1) authorizes an action for contribution only if the plaintiff itself has first been subject to enforcement.⁵⁴ The effect of this decision was to restrict the right of contribution to parties that meet specific conditions. Today, as a result of

⁴³ 543 U.S. 157 (2004).

⁴⁴ *Id.* at 164.

⁴⁵ *Id.* at 163.

⁴⁶ *Id.*

⁴⁷ *Id.* at 163–64.

⁴⁸ *Id.* at 164.

⁴⁹ *Id.*

⁵⁰ 42 U.S.C. § 9613(f)(1) (emphasis added).

⁵¹ *Cooper Indus.*, 543 U.S. at 164.

⁵² *Id.* at 165.

⁵³ *Id.*

⁵⁴ *Id.*

Cooper Industries, to assert a claim for contribution under § 113(f)(1), a party must first be sued under CERCLA §§ 106 or 107.⁵⁵ Similarly, to bring a claim for contribution under § 113(f)(3)(B), a plaintiff must first resolve some or all of its liability with the United States or a state through an administrative or judicially approved settlement.⁵⁶

The *Cooper Industries* court left unsettled the question of whether a PRP that did not meet either of these requirements could seek cost recovery under § 107 as an alternative. While the Court recognized that that question “merit[ed] full consideration,” the parties had not briefed the issue, and the Court declined to address it.⁵⁷ However, with the right to contribution now “drastically limited,”⁵⁸ the Second and Seventh Circuit Courts of Appeals, along with a number of district courts, reversed their previous decisions and decided that PRPs that did not qualify for contribution under the Court’s more restrictive approach should be allowed to pursue cost recovery.⁵⁹ That thinking was finally affirmed by the Supreme Court three years later with its ruling in *United States v. Atlantic Research*.⁶⁰

C. *The Court’s Decision*

The facts in *Atlantic Research* were unique in that the cleanup at issue was not compelled either by an enforcement action or by a settlement negotiated outside of the enforcement process. The Atlantic Research

⁵⁵ This is true, at least, in most jurisdictions. Other courts, such as the Eighth Circuit Court of Appeals, have held otherwise based upon a focus on the voluntary/involuntary nature of the expenses a plaintiff incurs. The Eighth Circuit’s focus on the “voluntariness” of the plaintiff’s costs is founded on language in the *Atlantic Research* decision to the effect that voluntarily incurred cleanup costs may only be recovered through a § 107 claim.

⁵⁶ 42 U.S.C. § 9613(f)(3)(B).

⁵⁷ *Cooper Indus.*, 543 U.S. at 168–69.

⁵⁸ Scott Patrick Brand, Note, *The Saga Continues—Trying to Find a Balance in CERCLA’s PRP Liability Suits*, 88 N.D. L. REV. 209, 218 (2012).

⁵⁹ See, e.g., *Schaefer v. Town of Victor*, 457 F.3d 188, 199 (2d Cir. 2006) (holding that a PRP that initiated cleanup action voluntarily, then later received a consent order concerning remediation already underway, could recover response costs under § 107(a)); *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 103 (2d Cir. 2005); *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 837 (7th Cir. 2007); *City of Bangor v. Citizens Commc’ns Co.*, 437 F. Supp. 2d 180, 223 (D. Me. 2006) (holding that PRPs that conduct voluntary cleanups and thus do not meet the requirements of § 113(f)(1) may bring claims under § 107); *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) (PRP that cannot sue for contribution under § 113 may seek cost recovery under § 107).

⁶⁰ 551 U.S. 128, 131 (2007). Justice Thomas, writing for a unanimous Court, explained that the Court’s purpose in accepting the case was to address the question left unresolved in *Cooper Industries*.

Corporation had leased property operated by the Department of Defense using the facility to retrofit rocket motors under contract with the United States government.⁶¹ Atlantic Research discovered through its own investigation that the property became contaminated.⁶² The company then remediated the site voluntarily and sued the United States under both § 107(a)(4)(B) and § 113(f)(1) to recover its costs. While the parties were still negotiating a settlement, the Supreme Court handed down its decision in *Cooper Industries*. The Court's decision in *Cooper Industries* foreclosed Atlantic Research's contribution claim because the company had not been subject to a CERCLA enforcement action. The company, therefore, amended its complaint going forward only with its cost recovery claim under § 107.⁶³

Following the Eighth Circuit's previous holdings—before *Cooper Industries*—the district court granted the United States' motion to dismiss the cost recovery claim.⁶⁴ This effectively left Atlantic Research with no remedy at all under CERCLA. On appeal, however, the Eighth Circuit followed the reasoning of the recent decisions by the Second and Seventh Circuits. Recognizing the unfairness of leaving voluntary remediators with no remedy, the Eighth Circuit reversed the trial court and held as follows: while “PRPs that ‘have been subject to §§ 106 or 107 enforcement actions are still required to use § 113,’” those that have not been subject to suit and are therefore not entitled to seek contribution may pursue cost recovery under § 107.⁶⁵

The Supreme Court granted certiorari in order to resolve what had become a split of authority among the circuits. The Second, Seventh, and Eighth Circuits had now taken the position that PRPs could pursue cost recovery claims, while other circuits continued to hold that they could not.⁶⁶ In taking the case, the Court expressed its intent to “decide [the] question left open in *Cooper Industries, Inc. v. Aviall Services, Inc.*,” i.e., “whether § 107(a) provides [PRPs] . . . with a cause of action to recover costs from other PRPs.”⁶⁷ Applying a textualist approach, as the Court historically has with CERCLA,⁶⁸ the Court read § 107(a)(4)(B) in conjunction with subparagraph

⁶¹ *Id.* at 133.

⁶² Roberto Comejo, *Not Playing Games: Eighth Circuit's Response to CERCLA Contribution in Light of Aviall*, 14 MO. ENVTL. & POL'Y REV. 351, 352 (2006).

⁶³ *Atl. Research*, 551 U.S. at 133.

⁶⁴ *Id.* at 134.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 131.

⁶⁸ See John M. Barkett, *CERCLA and the Supreme Court*, 29 NAT. RES. & THE ENV'T 58, 59 (2015).

(a)(4)(A). Noting the parallel structure of the two subparagraphs, the Court concluded that the phrase “any other person” in subparagraph (B) must mean “any person other than [those named in subsection (A) (the United States, a State, or an Indian tribe)].”⁶⁹ “Consequently,” the Court concluded, “the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs.”⁷⁰

The Court rejected the notion that its decision would “create friction between §§ 107(a) and 113(f)” or that the decision would “offer[] PRPs a choice between §§ 107(a) and 113(f).”⁷¹ It described §§ 107(a) and 113(f) as “two ‘clearly distinct’ remedies” and affirmed that “CERCLA provide[s] for a right to cost recovery in certain circumstances . . . and separate rights to contribution in other circumstances.”⁷² As in *Cooper Industries*, however, the Court clarified some issues while leaving a number of other key questions unresolved. *Atlantic Research* affirmed that PRPs may seek contribution under § 113(f)(1) only under limited circumstances:

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 Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution.⁷³

At the opposite extreme, the Court stated that PRPs could pursue cost recovery claims against other liable parties for “costs [they] incur[] voluntarily.”⁷⁴ The Court further explained that one of the keys in determining whether reimbursement would be by cost recovery or contribution is whether a plaintiff’s expenses represented: (1) reimbursement of another party’s costs; or (2) costs “incurred” directly by the plaintiff itself.⁷⁵ The Court also emphasized that a party “eligible to seek contribution under § 113(f)(1)” could not “simultaneously seek to recover the same expenses under § 107(a).”⁷⁶

Beyond that, however, the Court left a host of critical questions concerning the intersection of §§ 107 and 113 unanswered. Those unresolved issues have caused obvious confusion among the lower courts. The range of unresolved issues and the financial uncertainty they have created suggest that, after twelve years of silence on this important matter, it

⁶⁹ *Atl. Research*, 551 U.S. at 135.

