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Recent Developments in the CERCLA Contribution Scheme and How They Should Be Handled: U.S. v. Atlantic Research; Aviall Part II

Jacob M. Theis

Comments

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I. Introdcution

On June 11, 2007, the United States Supreme Court unanimously decided *U.S. v. Atlantic Research*.[1] This decision finally answered a vital question concerning the availability of certain contribution remedies, which the court intentionally left open in *Cooper Industries v. Aviall Services*.[2] The driving force behind this recent decision was a split

* J.D. Candidate, The Dickinson School of Law of The Pennsylvania State University, 2008; B.A., Government and International Politics, George Mason University, 2005. The author wishes to thank his mother Nancy for her constant support; his brother Aaron for keeping him conscious of his beginnings; and his sister Alisha for her unconditional love. The author is especially grateful to his tremendously supportive (and tolerant) wife Toni, who will always be his smarter half.

1. United States v. Atlantic Research Corp., 127 S.Ct. 2331 (2007) [hereinafter *Atlantic Research*].

2. Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004) [hereinafter *Aviall*].

among the circuit courts[3] regarding the interpretation of a cost recovery statute under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[4]

CERCLA regulates how parties may cleanup hazardous material spills and creates a number of legal actions to help make such cleanups more feasible.[5] With some of these cleanups costing more than $50 million and taking longer than 18 years to complete, businesses have been extremely interested in how to pursue contribution both before and after the establishment of liability.[6] One of the most effective methods of saving cleanup costs is to perform a "voluntary cleanup," which is a cleanup that a party is liable for, but is not compelled to perform by an administrative order, injunction or civil suit.[7] Voluntary cleanups have been widely accepted as the most cost-effective way to remedy hazardous material spills,[8] which explains why approximately 70% of all cleanups are now voluntary.[9]

Although the *Aviall* decision restricted the ability of certain parties to seek contribution after performing a voluntary cleanup, this decision was not absolute, and left open the possibility of allowing these parties

3. *See* E.I. DuPont De Nemours and Co. v. United States, 460 F.3d 515, 533 (3rd Cir. 2006) (breaking ranks with the Second, Seventh and Eighth Circuits by refusing to allow Potentially Responsible Parties to pursue cost recovery actions under CERCLA § 107).

4. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601-9675 (2006) and Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C.A. § 9613 (2007).

5. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (2007).

6. *See, e.g.,* INSURANCE SERVICES OFFICE, INC. (ISO), SUPERFUND AND THE INSURANCE ISSUES SURROUNDING ABANDONED HAZARDOUS WASTE SITES (December 1995) (analyzing the many estimates of site cleanup costs and their effect on insurance policies); MARK REISCH & DAVID MICHAEL BEARDEN, U.S. CONGRESSIONAL RESEARCH SERVICE, SUPERFUND FACT BOOK, CRS Report No. 97-312 ENR (March 3, 1997) (analyzing CERCLA statistics).

7. *Superfund Program: Status of Cleanup Efforts: Hearing Before the Subcomm. on Superfund, Waste Control, and Risk Assessment of the S. Comm. on Env't and Public Works*, 106th Cong. 82-83 (2000) (statement of Eugene Martin-Leff, Assistant Attorney General of the State of New York) (stating that although some truly voluntary cleanups still occur, practically all cleanups are regulated by state environmental protection agencies).

8. *See, e.g.,* Mercury Mall Assocs., Inc. v. Nick's Market, Inc., 368 F.Supp.2d 513 (E.D.Va. 2005); Consolidated Edison Co. of NY, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2nd Cir. 2006); Metro. Water Reclamation Dist. Of Greater Chicago, v. North Am. Galvanizing & Coatings, Inc., 2007 U.S. App. LEXIS 913 (7th Cir. 2007); Atlantic Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006); Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

9. Brief for American Chemistry Council and Superfund Settlement Project as Amici Curiae, E.I. DuPont De Nemours and Co. v. United States, 460 F.3d 515, 533 (3rd Cir. 2006) (Nos. 04-4546 and 04-4629).

contribution through a "cost recovery" section in CERCLA.[10] Although some circuit courts decided to allow contribution through this "cost recovery" section,[11] the Third Circuit and other district courts did not.[12] By a unanimous decision written by Justice Thomas, the Supreme Court in *U.S. v. Atlantic Research* rejected the Third Circuit's rationales, and held that contribution for voluntary cleanups is clearly allowed under the plain language of CERCLA's "cost recovery" section.[13] However, *Atlantic Research*, much like *Aviall*, left open another important question regarding the availability of contribution under CERCLA—what section should a Potentially Responsible Party pursue following a consent decree?[14]

This comment will analyze the Supreme Court's recent decision in *U.S. v. Atlantic Research*, and how it affects the current CERCLA contribution scheme. More specifically, Part II of this comment briefly sets forth the mechanics of CERCLA's recovery sections and highlights the conflict that had arisen between those mechanics and the Supreme Court's *Aviall* decision. Part III-A identifies the still-unsettled issues following the *U.S. v. Atlantic Research* decision, and how theses issues will impact certain Potentially Responsible Parties. Part III-B and III-C suggests how the courts should now view contribution under CERCLA—and thus how Potentially Responsible Parties should proceed. Finally, Part III-D discusses *Atlantic Research's* "new" settlement bar rule.