⁷⁰ *Id.* at 136.

⁷¹ *Id.* at 137 (quoting the government’s argument).

⁷² *Id.* at 138 (quoting *Cooper Indus.*, 543 U.S. at 163 n.3) (internal quotation marks omitted).

⁷³ *Id.* at 139.

⁷⁴ *Id.* at 139 n.6 (emphasis added).

⁷⁵ *Id.* at 139.

⁷⁶ *Id.*

may be time for the Court to provide clearer direction for the lower courts and the parties involved.

III. THE AFTERMATH OF *ATLANTIC RESEARCH*

A. *The Substantial Unresolved Questions*

While *Atlantic Research* clarified that claims under § 107 may be available to PRPs when actions for contribution are not, it did little else to “resolve the tension between § 107(a) and § 113(f).”⁷⁷ As a result, the lower courts have opined that “[n]avigating the interplay between § 107(a) and § 113(f) remains a deeply difficult task”⁷⁸ and one that “has proven vexing.”⁷⁹ Other commentators have expressed the same concern.⁸⁰ Even a brief analysis of the many unresolved questions demonstrates how fractured the lower courts have become and how helpful the Court’s guidance would be. Among the key questions requiring clarification are the following: (1) May costs incurred in response to a unilateral order that is not administratively or judicially approved (*i.e.*, “compelled” costs) be recovered through cost recovery under § 107? (2) What constitutes an “administrative or judicially approved settlement” for purposes of § 113(f)(3)(B)? Must the settlement specifically address CERCLA liability, or is the provision broad enough to encompass environmental liability generally? What is meant by “resolving” one’s liability? If an agreement includes contingencies that are not yet fulfilled when the agreement is signed, may the liability be considered “resolved” at that point; if not, at what point is eligibility for contribution under § 113(f)(3)(B) triggered?

⁷⁷ *Ford Motor Co. v. Mich. Consol. Gas Co.*, 993 F. Supp. 2d 693, 700 (E.D. Mich. 2014) (suggesting that the *Atlantic Research* decision merely “created a new playing field for these issues to unfold”).

⁷⁸ *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 218 (3d Cir. 2010).

⁷⁹ *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 690 (7th Cir. 2014).

⁸⁰ *See, e.g., Supreme Court Clarifies Rights of PRPs to Recover Cleanup Costs from Other PRPs, and the United States*, MARTEN LAW (June 13, 2007), <https://www.martenlaw.com/newsletter/20070613-cleanup-cost-recovery> [perma.cc/27EU-S7GP] (noting that the opinion left open whether some PRPs could recover costs under § 107(a), § 113(f), or both); Kevin A. Gaynor, Benjamin S. Lippard, and Sean M. Lomquist, *Unresolved CERCLA Issues After Atlantic Research and Burlington Northern*, 40 ENVTL. L. REP. 11198 (2010); Luis Inaraja Vera, Note, *Compelled Costs Under CERCLA: Incompatible Remedies, Joint and Several Liability, and Tort Law*, 17 VT.J. ENVTL. L. 394, 395–96 (2016); Brianna E. Tibett, Note, *Reinstating CERCLA as the “Polluter Pays” Statute with the Circuit Court’s Mutually Exclusive Approach*, HARV. ENVTL. L. REV., syndicated on Envtl. L. Rev. Syndicate, <https://harvardelr.com/2018/01/03/reinstating-cercla-as-the-polluter-pays-statute-with-the-circuit-courts-mutually-exclusive-approach> [perma.cc/P9QQ-HD73].

1. *Are “Compelled” Costs Recoverable Under § 107?*

The lower courts have expressed divergent views regarding PRPs that incur cleanup costs in response to “unilateral orders” that are not driven by enforcement actions. Such costs are “compelled” by regulatory authorities and are thus not strictly “voluntary.”⁸¹ They result, however, from interactions outside the administrative or judicial enforcement process.⁸² Most courts that have considered this question have held that such unilateral orders do not fall within § 113(f)(1) and thus do not trigger a party’s right to seek contribution.⁸³

The Eighth Circuit, however, held in *Morrison Enterprises*⁸⁴ that costs incurred pursuant to a unilateral administrative order (“UAO”) were recoverable only under § 113 because they were not “voluntarily” incurred.⁸⁵ Remarkably, the UAO in question was issued twelve years before the plaintiff was sued by the EPA; thus, enforcement action was not even contemplated at the time the plaintiff’s initial cleanup costs were incurred. In its analysis of the issue, the Eighth Circuit focused on a statement in footnote 6 of *Atlantic Research* where the Supreme Court said that “costs incurred *voluntarily* are recoverable only by way of § 107(a)(4)(B).”⁸⁶ The Eighth Circuit did not address the fact the Supreme Court did not say that *only* voluntarily incurred costs are recoverable under § 107(a)(4)(B).⁸⁷

2. *What Constitutes an “Administrative or Judicially Approved Settlement” for Purposes of § 113(f)(3)(B)?*

As to this question, it might be more accurate to characterize the courts as splintered than split. Since approximately 2010, the lower courts have broadened the range of settlements that they have found to qualify as

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See, e.g.,* W.R. Grace & Co. v. Zotos Int’l, Inc., 559 F.3d 85, 93–95 (2d Cir. 2009) (holding that a plaintiff who conducted cleanup under the terms of a consent order without being sued could seek cost recovery under § 107 despite the fact that its expenses were “compelled”); Agere Sys., Inc. v. Advanced Env’tl Tech. Corp., 602 F.3d 204, 225–29 (3d Cir. 2010) (holding that plaintiffs who settled following a suit by EPA were limited to seeking contribution under § 113(f)(1), but plaintiffs who settled with EPA without being sued could pursue cost recovery claims against defendants); Bernstein v. Bankert, 733 F.3d 190, 215 (7th Cir. 2012) (holding that a plaintiff who conducted cleanup in response to an Administrative Order on Consent whose terms had not yet been fulfilled could assert a cost recovery action under § 107(a)).

⁸⁴ *Morrison Enters., L.L.C. v. Dravo Corp.*, 638 F.3d 594 (8th Cir. 2011).

⁸⁵ *Id.* at 605.

⁸⁶ *Atl. Research*, 551 U.S. at 139 n.6 (emphasis added).

⁸⁷ *Id.*

“resolutions” of liability for purposes of § 113(f)(3)(B), and thus, the differences among the courts have grown.⁸⁸ Assuming this trend continues, its effect will be to funnel an increasing percentage of claimants away from § 107 cost recovery as a potential remedy under CERCLA.⁸⁹

The courts have drawn distinct lines with respect to at least three specific questions. First, a number of courts have expressly considered whether a release conditioned upon contingencies that are not yet fulfilled at the time an agreement is signed constitutes a “resolution” of liability.⁹⁰ The courts have been roughly evenly split on this issue. Some have held that a party has not “resolved” its liability for purposes of § 113(f)(3)(B) until all conditions listed in the settlement agreement have been met.⁹¹ Others have held that liability is resolved when the agreement is signed, suggesting that the government’s reservation of rights is no different from a provision in any contract permitting enforcement in the event of a breach.⁹²

Second, the courts have diverged as to whether a resolution of liability under state law invokes a right to seek contribution under § 113(f)(3)(B). While the decisions are too few to identify any clear pattern, cases decided after 2009 appear to have trended in the direction of recognizing a resolution of claims under state law as a resolution of liability for purposes of this provision.⁹³

Finally, the courts are divided on the question of whether an administrative settlement must resolve CERCLA-like liability specifically or may include environmental liability of a non-CERCLA nature. Again, the trend has been in the direction of broadening the scope of settlement agreements that meet the requirement and thus increasing the availability of contribution (which, of course, reduces the availability of cost recovery).⁹⁴

⁸⁸ Fotouhi & Murphy, *supra* note 39 (suggesting that the private party remedy framework under CERCLA is looking more as it did before *Aviall* and *Atlantic Research* as courts increasingly relegate parties to asserting § 113 claims).