II. Background

CERCLA was enacted in 1980 to provide the United States Environmental Protection Agency ("EPA") with a means to expedite the response to environmental concerns caused by hazardous waste sites.[15]

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10. *See Aviall,* 543 U.S. 157 (2004).

11. *See, e.g.,* Consolidated Edison Co. of NY, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2nd Cir. 2006); Metro. Water Reclamation Dist. Of Greater Chicago, v. North Am. Galvanizing & Coatings, Inc., 2007 U.S. App. LEXIS 913 (7th Cir. 2007); Atlantic Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006).

12. *See, e.g.,* E.I. DuPont De Nemours and Co., v. United States, 460 F.3d 515 (3rd Cir. 2006); Differential Development-1994, Ltd. v. Harkrider Distributing Co., 2007 U.S. Dist. LEXIS 1592 (S.D. Tex. 2007); AMCAL Multi-Housing, Inc. v. Pacific Clay Productions, 457 F. Supp.2d 1016 (C.D. Cal. 2006).

13. *See Atlantic Research*, 127 S.Ct. 2331 (2007).

14. *Id.* at 2338, n. 6.

15. *See, e.g.*, United States v. Ottati & Goss, Inc., 630 F.Supp. 1361 (6th Cir. 1985) (stating that the purpose of CERCLA is to enable the US EPA to act quickly to remedy environmental problems); Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-36 (8th Cir. 1995) (stating that the purpose of CERCLA is to "encourage the timely cleanup of hazardous waste sites" and "place the cost of that response on those responsible for creating or maintaining the hazardous condition."); United States v. Bestfoods, 524 U.S.

Consistent with that purpose, CERCLA contains a number of legal actions to ensure that neither the EPA nor other party gets stuck with the bill for response and cleanup.[16] The legal actions for recovery and contribution relative to this discussion are sections 107(a) (hereinafter "section 107" or "107," unless otherwise specified), section 106(a) (hereinafter "section 106" or "106"), and section 113(f)(1) and (2) (hereinafter "section 113" or "113," unless otherwise specified).[17]

Before proceeding further, it should be noted that CERCLA uses the terms "cost recovery" in section 107 and "contribution" in section 113 very differently. This is despite the fact that "contribution," by its very definition, includes the phrase "recovery from others."[18] Together, these two sections comprise the core of CERCLA's contribution scheme. Due to this artistic (and functionally inaccurate) language, a section 107 action is one of "cost recovery," whereas section 113 is one of "contribution." Though overlapping in nature, the two remedies have significantly different statutory consequences.

A. Section 107 "Recovery"

Black's Law Dictionary defines "recovery" as the "regaining or restoration of something lost or taken away."[19] Section 107 was originally the only available action for parties seeking contribution under CERCLA because section 113 was not passed until 1986 with the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[20] Section 107(a) holds certain "covered persons"—more commonly referred to as "Potentially Responsible Parties," or "PRPs"—liable for all costs of removal and cleanup incurred by the government and "other person[s]."[21] These PRPs are divided into four categories under the statute: (1) current owners or operators of facilities; (2) past owners or operators of facilities; (3) persons who arranged for other parties to dispose or treat hazardous substances;[22] and (4) persons who accepted, for disposal or treatment, hazardous substances.[23]

51, 55 (1998) (holding that the purpose of CERCLA is to remedy environmental and health risks created by pollution).

16. CERCLA, 42 U.S.C.A. §§ 9601-9675 (2007).

17. *Id.* at §§ 9607(a) and 9613(f)(1).

18. BLACK'S LAW DICTIONARY 352-3 (8th ed. 2004) (emphasis added).

19. *Id.* at 1302 (8th ed. 2004).

20. Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C.A. § 9613 (2007).

21. CERCLA, 42 U.S.C.A. § 9607 (2007).

22. *See* United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir.1989) (identifying this category of PRP as an "arranger" for arranging the disposal of hazardous substances).

23. *Id.*

Before the passage of SARA, the courts interpreted section 107, with its "cost recovery" language, as implying a right to contribution.[24] Specifically, federal courts held that a PRP who initiated the cleanup voluntarily (i.e. performing a cleanup without settling or being sued by the EPA or another party) could recover its cleanup costs from other PRPs under section 107. The application of this implied right to contribution under section 107, however, became complicated after the passage of SARA.

B. Section 113 "Contribution"

As discussed above, "contribution" is defined as "the right that gives one of several persons who are liable on a common debt *the ability to recover* ratably from each of the others. . . ."[25] It has been recognized by the judiciary that, in passing SARA, Congress intended to "clarify and confirm" a right to CERCLA contribution.[26] However, this new section 113 was more restricted than the right of contribution originally implied by the courts under section 107—as it only allowed contribution where the seeking PRP had first been sued under sections 106 or 107, or settled its liability with the EPA or state.[27] Due to section 113's more restrictive action for contribution, it followed that if a PRP had its choice between section 107 and 113, the PRP would obviously pick 107 (so that the PRP would not have to wait to be sued, or forced to settle). In order to give section 113 the effect that Congress intended, the courts began requiring PRPs seeking contribution to use section 113, reserving section 107 to "innocent parties," (parties that had not contributed to the pollution or contamination of the land; "non-PRPs").[28] This "traffic directing" between sections was arbitrary, and had no real basis in the statutory language of section 107—but was arguably implied from the "during or

24. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986); Walls v. Waste Res. Corp., 761 F.2d 311 (6th Cir. 1985); Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986); United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986).

25. BLACK'S LAW DICTIONARY 352-3 (8th ed. 2004) (emphasis added).

26. United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994).

27. *See* 42 U.S.C.A. § 113(f)(1-2) and (g)(3). (Section 113's right to contribution is subject to a three-year statute of limitations; plaintiffs can recover only costs in excess of their equitable share, and before *Atlantic Research*, could not recover from previously-settling parties).

28. *See, e.g.*, Dico Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769 (4th Cir. 1998) (A liable party should not have a right to full recovery under section 107 if it contributed to the contamination of the site, and thus must use section 113 instead.).

following" language in section 113.[29] In other words, the reservation of section 107 to innocent parties was the judiciary's way of making sense of CERCLA's overlapping contribution remedies.

Section 113 also contains a "saving clause," which provides that "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106 and 107]. . . ."[30] This saving clause created uncertainty as to whether section 113 truly precluded contribution under section 107, and some courts even began interpreting the two sections as a single remedy.[31]

C. *The Aviall Case*

The tension between the original interpretation of section 107 and the new restrictions under section 113 was fully realized in *Cooper Industries, Inc. v. Aviall Services, Inc.*[32]

Cooper Industries sold four aircraft engine maintenance facilities located in Texas to Aviall Services, who continued to operate those facilities.[33] Aviall Services later discovered that the property underneath the facilities had been contaminated with hazardous substances; caused by its own operations and by Cooper Industries.[34] After informing the Texas Natural Resource Conservation Commission of the contamination, Aviall Services was directed to cleanup the sites or face a state enforcement action.[35] Aviall Services voluntarily complied with these instructions under state supervision at the cost of $5 million, and avoided all enforcement actions by the state commission and the EPA.[36] In seeking contribution from Cooper Industries Inc. for these cleanup costs, Aviall Services Inc. combined their section 113(f)(1) and attempted section 107(a) claims into one claim—which at the time was a common practice due to the uncertainty of the CERCLA contribution scheme.[37] The District Court granted Cooper Industries' motion for summary judgment, reasoning that section 113 was only available to parties

29. Atlantic Research Corp. v. U.S., 459 F.3d 827, 832 (8th Cir. 2006).

30. 42 U.S.C.A. § 9613.

31. *See* United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 99 (1st Cir. 1994) (holding that both section 107 and 113 provide contribution through a "combined operation.").

32. Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004).

33. *Id.* at 163.

34. *Id.* at 164.

35. *Id.*

36. *Id.* ("Neither the [state] nor the EPA . . . took judicial or administrative measures to compel cleanup.").

37. *Aviall*, 543 U.S. at 165; *see also* United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 99 (1st Cir. 1994).

previously sued under CERCLA sections 106 or 107, and Aviall Services had not faced any administrative or judicial actions—failing to satisfy the clear statutory requirement in section 113.[38]

When this issue reached the Supreme Court, the majority agreed with the district court and construed section 113's language, "during or following a section 106 or 107 action" as restricting contribution to only those parties who had *actually been sued (or settled with the EPA or state)*, thus effectively barring parties performing voluntary cleanups from seeking contribution under section 113.[39] Further, the Court reasoned that where Congress narrowly tailors a cause of action in one sentence, the court would not render that sentence ineffective by interpreting a saving clause as negating those narrow requirements.[40]

Despite this holding, the majority specifically left unanswered the question of whether any contribution action would be allowable under section 107—as had been allowed before the passage of section 113.[41] The dissent in the *Aviall* case however, argued that technically speaking, all of the justices had previously agreed in *Key Tronic Corp. v. United States*[42] that section 107 allows PRPs to seek recovery of cleanup costs, albeit in dictum.[43]

D. The Circuit Split

The Second Circuit answered the *Aviall*-question of whether a PRP may seek contribution under section 107 in its *Consolidated Edison Co. of NY, Inc. v. UGI Utilities, Inc.*, decision.[44] The court held that section 107 must now, in light of the *Aviall* decision, be interpreted to allow PRPs who voluntarily clean up their contaminated sites to seek contribution, as this interpretation would be both consistent with the natural text of the statute, and the only way for PRPs performing voluntary cleanups to seek contribution under CERCLA.[45] The Eighth Circuit adopted this reasoning and came to the same conclusion in *Atlantic Research Corp. v. United States*, as did the Seventh Circuit in *Metropolitan Water Reclamation District Of Greater Chicago, v. North American Galvanizing & Coatings, Inc.*[46]

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38. *Id.*
39. *Id.* at 166.
40. *Id.* at 165.
41. *Id.* at 171.
42. Key Tronic Corp. v. United States, 511 U.S. 809, 818 (1994).
43. *Aviall*, 543 U.S. at 172 (Ginsburg, J., dissenting).
44. *See* Consolidated Edison Co. of NY, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2nd Cir. 2006).
45. *Id.*
46. *See* Atlantic Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006); *Metro. Water*, 2007 U.S. App. LEXIS 913 (7th Cir. 2007).