⁸⁹ *Id.*

⁹⁰ *See, e.g.*, *Bernstein v. Bankert*, 702 F.3d 964 (7th Cir. 2012); *DMJ Assocs., L.L.C. v. Capasso*, 97-CV-7285 (DLI)(RML) 2015 U.S. Dist. LEXIS 177460 (E.D.N.Y. Jul. 6, 2015); *Fla. Power Corp. v. First Energy Corp.*, 54 F. Supp. 3d 860 (N.D. Ohio 2014).

⁹¹ *Id.*

⁹² *See, e.g.*, *Asarco, L.L.C. v. Atl. Richfield Co.*, No. 14-35723, 2017 U.S. App. LEXIS 14781 (9th Cir. Feb. 8, 2017); *HLP Props., L.L.C. v. Consol. Edison Co. of N.Y.*, 14 Civ. 1383 (LGS), 2015 U.S. Dist. LEXIS 114779 (S.D.N.Y. Aug. 28, 2015).

⁹³ *See, e.g.*, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *MPM Silicones, L.L.C. v. Union Carbide Corp.*, 931 F. Supp. 2d 387 (N.D.N.Y. 2013).

⁹⁴ *See, e.g.*, *Trinity Indus. v. Chi. Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013); *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486 (S.D. Tex. 2015).

B. The Split of Authority on Simultaneous Cost Recovery and Contribution Claims

While some of the questions discussed above have been ably addressed by other scholars,⁹⁵ the issue this article focuses on—the availability of simultaneous cost recovery and contribution claims—has received scant attention, even though it can profoundly affect parties caught up in environmental litigation. Lacking clear direction on this question from the Supreme Court, the lower courts have inevitably taken disparate approaches. There is no present conflict among the circuit courts, but a minority approach has developed among several district courts based upon their interpretation of certain appellate opinions and their reading of the Court’s *Atlantic Research* decision.

The three circuit courts that have considered this issue have all answered the question in the affirmative. In *Agere Systems v. Advanced Environmental Technology Corp.*⁹⁶—a Third Circuit case—plaintiffs sued a group of PRPs over liability for toxic waste that was dumped at the Boarhead Farms Site in Bucks County, Pennsylvania. For ease of administration, the EPA had divided the Site into two Operable Units—“OU-1” and “OU-2.” After settling the suit with the EPA, the plaintiffs pooled their resources and initiated a cleanup. They then sued more than twenty non-settling defendants seeking both cost recovery and contribution under CERCLA.⁹⁷

The litigation began in 2000, when the EPA sued three of the plaintiffs with respect to OU-1. Those parties eventually entered into a settlement agreement with EPA under which they established a trust fund to carry out the cleanup under the agency’s supervision.⁹⁸ Two additional plaintiffs—TI Automotive Systems, L.L.C. (TI) and Agere Systems, Inc. (Agere)—were not sued by the EPA but agreed with the other three PRPs to contribute to the trust fund. In 2001, the EPA brought a second suit against four of the plaintiffs (this time including TI) and entered into a second settlement agreement with those four to fund a cleanup of OU-2.⁹⁹ As before, Agere agreed with the other four plaintiffs to contribute to the fund. All five

⁹⁵ See, e.g., Amy Luria, *CERCLA Contribution: An Inquiry into What Constitutes an Administrative Settlement*, 84 N. DAK. L. REV. 333 (2008) (discussing what constitutes an administrative settlement for purposes of triggering entitlement to seek contribution pursuant to § 113(f)(3)(B)); Alfred R. Light, *Avoiding the Contribution “Catch-22”: CERCLA Administrative Orders for Cleanup Are Civil Actions*, 46 ENVTL. L. REP. 10791 (2016) (addressing the same issue); Ferrey, *supra* note 5.

⁹⁶ 602 F.3d 204 (3d Cir. 2010).

⁹⁷ *Id.* at 213–14.

⁹⁸ *Id.* at 212.

⁹⁹ *Id.* at 212–13.

plaintiffs then filed suit against the non-settling defendants in 2002 to recover costs for both cleanups.

In determining which of the plaintiffs' claims should survive the defendants' motion to dismiss, the Third Circuit Court of Appeals distinguished the costs that were associated with plaintiffs' settlement agreements with the EPA from those costs contributed by TI and Agere to the plaintiffs' trust fund. The three plaintiffs that had been parties to both settlement agreements with the EPA were permitted to seek only contribution from the defendants for costs they incurred at both Operable Units. Agere, by contrast, was permitted to seek cost recovery under § 107 with respect to its costs for both OU-1 and OU-2. Because Agere had not been sued by the EPA or the other plaintiffs before seeking cost recovery from the defendants, it did not qualify for contribution regarding either Operable Unit. TI was limited to a contribution action with respect to OU-2 because its claim against the defendants was preceded by the EPA's suit. It was, however, allowed to seek cost recovery with respect to its costs for OU-1.¹⁰⁰

In *Bernstein v. Bankert*,¹⁰¹ the Seventh Circuit Court of Appeals followed the same approach with respect to two distinct claims by the same plaintiffs. Plaintiffs were trustees of a fund created to finance and oversee the cleanup of a site formerly used for waste handling and disposal.¹⁰² Defendants were former owners of the site, their corporate entities, and insurers. Plaintiffs entered into two Administrative Orders on Consent ("AOCs") with the EPA, in 1999 and 2002, each of which called for the establishment of a fund for cleanup of the site in return for a release from liability.¹⁰³ Plaintiffs then sued the defendants, seeking cost recovery pursuant to § 107.

The court determined that the plaintiffs had complied with the terms of the 1999 AOC and obtained a full release from liability.¹⁰⁴ That release served as a trigger under CERCLA § 113(f)(3)(B), thereby providing plaintiffs a right to seek contribution. The statute of limitations for contribution actions had run, however, so the circuit court affirmed the trial court's dismissal of plaintiffs' claim for costs related to the 1999 AOC. Because plaintiffs had not yet fully complied with the terms of the 2002 AOC, they had not yet "resolved" their liability with respect to that

¹⁰⁰ *Id.* at 237.

¹⁰¹ 733 F.3d 190 (7th Cir. 2012).

¹⁰² *Id.* at 195.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 204.

agreement, and thus, had not triggered a right to pursue contribution.¹⁰⁵ The circuit court, therefore, held that plaintiffs established a basis for cost recovery under § 107.¹⁰⁶ The guiding principle in the court’s analysis was that “each CERCLA right of action carries with it its own statutory trigger, and each is a distinct remedy available to persons in different procedural circumstances.”¹⁰⁷ Thus, the cause of action was based upon the plaintiffs’ procedural circumstances with respect to each separate claim.

In the Ninth Circuit, the district court for the Central District of California initially adopted the minority approach in *Whittaker Corp. v. United States*.¹⁰⁸ Whittaker owned and operated a facility in Santa Clarita, California, where it had manufactured munitions for the United States government for several decades.¹⁰⁹ In 2000, it was one of several parties sued by the Castaic Lake Water Agency and other plaintiffs for costs they had incurred in responding to contamination in the local water supply. The case against Whittaker was settled in 2007.¹¹⁰ In March 2013, Whittaker sued the United States under CERCLA § 107 to recover costs it had incurred in responding to contamination in soil and groundwater on its own property.¹¹¹

Whittaker acknowledged that it could only have sued the United States under § 113 for costs associated with the Castaic Lake cleanup, but it claimed that it could seek cost recovery under § 107 for the separate costs it incurred in cleaning up its own site.¹¹² The district court disagreed and held that § 113(f)(1) “does not limit recovery to the scope of the settlement.”¹¹³ Once the right to contribution is triggered under §§ 113(f)(1) or 113(f)(3)(B), the trial court said, all of a party’s costs—both before and after that event—are subject to recovery only under § 113.¹¹⁴ The Ninth Circuit reversed that decision, however, finding the reasoning of the Third and Seventh Circuits in *Bernstein*, *NCR*, and *Agere* persuasive.¹¹⁵ The Circuit

¹⁰⁵ *Id.* at 207.