Approximately two weeks after the Eighth Circuit's decision, the Third Circuit decided the *E.I. DuPont De Nemours and Company v. United States* case.[47] The Third Circuit reasoned that since section 107 has been interpreted as being reserved to innocent parties, PRPs who voluntarily chose to clean up contaminated sites could not utilize section 107 to seek contribution, and thus refused to overturn what the Third Circuit regarded as well founded precedent.[48] The Third Circuit ultimately found that Congress did not necessarily intend for PRPs engaged in voluntary cleanups to be eligible for contribution altogether; that section 113 was the sole means of contribution for PRPs.[49]

Encouraged by the Third Circuit's *Dupont* decision, the Government (defendant respondent) in *Atlantic Research v. U.S.* appealed the Eighth Circuit's decision allowing section 107 cost recovery actions by PRPs. On January 19, 2007, the Supreme Court granted certiorari to decide this issue, and ultimately rejected the Third Circuit's refusal to allow PRP's contribution under section 107.[50]

III. Analysis

Atlantic Research was decided by a very simple, well-established maxim; that "statutes must be read as a whole."[51] Avoiding a comprehensive summary of CERCLA's contribution problems, Justice Thomas directed the rather concise opinion at a very narrow issue—whether section 107, by its clear statutory language, allowed PRPs to pursue a cost recovery action. Arguing for a most illogical interpretation of section 107 was the government,[52] which attempted to construe subsection 107(a)(4)(b)'s "any other person" phrase as jumping past the immediately preceding, similarly phrased subparagraph(A), and applying to subsection 107(a)'s list of PRPs.[53] Thus, the government's argument went, "'any other person' means any other person *besides* the PRPs listed above."

By simply looking at the structure of section 107,[54] it was easily

47. E.I. DuPont De Nemours and Co., v. United States, 460 F.3d 515 (3rd Cir. 2006).
48. *Id.*
49. *Id.*
50. *See* Atlantic Research Corp. v. U.S., 459 F.3d 827 (8th Cir. 2006).
51. *Atlantic Research*, 127 S.Ct. at 2336 (2007) (citing King v. St. Vincent's Hospital, 502 U.S. 215, 112 S.Ct. 570 (1991)).
52. *Id.* ("The government's interpretation makes little textual sense.").
53. *Id.*
54. To understand the Court's holding, it is best to view the structure of Section 107(a) as a whole, which in pertinent part, is as follows (emphasis added):

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,

decided that the "any other person" language applied to the immediately preceding subparagraph (A), which identified only three parties: the United States, a state, or an Indian Tribe.[55] From this, the "any other person" language of section 107(a)(4)(b) most logically reads as follows: "PRPs shall be liable to the United States, a State, an Indian Tribe, or *any other person* who incurs necessary response costs."[56] Therefore, the *any other person* language includes other PRPs.

After dismissing the Government's interpretive arguments, the court summarized its holding by reestablishing section 113 and 107's distinctness: "107(a) permits recovery of cleanup costs but does not create a right to contribution."[57] More specifically, a section 107 cost recovery action requires no establishment of liability—it simply holds a defendant jointly and severally liable for cleanup costs incurred by the plaintiff.[58]

The court further reiterated that a section 113 contribution action is limited to situations where there has been a judicially or administratively approved settlement with the EPA or state, or an "inequitable distribution of common liability" based on an a section 106 or 107 civil suit.[59] Thus, section 113 remains available to PRPs *only after* liability has been initiated (by way of a section 106 or 107 action) or actually established

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> (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, . . . of hazardous substances owned or possessed by such person, by any other party or entity, . . . and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, ***shall be 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, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

55. *Atlantic Research*, 127 S.Ct. at 2336.

56. *Id.* at 2336-2337 ("Reading the statute in the manner suggested by the Government would destroy the symmetry of §§ 107(a)(4)(A) and (B) and render subparagraph (B) internally confusing" and would render section 107(a)(4)(B) a "dead letter" by reducing the number of eligible plaintiffs to zero).

57. *Id.* at 2338.

58. *Id.*

59. *Id.*

(by a subsequent judgment or settlement).[60] Despite these sections' distinctness, the court recognized their overlap, stating that they are remedies that provide similar causes of action to differently situated parties.[61]

A. What Atlantic Research Left Undecided

The *Atlantic Research* decision expressly left undecided the issue of whether PRPs that incur expenses following a consent decree (and arguably an administrative order) are able to pursue a section 107 cost recovery action or a section 113 contribution action, or both.[62] The consent decree is problematic, the court points out, because it results in "compelled costs of response" that are neither voluntary, nor reimbursements to other PRPs.[63] Following this point, the court emphasized two terms of art that help to determine the applicability of each remedy; that *voluntary* cleanup costs are recoverable under section 107, and *reimbursement* to other parties under a judgment or settlement are recoverable under section 113.[64] Aside from the larger question of what section a party subject to a consent decree should pursue, why does the court suggest that a *combination* of the sections—"§ 113(f), § 107(a), *or both*"—is even possible in light of their express language (on the same page no doubt) that 107 and 113 are two distinct remedies?

B. An Argument Regarding Contribution, Consent Decrees, and Orders; How Courts should proceed after Atlantic Research.

Consent Decrees and Administrative Orders on Consent are unique legal mechanisms used by the EPA to achieve environmental compliance. Detailed nuances aside, they resemble a settlement in that both plaintiff and defendant voluntarily agree to certain terms; yet have the force of a judgment once judicially approved.[65] Consent Decrees under CERCLA are specifically authorized in section 122(d)(1)(a).[66] To obtain a consent decree, CERCLA prescribes a certain process that involves a period of time for public comment and ultimately requires court approval.[67] Consent decrees usually follow detailed negotiations

60. *See id.* (citing section 113's "during or following" language).
61. *Atlantic Research*, at 2338, n.6.
62. *Id.*
63. *Id.*
64. *Id.*
65. BLACK'S LAW DICTIONARY 441 (8th ed. 2004) ("Consent Decree—A court decree that all parties agree to.—Also termed *consent order*.")
66. 42 U.S.C.A. § 9622(d)(1)(a).
67. JAMES T. O'REILLY AND CAROLINE BROUN, RCRA AND SUPERFUND: A PRACTICE GUIDE, 3d, § 13:10 (2007). Outlining the consent decree process as follows:

between a PRP and the EPA that are brought about by, although not always, section 106 actions.

Two other enforcement tools utilized by the EPA are Administrative Orders and Unilateral Administrative Orders (hereinafter "administrative orders," or "orders").[68] Both consent decrees and orders can vary drastically in their terms because of their contract-like nature and their need to be fact specific. Due to these characteristics, and as *Atlantic Research* recognized,[69] the consent decree and administrative order do not squarely fit into the rubric of sections 107 or 113.[70]

Before proceeding further, it is important to address certain arguments that may be helpful in identifying a possible resolution to the consent decree/administrative order problem.

1. Should a Section 107 Cost Recovery Action Require a PRP to "Voluntarily" Incur Response Costs?

Despite the subject matter variances in consent decrees and administrative orders, there is one common issue that could potentially have a drastic impact on whether the decree or order may fit within a section 107 or 113 remedy: whether, pursuant to the terms of the decree or order, a PRP is required to perform the cleanup itself, and be responsible for all costs associated therewith. More often than not, the

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Assuming the DOJ's concerns are addressed, the decree will be lodged with the court, after which time public comment is taken on the proposed decree. Notice of the consent decree and its terms are published in the Federal Register. The notice identifies the parties, describes the subject matter of the settlement, and invites comments from the public for a period of 30 days. At the close of the comment period, the DOJ reports to the court regarding the comments received and the government's response to them. If the comments indicate that the decree is inappropriate or inadequate, the decree may be withdrawn or renegotiated. The court considers the DOJ report in determining whether to finally enter the decree. The government then moves the court to enter the decree, and settling defendants generally join in the motion. Approval or rejection of a consent decree is within the court's discretion. While a court's review is "highly deferential," the court must not simply "rubber stamp" a proposed consent decree.

68. *See* 42 U.S.C.A. § 9606; *see also* Pharmacia Corp. v. Clayton Chemical Acquisition LLC, 382 F.Supp.2d 1079 (S.D. Ill. 2005) (citing General Electric Co. v. E.P.A., 360 F.3d 188 (D.C. Cir. 2004)) (holding that section 106's general language provides for two types of actions: (1) a suit in a district court, or (2) other action, including orders—such as Administrative Orders and Unilateral Administrative Orders).

69. Although the Supreme Court suggests that only consent decrees presents this problem, the author argues, for reasons contained *infra*, that administrative orders place PRPs in similar situations. *Atlantic Research*, 127 S.Ct. at 2338, n. 6.

70. Scott H. Reisch and Jennifer E. Mclister, *Cercla Comes Full Circle in ARC*, 36-NOV Colo.Law. 65 (Nov. 2007) (coining the phrase "squarely fit" to describe the problem of consent decrees and orders in relation to the two remedies).

EPA aims to achieve this very goal.[71]

For example, assume that a consent decree or administrative order directed a PRP to be responsible for performing the cleanup itself, and all related costs. Although forced (or "compelled," as the court puts it) to perform such cleanup, the PRP has technically satisfied the language in section 107—"incurred necessary costs of response."[72] From this, it can certainly be argued that there is little difference between a PRP voluntarily cleaning a site absent any EPA action[73] (a cleanup which must comply with the National Contingency Plan, and ultimately requires some degree of EPA or state oversight), and a PRP performing an identical cleanup pursuant to a consent decree or administrative order (which similarly requires compliance with the National Contingency Plan and is subject to EPA oversight).[74] Also, in the example above, the PRP is not reimbursing any party—rather it is *incurring its own response costs* (albeit under EPA or court order). The underlying factor is that, in both situations, the PRP has "incurred costs," which is all that the text of section 107 requires.

While the term "voluntary" is absent in the text of section 107, the Supreme Court has reiterated that, in efforts to keep section 107 and 113 separate and distinct remedies, 107 recovery is premised on the *voluntary* incurrence of response costs. However, this judicial interpretation has less of a "separating" effect in the situation of a consent decree or administrative order—because in such situations, section 107 and 113 will rarely *both* be available to a PRP (it will only be one or the other). This argument is wholly consistent with the court's language in *Atlantic Research*: "For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable under § 113(f)."[75] Note that the court does *not* say that section 107 is reserved only for PRPs that incur costs

71. Environmental Protection Agency Memorandum, *Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites* (June 17, 1999), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/neg-enfst-mem.pdf (encouraging the EPA to obtain settlements that entail private-party response action).

72. 42 U.S.C.A. § 9607(a)(4)(b).

73. It should be noted that in many instances—as was the case in *Aviall*—the EPA or state will send notices to PRPs regarding their potential liability and site cleanup, instructing them to clean the site or face enforcement action. Consequently, the term "voluntary" as used by the courts is more often than not a legal fiction. *See Aviall*, 543 U.S. 157.

74. *See* 40 C.F.R. § 300.700(c)(3)(i) and (ii) (2008) (stating that cleanups conducted under a section 106 administrative order or a section 122 consent decree are presumed consistent with the NCP).

75. *Atlantic Research*, 127 S.Ct. at 2338, n. 6.

voluntarily.