¹⁰⁶ *Id.* at 202. The Seventh Circuit reaffirmed its approach to this issue two years later, in *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 690–92 (7th Cir. 2014). Although the court rejected NCR’s position and limited the plaintiff to claims for contribution for each of three administrative orders, the court noted that it was bound to consider each order individually in determining the remedy applicable.

¹⁰⁷ *Bernstein*, 733 F.3d at 202.

¹⁰⁸ No. CV 13-1741 FMO (JCx), 2014 U.S. Dist. LEXIS 23918 (C.D. Cal. Feb. 10, 2014).

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.* at 4–5.

¹¹¹ *Id.* at 1–3.

¹¹² *Id.* at 13.

¹¹³ *Id.* at 14.

¹¹⁴ *Id.* at 15.

¹¹⁵ *See Whittaker Corp. v. United States*, 825 F.3d 1002, 1010 (9th Cir. 2016).

Court found the procedural circumstances of the plaintiff relevant but only with respect to each specific claim.

The circuit courts, then, have been consistent in their approach to this question, but district courts in the Fourth, Fifth, and Sixth Circuits have differed.¹¹⁶ Part IV of this article discusses in greater detail how and why they have differed. The following section highlights, analyzing the South Dayton Landfill litigation, the substantial difference this issue can make for a party engaged in a CERCLA cleanup.

C. *Valley Asphalt and the South Dayton Landfill: A Case in Point*

A recent case in the Southern District of Ohio—*Hobart Corp. v. Dayton Power & Light Co.*¹¹⁷—tangibly illustrates the need for the Court’s attention to this issue. The story involves the Valley Asphalt Corporation, which operates an asphalt recycling business in Moraine, Ohio, a suburb of Dayton. The City of Moraine provides a commercial and industrial presence on the south side of the Dayton metropolitan area. Straddling the Miami River and the I-75 corridor, Moraine is strategically located to allow Valley Asphalt access to its suppliers and markets. At the city’s north end, where the Miami River turns south, is a former sand and gravel quarry. After the quarry closed in the early 1940s, the site was operated for over half a century as a landfill.¹¹⁸ The former quarry was filled with waste and covered with soil over the years and is now the home of several businesses including Valley Asphalt.¹¹⁹

Unfortunately, while being used as a landfill, the site became heavily contaminated.¹²⁰ Following investigation in the early 2000s, responsible

¹¹⁶ See, e.g., *Hobart Corp. v. Dayton Power & Light Co.*, 336 F. Supp. 3d 888, 892–93 (S.D. Ohio 2018); *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 507 (S.D. Tex. 2015); *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 740 (D.S.C. 2015); *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034 (E.D. Wis. 2008).

¹¹⁷ *Hobart*, 336 F. Supp. 3d 888.

¹¹⁸ The South Dayton Dump and Landfill operated from 1941 to 1996 and received both municipal and industrial waste. As areas of the landfill were filled, the property was graded and either leased or sold to local businesses. Valley Asphalt purchased its present ten-acre site in 1993. U.S. ENVTL. PROT. AGENCY REGION 5, SITUATION ASSESSMENT OF SOUTH DAYTON DUMP AND LANDFILL SITE (2011) (hereinafter “Situation Assessment”).

¹¹⁹ Valley Asphalt is described in site-related documents as “an asphalt recycling company” and now has multiple facilities throughout the Midwest. The Moraine facility, which was originally the company’s “base of operations” and is now known as Plant 6, lies at the north end of the current Superfund site. Situation Assessment, *supra* note 118, at 12.

¹²⁰ Public Health Assessment, *infra* note 126, at 9–10 (citing the presence of volatile organic compounds (VOCs), PCBs, heavy metals and pesticides at significant concentrations in the soil and groundwater throughout the site).

parties undertook a cleanup that is still ongoing.¹²¹ Serious remedial actions began under the terms of three Administrative Settlement Agreements and Orders on Consent (“ASAOCs”) entered into between the United States Environmental Protection Agency and three potentially responsible parties.¹²² Valley Asphalt also conducted cleanup on its own property—which is considered part of the “site”—under the terms of a Unilateral Administrative Order issued to it by EPA in 2013.¹²³

The three PRPs that signed the ASAOCs—Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation (“Plaintiffs” in the ensuing litigation)—were among the most prominent users of the landfill. Those three parties have conducted much of the cleanup under the terms of the three ASAOCs, and they have sued more than thirty other parties (Defendants) for contribution in order to recoup a portion of their costs under CERCLA. Valley Asphalt has been one of the Defendants from the earliest stages of litigation.¹²⁴

Although the amount of the Defendants’ liability has not yet been determined, it is likely that Valley Asphalt will be required to share in the Plaintiffs’ costs to some extent. In addition, Valley Asphalt has spent a considerable sum remediating its own property pursuant to the separate

¹²¹ See Situation Assessment, *supra* note 118, at 6–7; *Hobart Corp. v. Dayton Power & Light Co.*, 997 F. Supp. 2d 835, 841–42 (S.D. Ohio 2014); *Hobart Corp. v. Dayton Power & Light Co.*, No. 3:13-cv-115, 2017 U.S. Dist. LEXIS 203684, at *21 (S.D. Ohio Dec. 11, 2017).

¹²² U.S. ENVTL. PROT. AGENCY REGION 5, ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY (2006) (“2006 ASAOC”); U.S. ENVTL. PROT. AGENCY REGION 5, ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION (2013) (2013 ASAOC); U.S. ENVTL. PROT. AGENCY REGION 5, ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY FOR OU1 AND OU2 (2016) (2016 ASAOC).

¹²³ Order Pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, As Amended (Docket No. V-W-13-C-008).

¹²⁴ On May 24, 2010, Plaintiffs sued eight Defendants, including Valley Asphalt, under CERCLA §§ 107(a) and 113(f)(3)(B) (Hobart I). On June 29, 2012, Plaintiffs sued four additional companies for the same claims (Hobart II). On February 8, 2013, the District Court ruled on both cases, dismissing Plaintiffs’ cost recovery claim under § 107 due to their eligibility for contribution under § 113(f)(3)(B) based on the 2006 ASAOC. The court also dismissed Plaintiffs’ contribution claim as untimely. See *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 923 F. Supp. 2d 1086 (S.D. Ohio 2013). The Sixth Circuit upheld the dismissal of both claims. See *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014). In April 2013, Plaintiffs sued all the Defendants included in the Hobart I and II claims for contribution. Those claims, and Defendants’ possible counterclaims, are now being resolved.

order it received from EPA in 2013—the UAO.¹²⁵ Valley Asphalt incurred this separate liability even though other parties—including the Plaintiffs—may well have been responsible for much of that contamination.¹²⁶ Whether, and to what extent, Valley Asphalt can recover those costs from the responsible parties goes to the heart of the question addressed in this article—a question the Supreme Court left unresolved when it last spoke to the issue of CERCLA’s private party remedies. At this point, the district court has held that Valley Asphalt will be limited to a contribution action and that it may assert its claim only against parties other than the Plaintiffs.¹²⁷ This will place a significant evidentiary burden on Valley Asphalt and will severely limit its potential recovery assuming it pursues that claim.

In the world of CERCLA, Valley Asphalt’s concerns are modest, and its story alone might not warrant significant attention. But its experience is not unique. The remedy sought by Valley Asphalt against the Plaintiffs has been pursued by other parties similarly situated at sites throughout the country, and the company’s dispute against the Plaintiffs highlights the need for further clarity regarding “the interplay between [CERCLA] § 107(a) and § 113(f).”¹²⁸ The author suggests that, with its adverse holding in Valley Asphalt’s case, the district court has misinterpreted CERCLA’s cost recovery framework, applying it in a way that would discourage voluntary cleanups and be counterproductive to CERCLA’s goals.

D. The Problem—An Unwarranted Contribution/Cost Recovery

¹²⁵ See, e.g., Defendant Valley Asphalt Corporation’s Answer to Plaintiffs’ First Amended Complaint, Affirmative Defense and Counterclaim at 7, ¶ 133, *Hobart Corp. v. The Dayton Power and Light Co.*, 997 F. Supp. 2d 835 (S.D. Ohio 2014); BOWSER-MORNER, DRAFT VAPOR INTRUSION MITIGATION WORK PLAN FOR VALLEY ASPHALT PROPERTY/SOUTH DAYTON DUMP & LANDFILL (2013) (hereinafter “Vapor Intrusion Work Plan”).

¹²⁶ Valley Asphalt leased its present ten-acre site and has operated an asphalt plant at that location since the mid-1950s. It purchased the property in 1993, and the landfill closed three years later. In 1997, buried drums containing hazardous waste were discovered on Valley Asphalt’s property when the company installed a new sewer line at the plant. Only then did the parties realize that the landfill had extended as far north as the southern half of Valley Asphalt’s property. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH ASSESSMENT FOR SOUTH DAYTON DUMP AND LANDFILL, MORaine, MONTGOMERY COUNTY, OHIO EPA FACILITY ID: OHD980611388 (2008) (hereinafter “Public Health Assessment”); see also Vapor Intrusion Work Plan, *supra* note 125.

¹²⁷ *Hobart Corp. v. Dayton Power & Light Co.*, 336 F. Supp. 3d 888, 896 (S.D. Ohio 2018). Valley Asphalt asserted a counterclaim against the Plaintiffs for cost recovery under § 107 for the costs it incurred under the 2013 UAO. The district court has held, however, that Valley Asphalt is limited to a claim for contribution and that the Plaintiffs are shielded from such a claim by virtue of the contribution protection they received pursuant to CERCLA § 113(f)(2), when they settled their own liability with EPA and signed the ASAOs.

¹²⁸ *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 739 (D.S.C. 2015).

Dichotomy

District courts that have rejected the possibility of simultaneous cost recovery and contribution claims have discerned, in the *Atlantic Research* decision, a dichotomy that does not exist. The decision of the district court for the Eastern District of Wisconsin best illustrates the courts' thinking. In *Appleton Papers, Inc. v. George Whiting Paper Co.*,¹²⁹ the plaintiffs were paper manufacturers engaged in a massive cleanup of the Fox River, near Green Bay, Wisconsin. Many of the plaintiffs' actions were dictated by settlement agreements they had made with the EPA, and the plaintiffs conceded that they could recover the costs for those actions from non-settling parties only through contribution claims under § 113.¹³⁰ The plaintiffs had, however, incurred additional costs voluntarily outside the scope of those agreements. For those costs, they claimed the right to pursue cost recovery under § 107.¹³¹ The court, therefore, squarely faced the issue of whether the plaintiffs should be allowed to seek contribution under § 113 while simultaneously pursuing cost recovery claims under § 107 for separate expenses they had "voluntarily" incurred. The court opined that, in resolving this important question, a court ultimately had to decide whether the "focus [should] be on the *nature of the costs* themselves or on the *procedural status of the party* seeking to recover those costs [i.e., the plaintiffs]."¹³²

It seems the crux of the problem stems from what the courts have meant when they say that § 107 is available for a party to recover "voluntarily" incurred costs. Does "voluntary" mean that courts should analyze all of a PRP's costs to determine which costs were compelled and which were voluntary? Or, instead, did the courts using that term assume that once a Government enforcement action began, all costs incurred by the PRP no longer qualified as voluntarily incurred costs?¹³³

Focusing on the Eighth Circuit's decision in *Atlantic Research*,¹³⁴ which was ultimately affirmed by the Supreme Court,¹³⁵ the district court concluded that "courts are not interested in analyzing the particular nature of the costs sought (as Plaintiffs prefer) but rather focus simply on the PRP's procedural status, specifically, whether it has been 'subject' to an enforcement action."¹³⁶

¹²⁹ 572 F. Supp. 2d 1034 (E.D. Wis. 2008).

¹³⁰ *Id.* at 1041.

¹³¹ *Id.*

¹³² *Id.* at 1042 (emphasis added).

¹³³ *Id.* at 1041-42.

¹³⁴ *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006).

¹³⁵ *United States v. Atl. Research Corp.* 551 U.S. 128 (2007).

¹³⁶ *Appleton Papers*, 572 F. Supp. 2d at 1042.

Assuming that it was faced with an either/or question—and had to decide whether to focus on the nature of the costs claimed *or* on the procedural status of the plaintiffs—the court chose to focus on the latter and dismissed the plaintiffs’ cost recovery claims.

Seven years later, a decision in *Exxon Mobil Corp. v. United States* in the district court for the Southern District of Texas followed precisely the same reasoning.¹³⁷ Exxon had signed two administrative consent orders with the State of Texas for remediation of its Baytown facility.¹³⁸ After spending over \$40 million cleaning up the plant, it sued the United States for cost recovery under CERCLA § 107. In support of its cost recovery claim, Exxon argued, first, that the consent orders with the State did not constitute a “resolution of liability” for purposes of CERCLA § 113(f)(3)(B) because it pertained to state regulations and were not tied to a CERCLA cleanup.¹³⁹ However, even if the agreements did trigger a right to contribution under CERCLA, Exxon asserted that it had incurred substantial cleanup costs for almost a decade before entering into those agreements and had, more recently, incurred additional costs outside the scope of the agreements.¹⁴⁰ Even if it was limited to recovery by contribution for matters covered in the settlement agreements, Exxon argued that it should be allowed to seek cost recovery for any costs incurred outside their scope.¹⁴¹

Citing a number of circuit court decisions for the proposition that parties are restricted to contribution actions if contribution is available to them¹⁴²—and drawing upon selected language from the *Atlantic Research* decision emphasizing the “procedural circumstances [of] the PRP”¹⁴³—the district court held that all of Exxon’s response costs were recoverable through contribution including those outside the scope of the settlement agreements and those incurred before the agreements were signed.¹⁴⁴

The District Court for the Southern District of Ohio, which has jurisdiction over Valley Asphalt and the South Dayton Landfill litigation, also appears to have followed the minority approach.¹⁴⁵ The effect can be

¹³⁷ 108 F. Supp. 3d 486 (S.D. Tex. 2015).

¹³⁸ The facility was originally owned and operated by Exxon’s predecessor, Humble Oil & Refining Company. It included three components that produced synthetic rubber and one that produced aviation gasoline to help with the war effort during the 1940s and 50s (World War II and Korea).

¹³⁹ *Id.* at 505.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 506–09.

¹⁴³ *Id.* at 506.

¹⁴⁴ *Id.* at 505–06.

¹⁴⁵ See *Hobart Corp. v. Dayton Power & Light Co.*, 336 F. Supp. 3d 888 (S.D. Ohio 2014).

clearly seen in the court's decision to deny Valley Asphalt the right to countersue Plaintiffs under § 107 for the costs it has independently incurred complying with the 2013 UAO.¹⁴⁶

In rejecting Valley Asphalt's counterclaim against the Plaintiffs, the court focused on the company's procedural status and even failed to address the nature of the cost Valley Asphalt was claiming. The court explained that Valley Asphalt was "entitled to bring a § 113(f)(1) contribution claim by virtue of the fact that it ha[d] been sued [for contribution] in the instant action" by the Plaintiffs.¹⁴⁷ The court did not respond to Valley Asphalt's argument that the expenses it claimed for vapor extraction mitigation on its own property were directly incurred in compliance with a separate administrative order.¹⁴⁸ The court's opinion contained only a cursory analysis as it apparently concluded that it was following the Sixth Circuit's lead in *Hobart Corp. v. Waste Mgmt. of Ohio*.¹⁴⁹ The court rejected Valley

¹⁴⁶ *Id.* at 896-97.