It should be noted that the judicially added requirement of "voluntary" to section 107 is analogous to the prior judicial-addition of "innocent"—which was eventually rejected by the Supreme Court in *Aviall* as no longer necessary to direct traffic between sections. The same could be argued for the use of "voluntary" in situations involving consent decrees and administrative orders.

Yet another, although weaker argument, is that the very definition of consent decree involves the PRP's *voluntary acceptance* of the decree before it will be lodged with the court. Accordingly, the consent decree (but not an Administrative Order) contains some degree of "voluntariness" in the first instance.

To answer the question posed by this section's heading—*No, a section 107 cost recovery action brought by a PRP following a consent decree or administrative order should not require the court created "voluntariness" element.* It should instead, be based on the plain text of section 107—recovery for costs incurred.

For the remainder of this piece, this argument shall be referred to as the "involuntarily incurred costs" argument.

2. Are Consent Decrees Settlements Under 113(f)(B)(3)?

Section 122, entitled "Settlements," contains a subsection specifically authorizing the entry of consent decrees.[76] As well, consent decrees require judicial approval.[77] Thus, and as some courts have inherently agreed,[78] consent decrees qualify as "judicially approved settlements" under section 113(f)(B)(3), and as such, all PRPs subject to a consent decree should qualify for section 113 contribution.[79]

3. Is an Administrative Order a "Civil Action" Under 113?

The text of 113 allows contribution "during or following any *civil action* under section [106 or 107]."[80] Based on section 113(f)(1)'s "civil action" requirement, the question is as follows: what constitutes a civil action?

As one might expect in the CERCLA realm, the courts have yet

76. 42 U.S.C.A. § 9622(d)(1)(a).

77. JAMES T. O'REILLY AND CAROLINE BROUN, *supra* note 67.

78. Emhart Industries, Inc. v. New England Container Co., Inc., 478 F.Supp.2d 199 (D.R.I. 2007) (dismissing a section 113 claim based solely on an administrative order, and distinguishing such an order from consent decrees).

79. The *Atlantic Research* decision does not necessarily challenge this conclusion, but rather, raises the issue of whether a section 107 action could also be brought under a consent decree, and whether a PRP could ever bring both a section 107 and 113 action.

80. 42 U.S.C.A. § 9613(f) (emphasis added).

again disagreed as to what satisfies this "civil action" requirement following the Supreme Court's refusal to address the issue in its *Aviall* decision.[81] A civil action is defined rather generally as an action that is brought to "enforce, redress, or protect a private or civil right; a noncriminal litigation."[82]

Most courts have adopted the rationale that, by adding the restrictive term "civil action" in section 113(f)(1), instead of just saying "section 106 or 107 action," Congress intended for section 113 to be limited to PRPs following an *actual judicial proceeding*.[83] The only court to decide otherwise was the court in *Carrier Corp. v. Piper*.[84] The *Piper* court allowed a section 113 contribution action where the only prior "civil action" filed by the EPA was a Unilateral Administrative Order. The court reasoned that the burden an administrative order places on a PRP is similar to that of a court proceeding and hence, they should be given the same treatment under section 113.[85]

In light of the majority of courts adopting the more sound analysis of section 113's civil action requirement (and their rejection of the *Piper* court's rather shallow burden-comparison analysis), it appears that the civil action requirement will only be satisfied where the EPA actually files suit in court.[86] This functionally removes section 113 as a remedy to PRPs subject to an administrative order—thus section 107 remains their only hope for recovery under CERCLA.

C. *A Functional Approach to Solving the Consent Decree and Administrative Order Problem*

Despite the lack of a perfect fit in either section 107 or 113, the elements of consent decrees and administrative orders named above can be divided into two general elements: consent decrees or administrative orders requiring (1) the PRP to cleanup the site itself, covering all costs

81. *See, e.g.*, Pharmacia Corp. v. Clayton Chemical Acquisition LLC, 382 F.Supp.2d 1079 (S.D. Ill. 2005); Emhart Industries, Inc. v. New England Container Co., Inc., 478 F.Supp.2d 199 (D.R.I. 2007) (holding that, following the Supreme Court's refusal to decide the issue, EPA administrative orders under section 106 are not civil actions); *but see* Carrier Corp. v. Piper, 460 F. Supp. 2d 827 (W.D. Tenn. 2006) (holding that in light of the more conceptual similarities between a Unilateral Administrative Order and a judgment, the prior satisfied section 113's civil action requirement).

82. BLACK'S LAW DICTIONARY 32 (8th ed. 2004) (emphasis added).

83. Pharmacia Corp. v. Clayton Chemical Acquisition LLC, 382 F.Supp.2d 1079, 1089 (S.D. Ill. 2005) (looking to the Federal Rules of Civil Procedure to identify the scope of a "civil action").

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

85. *Id.*

86. *See* 42 U.S.C.A. § 9622(c)(2) (permitting the EPA to pursue a section 106 action after a PRP has failed to settle).

associated therewith, or (2) the PRPs' obligation to make payments to the EPA as reimbursement for their cleanup costs.

Based on these two factors, and compared with the remedies' statutory language and courts' interpretations thereof, there appears to be four general situations (and a possible fifth to be discussed below) in which a PRP may find itself after a consent decree or administrative order. The four following situations are explanations of the chart in *Figure 1*.

Situation 1: Where a consent decree directs a PRP to cleanup a site itself, and based on the "involuntarily incurred costs" argument relating to section 107 outlined above, both section 107 and 113 are available. This is because the consent decree qualifies as a settlement under section 113(f)(B)(3), which is the prerequisite for a section 113 contribution action, and pursuant to the terms of the consent decree, the PRP has directly incurred cleanup costs.

However, should the PRP be able to recover under both sections? No. There is a missing factor of "reimbursement." Despite technically qualifying for a section 113 contribution action, the PRP has not been required to reimburse any party's cleanup costs. This makes section 107 more appropriate in this situation than section 113.

Situation 2: Using the same facts as above, except that instead of the consent decree stipulating for the PRP to perform and cover costs of cleanup, it requires the PRP to reimburse the EPA for the costs of cleanup. Obviously, the "involuntarily incurred costs" argument does not apply here because the PRP has not directly incurred cleanup costs. Rather, the PRP has reimbursed the EPA. Thus, the only available action would be for contribution under section 113. In light of the EPA's policy of pursuing PRP-performed site cleanup, this situation seems more unlikely than the first.

Situation 3: Because an administrative order probably does not qualify as a "civil action" under section 113, both this situation, and situation four below do not allow section 113 recovery. Where an administrative order requires a PRP to perform a site cleanup and pay all incurred costs, once again, the "involuntarily incurred costs" argument applies, and section 107 would be the only option for recovery to PRPs in this situation.

Situation 4: Finally, and most disappointing to PRPs, is the situation where an administrative order requires the PRP to reimburse the EPA for the costs of the cleanup. Because no cleanup costs are directly incurred by the PRP, and because an administrative order does not qualify as a civil action under section 113, neither section is available. As mentioned above, the EPA almost always seeks to avoid cleaning

sites itself, making this situation rare.[87]

87. Because the EPA will usually file suit in court (under section 106) if a PRP refuses to comply with its administrative order, a possible strategy for PRPs wishing to avoid this situation is to refuse compliance and wait for the section 106 *civil* action—thus making a contribution action available. However, this strategy is risky because ignoring an administrative order usually results in massive fines and penalties.

Figure 1.
Consent Decree & Administrative Order Remedy Chart

	Consent Decrees (Judicially approved settlements under 113(f)(B)(3))	**Admin. Orders** (not "civil actions" under 113(f)).
PRP is required to perform cleanup, and incur all costs.	§ 107 Cost Recovery § 113 Contribution [Situation 1]	§ 107 Cost Recovery ~~§ 113 Contribution~~ [Situation 3]
PRP is required to reimburse the EPA for cost of cleanup.	~~§ 107 Cost Recovery~~ § 113 Contribution [Situation 2]	~~§ 107 Cost Recovery~~ ~~§ 113 Contribution~~ [Situation 4]

Figure 1 and its explanations indicate which remedies are available in the specified situations. However, this chart does not address the *Atlantic Research* opinion's recognition that perhaps "both" section 113 and 107 could be available to PRPs—this would be the *fifth situation* not discussed above.[88] The Supreme Court's *Atlantic Research* language points to a more simple issue regarding consent decrees—what section should a PRP pursue when it has both reimbursed the EPA for initial response costs, and then required to complete the cleanup itself, thus directly incurring the response costs?[89] (i.e., where a PRP falls into both situation 1 and 2).[90]

88. Although the author recognizes that situation 1 technically allows for both actions, as the explanation indicates, section 107 is probably more appropriate due to a lack of "reimbursement" to any party. Rather, the *Atlantic Research* opinion cites United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96, 97 (1st Cir. 1994), which grapples with the problem of when a consent decree (and possibly an order) directs a PRP to both perform the remaining cleanup, and reimburse the EPA for initial response costs. In other words, what action is available when both situations 1 and 2 exist at the same time?

89. *Atlantic Research*, 127 S.Ct. at 2338, n. 6. (citing United Technologies Corp. v. Browning-Ferris Industries, Inc., which held that where a PRP has both reimbursed the EPA for response costs, and incurred its own response costs, section 113 alone should allow recovery of both. *United Technologies* was abrogated by *Aviall*, 543 U.S. 157).

90. This combination of situation 1 and 2 seems likely to occur in light of the two types of response actions: (1) removal actions, which are short-term immediate or interim measures taken to assess, evaluate and mitigate dangers to health or the environment (usually taken by the EPA; and (2) Remedial actions, which are the more long-term

Based on the arguments set forth above, it would appear that (and as reflected in Figure 1), a PRP in this situation would be eligible for both section 107 and 113 actions simultaneously. Because these two claims would not provide duplicative recovery for the PRP—the PRP could only recover the amount that it reimbursed the EPA, and recover only the costs it incurred during cleanup from another party—the logical answers seems to be *yes; a PRP in this situation should be allowed to recover under both section 107 and 113 simultaneously.*[91] Although section 107 technically provides for joint and several liability,[92] any fear that the PRP's 107 cost recovery action would recover an inequitable share is set aside by the fact that a section 113 counterclaim remains available to defendant PRPs.[93]

A more difficult problem arises when deciding which statute of limitations to apply where a PRP brings both actions. Should it be given the longer section 107 (6 years), or the short section 113 (3 years) statute of limitations? This exact issue was addressed by the First Circuit Court of Appeals in *United Technologies Corp. v. Browning-Ferris Industries* back in 1994; long before *Aviall* and *Atlantic Research.*[94]

In *United Technologies*, the court concluded that, based on the plain meaning of "contribution," section 113 provides recovery for both first-instance costs (those incurred during cleanup) and reimbursed costs paid to another party.[95] Because section 113 allowed both remedies sought by the plaintiff, the court reasoned, the only statute of limitations applicable was that of section 113 (3 years).[96] While this approach seems logical enough, unfortunately, the Supreme Court's decisions in *Aviall* and *Atlantic Research* have since drastically changed the applicability of sections 107 and 113, and thus the holding in *United Technologies* is no longer valid.