¹⁴⁷ *Id.* at 896.

¹⁴⁸ *Id.* at 893-97. Valley Asphalt claimed that it had "incurred costs in excess of \$220,000 . . . in compliance with the terms of a March 2013 [UAO]" for actions including "testing, demolition of buildings and installation of a sub-slab vapor mitigation system." *Id.* at 894. The court's response was that, because (1) Valley Asphalt's property is part of the larger site, and (2) Plaintiffs were ordered in the 2013 ASAOC to do the same work site-wide, Plaintiffs were entitled to contribution from Valley Asphalt for that work and Plaintiffs' suit to recover those costs triggered Valley Asphalt's eligibility for contribution. *Id.* at 900-01.

The court's response arguably glossed over the EPA's treatment of Plaintiffs' 2013 ASAOC and Valley Asphalt's 2013 UAO as parallel responses. The EPA Region 5 personnel were obviously aware of both initiatives. The same Regional On-Scene Coordinator transmitted the March 22, 2013 UAO to Valley Asphalt by cover letter on May 21, 2013 and the April 5 ASAOC to the Plaintiffs on May 1. Valley Asphalt's UAO repeatedly emphasized that the "Work to Be Performed" (including design and installation of vapor abatement mitigation systems) was "for Valley Asphalt Property." In addition, the Vapor Intrusion Work Plan prepared for EPA by Valley Asphalt's contractor, Bowser-Morner, specifically noted that "[a] group of Potentially Responsible Parties (PRPs) is working a project parallel to Valley's in accordance with the Administrative Settlement Agreement and Order on Consent for Removal Action (ASAOC) with USEPA, for the SSDL site."

Similarly, the Plaintiffs' ASAOC specifically states that "EPA recognizes that the Respondents have entered into an agreement wherein Respondent Valley Asphalt has assumed the obligations set forth in this Consent Order to perform the Valley Asphalt Work at the Site and the Group Respondents [Hobart, NCR and Kelsey-Hayes] have assumed the obligations set forth . . . to perform the Non-Valley Asphalt Work at the Site."

All of the above suggests that Valley Asphalt's vapor intrusion mitigation work could be reasonably viewed as parallel to, rather than duplicative of, the Plaintiffs' work.

¹⁴⁹ *Id.* at 894; *Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757 (6th Cir. 2014). The district court's reliance was arguably misplaced, as the Sixth Circuit did not address the issue in that decision. The only question resolved by the Circuit Court was whether a plaintiff that had been sued by the government—thereby meeting the requirement to pursue an action for

Asphalt's assertion that the result was inequitable suggesting that the alternative Valley Asphalt proposed would discourage voluntary settlements by parties such as the Plaintiffs.¹⁵⁰

The final section of this article suggests that the majority approach to this question is more consistent with CERCLA's statutory text and scheme, aligns with the Court's decision in *Atlantic Research*, is more equitable than the minority approach, and would promote voluntary settlements rather than discourage them.

IV. RESOLVING THE COST RECOVERY/CONTRIBUTION DICHOTOMY

Resolving the concern raised in the previous section requires courts to recognize that *both* the nature of the cost claimed in a CERCLA action *and* the plaintiff's procedural posture are relevant in determining the appropriate remedy for a private plaintiff. Courts need not choose between the two, and neither the text of CERCLA nor the Court's opinion in *Atlantic Research* suggest otherwise. Instead, the plaintiff's procedural posture regarding each specific cost should control for each claim or counterclaim.

A. Consistency with CERCLA's Text and Structure

Given the way the Court has historically construed CERCLA, one would expect it to follow a textualist approach if or when it chooses to address this issue.¹⁵¹ The plain meaning of the statutory language would therefore guide the Court to the extent its meaning can be discerned.¹⁵² While CERCLA does not directly address this issue, its text and framework both suggest an emphasis on discrete liabilities. The outer limits of

contribution—was precluded from asserting a cost recovery claim for the same expenses. The court answered that question in the affirmative, but it did not address whether the plaintiff could bring a cost recovery claim for other expenses incurred outside the enforcement process. *Id.* at 776.

¹⁵⁰ *Hobart*, 336 F. Supp. 3d at 896–97.

¹⁵¹ See Barkett, *supra* note 68 (asserting that, from *Key Tronic Corp.*, in 1994, to *Waldebarger*, in 2014, the Supreme Court's decisions have been “guided by the plain meaning of CERCLA's text”). One could add to that list the decisions in *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). This pattern has been true of the Court regardless of the perceived political bent of the authors of the Court's opinions (Justices Brennan, Marshall, Kennedy, Stevens and Thomas, for example, have all applied a textualist approach).

¹⁵² See generally, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010).

CERCLA liability are specified in § 107(a)(4)(A)–(D).¹⁵³ The statute casts a broad net by imposing liability upon multiple categories of defendants¹⁵⁴ and providing only a limited number of narrow defenses.¹⁵⁵ However, liability under CERCLA is “not unlimited.”¹⁵⁶ Section 107(a) restricts liability not only to costs actually incurred,¹⁵⁷ but to those that are both “necessary” and

¹⁵³ Those who are within the four classes of responsible parties listed in § 107(a)(1)–(4) and do not meet any of CERCLA’s narrow defenses are liable for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources . . . ; and
- (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a)(1)–(4).

¹⁵⁴ CERCLA § 107(a) imposes liability upon four classes of persons:

- (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . , and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities

42 U.S.C. § 9607(a)(1)–(4).

The courts have also held that liability may extend to corporate parents, subsidiaries and successors, corporate officers, directors, and sometimes stockholders or counsel; trustees, and even response action contractors. *See, e.g.*, David O. Ledbetter et al., *Outline of RCRA/CERCLA Enforcement Issues and Holdings*, CHEM. WASTE LITIG. REP. (2010).

¹⁵⁵ CERCLA § 107(b) exempts from liability anyone who can establish by a preponderance of the evidence that a release or threatened release was caused solely by: “(1) an act of God (2) an act of war; or (3) an act or omission of a third party other than an employee or agent of the defendant” 42 U.S.C. § 9607(b). In addition § 101(20)(E) defines “owner” in such a way as to exempt lenders that do not engage in management of the facility; the third-party defense in § 107(3) exempts “innocent” landowners, including contiguous landowners, subject to certain conditions; and as part of the Brownfields program, an exemption was added in § 101(40) for “bona fide prospective purchasers.” 42 U.S.C. §§ 9601(20)(E), 101(40), 107(3).

¹⁵⁶ *See, e.g.*, *Marsh v. Rosenbloom*, 499 F.3d 165, 179 (2d Cir. 2007) (quoting *Onan Corp. v. Indus. Steel Corp.*, 770 F. Supp. 490, 494 (D. Minn. 1989), *aff’d*, 909 F.2d 511 (8th Cir. 1990)).

¹⁵⁷ CERCLA § 107(a)(4)(B) provides that responsible parties are liable for “any other necessary costs of response *incurred* by any other person.” 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

spent in a manner “consistent with the national contingency plan.”¹⁵⁸ Furthermore, “contribution” toward a joint liability¹⁵⁹ or “settlement” of a liability to the United States or a State government¹⁶⁰—while possibly entailing a substantial sum—is inherently limited in scope. The very nature of “contribution” is that it consists of a share of some discreet amount.¹⁶¹ Thus, reading the statute as a whole,¹⁶² every provision concerning liability under CERCLA—whether for cost recovery or contribution—reflects an obligation that is, out of necessity, limited in scope.

The structure of CERCLA also seems consistent with the majority position on this issue.¹⁶³ Section 107(a) provides the basic framework for potential liability under CERCLA in broad terms.¹⁶⁴ By contrast, § 113(f) authorizes contribution actions for PRPs in comparatively narrow, specific circumstances. A fair reading of these provisions together would suggest that a CERCLA defendant is generally liable for “any . . . necessary costs of response,”¹⁶⁵ unless the specific circumstances delineated in § 113(f) have been met—in which case the plaintiff would be limited to an action for contribution.¹⁶⁶ CERCLA’s provision for contribution protection reinforces this structure.¹⁶⁷ It provides contribution protection for a person who has “resolved its liability . . . in an administrative or judicially approved settlement,” but the protection it provides is expressly limited to “*matters addressed* in the settlement.”¹⁶⁸ Thus, the specific terms of the settlement dictate the scope of protection the party enjoys. Therefore, under this

¹⁵⁸ Expenses must be incurred in a manner “*not inconsistent* with the [NCP]” if the plaintiff is a government entity or Indian tribe. *Id.* at § 9607(a)(4)(A) (emphasis added).

¹⁵⁹ 42 U.S.C. § 9613(f)(1).

¹⁶⁰ *Id.* § (f)(3)(B).

¹⁶¹ This is consistent with the concept of “contribution” as described in the Restatement (Third) of Torts, which characterizes contribution as the recovery of an amount “in excess of [a party’s] *comparative share* or responsibility,” suggesting that a party liable for contribution is liable for no more than a share of a specific and limited (though possibly substantial) amount. RESTATEMENT (THIRD) OF TORTS (AM. LAW INST. 1995).

¹⁶² *See* United States v. Atl. Research Corp., 551 U.S. 128, 135 (2007) (quoting King v. St. Vincent’s Hospital, 502 U.S. 215, 221 (1991)) (emphasizing that “[s]tatutes must ‘be read as a whole’”).

¹⁶³ *See supra* notes 21–35 and accompanying text.

¹⁶⁴ *See supra* notes 153–157 and accompanying text.

¹⁶⁵ 42 U.S.C. § 9607(a)(4)(B).

¹⁶⁶ The text of CERCLA does not expressly dictate this result but was so construed by the Supreme Court in *Cooper Industries*. *See supra* notes 43–60 and accompanying text.

¹⁶⁷ CERCLA § 113(f)(2) provides, in relevant part, as follows: “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).

¹⁶⁸ *Id.* (emphasis added).

provision, even a settling party is not sheltered from CERCLA claims as a whole; it is arguably sheltered only from contribution claims¹⁶⁹ and only with respect to those matters that are within the scope of the agreement. It seems counterintuitive that a statute that carefully limits the terms of liability based upon specific procedural circumstances would then lump together all of a party's claims and ignore any procedural distinctions among them. It also seems unlikely that Congress would limit contribution protection to the scope of a settlement agreement while, at the same time, intending for the courts to use the same agreement to dictate the form of recovery for every claim that party might be able to assert.

Exxon's cleanup of its Baytown facility provides an extreme example.¹⁷⁰ As explained previously, Exxon signed two administrative consent orders with the State of Texas in 1995 calling for specific environmental response actions at the facility. However, Exxon had already incurred substantial cleanup costs beginning in 1986, and it continued to incur cleanup costs outside the scope of the two agreements after they were signed.¹⁷¹ Because the United States government had been heavily involved with wartime production at the facility, Exxon sued the United States for cost recovery under § 107 after conducting extensive cleanup.¹⁷²

The court determined that the settlement agreements Exxon signed with the State constituted "settlements" within the meaning of CERCLA § 113(f)(3)(B).¹⁷³ Under § 113(f)(2), therefore, Exxon could have received contribution protection. That protection, however, would have been limited to the "matters addressed" in the settlements. But despite the limited nature of the contribution protection available to Exxon, the court held that the same settlements restricted Exxon's claim against the government to a contribution action even for costs that fell outside the scope of the agreements or were incurred as much as nine years before the agreements were signed.

B. Consistency with the Atlantic Research Decision

In addition to being more consistent with the text and structure of CERCLA, the approach recommended in this article would comport with the Supreme Court's decision in *Atlantic Research*. Courts that follow the

¹⁶⁹ *United States v. Atl. Research Corp.*, 551 U.S. 128, 140 (2007) (noting that "[t]he settlement bar does not by its terms protect against cost-recovery liability under § 107(a)," but expressing doubt that "this supposed loophole would discourage settlement").

¹⁷⁰ *See supra* notes 140-47 and accompanying text.

¹⁷¹ *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 505 (S.D. Tex. 2015).

¹⁷² *Id.* at 502-503.

¹⁷³ *Id.* at 506.

minority approach on this issue have cited two statements from that opinion, which they assert support their position. Upon closer examination, however, neither statement mandates the minority approach. The first statement is actually a quotation from the Second Circuit's opinion in *Consolidated Edison*,¹⁷⁴ which, in context, is at most ambiguous. When referencing the Second Circuit's opinion, the Court emphasized that the remedies of cost recovery and contribution are not interchangeable but serve as "complement[s]" to one another.¹⁷⁵ Pulling a phrase from *Consolidated Edison* to help elaborate that point, the Court explained that §§ 107 and 113 "provid[e] causes of action 'to persons in different procedural circumstances.'"¹⁷⁶ Though minority courts point to that statement for support, it does not specify that a party eligible to seek contribution for one particular expense is automatically restricted to contribution with respect to all of its potential claims or counterclaims. Neither the Supreme Court, in *Atlantic Research* nor the Second Circuit, in *Consolidated Edison*, was faced with that question, and neither explicitly addressed it.

A number of the lower courts have also cited a second statement from *Atlantic Research* that furnishes a bright-line rule regarding the concurrent use of cost recovery and contribution. The rule it articulates, however, is very narrow; it does not address the question raised in this article, as some courts have suggested.¹⁷⁷ Expressing concern over the continued viability of § 113, the Court in *Atlantic Research* emphasized that a PRP could not simply choose which remedy it wished to pursue.¹⁷⁸ If a PRP is "eligible to seek contribution under § 113(f)," the Court stated, then that party is required to use § 113 as its remedy.¹⁷⁹ The Court then stated that such a plaintiff "[could not] simultaneously seek to recover the same expenses under § 107(a)."¹⁸⁰ Just as important as what this often-cited rule does say, is likely what it does not say. In it, the Court merely precluded the use of both §§ 107 and 113 to recover "the *same* expenses." It did not clarify whether a party could simultaneously seek both remedies to recover *different* expenses. That door, therefore, was left ajar. Not surprisingly, the lower courts have reached disparate conclusions on this issue, and further clarification from the Court would be helpful. Until then, it is fair to say at

¹⁷⁴ *Consolidated Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005).

¹⁷⁵ *Atl. Research*, 551 U.S. at 139.

¹⁷⁶ *Id.* (quoting *Consolidated Edison*, 423 F.3d at 99).

¹⁷⁷ *See, e.g.*, *Whittaker Corp. v. United States*, 825 F.3d 1002 (9th Cir. 2016); *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013); *Morrison Enterprises, LLC v. Dravo Corp.*, 638 F.3d 594 (8th Cir. 2011); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *ITT Industries, Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007).

¹⁷⁸ *Atl. Research*, 551 U.S. at 132.

¹⁷⁹ *Id.* at 139.

¹⁸⁰ *Id.*

least that the approach recommended in this article comports with the Court's most recent guidance.

C. *Addressing Objections*

Jurists and scholars have raised two significant concerns about the approach recommended in this article. One objection is that such an approach might discourage voluntary settlements. Those familiar with CERCLA know that its purposes have always been to (1) promote the prompt and effective cleanup of hazardous waste sites and (2) ensure that those responsible for the dangers those sites represent pay for their remediation.¹⁸¹ One of the keys to achieving these objectives is to encourage voluntary cleanups. CERCLA's contribution protection provision is generally viewed as furthering timely cleanups by rewarding early settlements.¹⁸² Some are concerned that if parties that have settled and received contribution protection were later subject to cost recovery claims (which presumably would provide joint and several liability),¹⁸³ the incentive to settle early and receive that protection would be reduced. The EPA and the Department of Justice have consistently expressed this concern, whether writing as parties to litigation or as friends of the court:

To encourage PRPs to settle with the United States, CERCLA bars contribution claims against settling PRPs It is unclear whether that bar, or an equivalent common law bar, would block a § 107(a)(4)(B) claim brought by one settling PRP against another PRPs will be much less likely to settle with EPA and begin cleanup work if they potentially remain vulnerable to such claims.¹⁸⁴

A unanimous Court, in *Atlantic Research*, foresaw that issue, and Justice Thomas, writing for the Court, addressed it squarely. He suggested that allowing PRPs to pursue cost recovery under § 107 would “not eviscerate the settlement bar set forth in § 113(f)(2).”¹⁸⁵ First, he suggested, if sued for cost recovery a defendant could invoke equitable apportionment by filing a § 113(f) counterclaim.¹⁸⁶ In determining the parties' relative shares

¹⁸¹ See, e.g., *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

¹⁸² See, e.g., Stefanie Gitler, Note, *Settling the Tradeoffs between Voluntary Cleanup of Contaminated Sites and Cooperation with the Government under CERCLA*, 35 *ECOL. L.Q.* 337, 355-61 (2008).

¹⁸³ See *Atl. Research*, 551 U.S. at 140.

¹⁸⁴ Brief of the United States Department of Justice as Amicus Curiae, 8-9, *Hobart v. Waste Mgmt. of Ohio*, 758 F.3d 757 (6th Cir. 2014) (citations omitted).

¹⁸⁵ *Atl. Research*, 551 U.S. at 140.

¹⁸⁶ *Id.* at 140-41.

of liability, a court with discretion to “use[] such equitable factors as [it] determines are appropriate”¹⁸⁷ would likely account for the fact that the defendant had settled early and conducted response actions in fulfillment of its settlement.¹⁸⁸ Given the cost of litigation, and the likelihood that a court’s apportionment would weigh heavily in favor of the defendant in such a case, some scholars have questioned whether cost recovery suits would often be pursued in such cases.¹⁸⁹ Second, the contribution bar would continue to provide protection against contribution claims by other private or government entities.¹⁹⁰ Finally, a settlement with the government would still “carr[y] the inherent benefit of finally resolving liability as to the United States or a State” regardless of the party’s susceptibility to a cost recovery claim from a private claimant.¹⁹¹

Also, offsetting this concern is the likelihood that additional parties might be encouraged to settle without litigation if they knew that cost recovery under § 107 would be possible. The South Dayton Landfill litigation illustrates this point. Other than owning land that had once been part of the landfill, Valley Asphalt’s connection with that part of the site was minimal. It had allegedly never deposited waste of any kind at the dump.¹⁹² Nevertheless, it was one of thirty parties sued by the defendants who sought contribution after settling claims with the EPA.

Valley Asphalt later agreed—without being sued—to initiate vapor intrusion mitigation measures on its own land at considerable cost. It is not clear how much of the contamination that created the need for mitigation was caused by other parties, including the Plaintiffs; but Valley Asphalt’s engineering consultants found that the soil and groundwater contaminants on Valley Asphalt’s property were virtually the same as those found in the landfill.¹⁹³ Following the minority approach, however, the district court dismissed Valley Asphalt’s cost recovery counterclaim against the Plaintiffs and foreclosed any opportunity to discover the contributing role Plaintiffs might have played in the expenses Valley Asphalt incurred.

¹⁸⁷ *See, e.g.*, *RSR Corp. v. Avanti Dev., Inc.*, No. IP 95-1359-C-M/S, U.S. Dist. LEXIS 14203, 38 (S.D. Ind. Mar. 31, 2000).

¹⁸⁸ This argument admittedly does not account for the fact that a defendant in such a cost recovery action could be held liable for the costs of an orphan share if one or more parties at the site are insolvent. *See Vera, supra* note 81, at 415.

¹⁸⁹ *See, e.g.*, Elizabeth E. Mack and Angela D. Hodges, *Settling CERCLA Section 107 Claims*, LAW 360 (Feb. 25, 2009).

¹⁹⁰ *Atl. Research*, 551 U.S. at 141.

¹⁹¹ *Id.*

¹⁹² Vapor Intrusion Work Plan, *supra* note 126, at 5.

¹⁹³ *Id.* at 5, 9.

Although Valley Asphalt's expenditure was not strictly "voluntary," the EPA was able to preserve critical resources because the company was willing to act without being forced to do so through the enforcement process. This article suggests that the incentives would be greater for parties in Valley Asphalt's position to settle outside of litigation or formal enforcement if there were a realistic opportunity to recover a significant portion of their costs from other liable parties.

Others have opined that permitting a § 107 cost recovery claim following a judicially approved settlement under § 113(f)(3)(B) would allow a plaintiff the benefit of joint and several liability while being shielded from a contribution counterclaim.¹⁹⁴ This concern is arguably exaggerated, however, given the "mutually exclusive approach" the courts have consistently followed.¹⁹⁵ The *Atlantic Research* Court unanimously held that a party entitled to pursue contribution may seek only that remedy.¹⁹⁶ Given that a resolution of liability under § 113(f)(3)(B) triggers a claim for contribution, it is difficult to imagine a scenario in which a PRP could resolve its liability with a government entity, receive contribution protection under § 113(f)(2), and then pursue a cost recovery claim for the same costs.

V. CONCLUSION

In *Cooper Industries* and *Atlantic Research*, the Supreme Court provided sorely needed clarification regarding private party remedies under CERCLA. Twelve years later, however, the boundary between §§ 107 and 113 remains obscure. Given the many unresolved issues, the disparity of approaches among the courts, and the financial stakes for the parties involved, the Court would be justified in granting certiorari in an appropriate case to help bring clarity.

One of the issues on which the courts are divided is whether a party may simultaneously pursue cost recovery and contribution for separate claims or counterclaims. This article suggests that the majority of courts—which allow parties to pursue both remedies under appropriate circumstances—have gotten it right. They have struck a balance that comports with the text and structure of CERCLA and rendered decisions consistent with the Court's decision in *Atlantic Research*.

¹⁹⁴ See Vera, *supra* note 80. See also *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 228 (3d Cir. 2010); *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 740 (D.S.C. 2015); *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1042–43 (E.D. Wis. 2008).

¹⁹⁵ See Brianna E. Tibett, *Reinstating CERCLA as the "Polluter Pays" Statute with the Circuit Court's Mutually Exclusive Approach*, HARV. ENVTL. L. REV. 6 (Jan. 3, 2018).

¹⁹⁶ *United States v. Atl. Research Corp.*, 551 U.S. 128, 139–40 (2007).

The majority approach also encourages voluntary cleanups and thus helps further the goals of CERCLA. Offering the advantages of cost recovery to parties that voluntarily remediate a site or conduct cleanups beyond the scope required of a settlement agreement promotes the kind of behavior CERCLA was intended to encourage. Even parties such as Valley Asphalt—whose costs were not truly “voluntary”—make it possible for authorities to preserve vital resources when they cooperate in the cleanup process without having to be sued.

Courts that have taken a contrary position have done so based upon a false choice between the nature of the costs incurred and the procedural posture of the party seeking recovery. The appropriate way to resolve the issue is to account for the procedural posture of the party with respect to the specific cost it has claimed. A contrary approach does not conform to CERCLA’s text and structure and is not mandated by the guidance the Court has previously given.

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