Section 113 contains the two relevant statutes of limitations: that 107 cost recovery actions must be commenced within six years of the date of the "initiation of physical on-site construction of the remedial action"; and that section 113 contribution actions must be commenced

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actions or permanent remedies at a site (more commonly performed by the PRP). *See* JAMES T. O'REILLY AND CAROLINE BROUN, RCRA AND SUPERFUND: A PRACTICE GUIDE, 3d, § 11:7 (2007).

91. *Atlantic Research*, 127 S.Ct. at 2339 (stating that parties in a reimbursement-only case could not seek to recover under both sections; but not deciding whether such is true in the case of a consent decree).

92. *Id.* at 2339, n. 7 (refusing to decide whether section 107 provides joint and several liability, but simply assuming that it did for the sake of discussion).

93. *Id.* at 2339.

94. *United Technologies*, 33 F.3d at 97.

95. *Id.*

96. *Id.*

within 3 years "after . . . the date of . . . entry of a judicially approved settlement with respect to such costs or damages."[97] In the situation of a consent decree, the final court approval of the decree will be a clear and definite point at which a PRP will be able to understand its legal obligations, as apposed to the more arguable standard of "physical on-site construction." Accordingly, section 113's clearer accrual date is preferable over section 107's.

In a situation where a PRP is eligible for both actions, the PRP will probably not have begun cleanup activities, but the EPA will have commenced the initial remedial cleanup action. Because the section 107 statute of limitations begins only once cleanup activities begin, and because consent decrees can vary as to when they require the PRP to commence these cleanup activities, the section 107 statute of limitations could technically *not* begin to run until after the expiration of the section 113 statute of limitations. Further, to consider a section 113 claim, the entire picture of liability must be examined—thus any potential section 107 claims would have to be considered at such time. It seems that an application of both statutes of limitation cannot be applied separately to each claim.

In addition to the infeasibility of applying both statutes of limitation separately, policy suggests that courts should apply the shorter section 113 statute of limitations. As stated above, the entry of consent decrees provides a definite point at which a PRP is on notice of its obligations. Since the remaining PRPs will have to be sued under section 113 for the reimbursement costs suffered by the settling PRP (i.e. the original PRP subject to the consent decree) within three years, and these same defendant PRPs will be subject to a later suit under a section 107 cost recovery claim once cleanup activities begin, it only makes sense that the settling PRP be required to bring its 107 action alongside its section 113 action. This requirement would also provide for a considerable amount of judicial economy—courts would not be faced with apportioning liability among PRPs based solely on the amount reimbursed to the EPA under the consent decree, and then later having to apportion the amount incurred by the PRP during subsequent cleanup. These two apportionments could be years apart from each other due to the rather long period of time entailed in CERCLA cleanups. Stated another way, the "equitable distribution of common liability" among all PRPs cannot be determined by a court until the settling PRP's incurred response costs are known (or at least established with some certainty).

Consequently, by requiring a PRP to bring both section 107 and 113 claims at the same time, and within the shorter 3 year statute of

97. 42 U.S.C.A. § 9613(g)(3).

limitations, the court—as well as all PRPs—will be on notice as to what damages will eventually be apportioned among the parties. This will also prevent the bifurcation of section 107 and 113 cost determination, and save precious judicial resources.

D. Atlantic Research's Necessary Yet Somewhat Undesirable Interpretation of the 113 Settlement-Bar

Section 113(f)(2), referred to as the "settlement bar," prohibits section 113 contribution claims brought against any party that has resolved its liability to the federal or state governments in an administrative or judicially approved settlement.[98] Before *Aviall*, PRPs were ineligible to pursue section 107 cost recovery actions, and therefore, the settlement bar provided complete protection to PRPs that settled with the state or federal government. But as the circuit courts began to allow section 107 cost recovery actions following *Aviall*, (an approach affirmed in *Atlantic Research*) the question arose as to whether the settlement bar also protected settling PRPs' from these newer, PRP-brought section 107 actions. *Atlantic Research* ultimately decided the issue in the negative—PRPs that settle with the government are not protected from section 107 actions.[99] This conclusion was based on the plain text of section 113(f)(2).[100]

The court reasoned that any PRP sued by another PRP under section 107, despite prior settlement with the government, could simply counterclaim under section 113, triggering an equitable apportionment.[101] While this apportionment is a useful defense, the court passes by the fact that it opens up a significantly larger hole for liability following a settlement than existed before, claiming that PRPs will not be deterred by this change.[102]

Although this interpretation is clearly supported by the text of section 113, it no doubt waters-down the PRPs' incentive to settle with the EPA. However, it seems to go unmentioned that the alternative approach to the settlement bar, (forbidding 107 actions against settling

98. 42 U.S.C. § 9613(f)(2).

99. *Atlantic Research*, 127 S.Ct. at 2339.

100. *Id.* (giving the text of section 113(f)(2) little analysis—possibly due to its rather simple and straightforward language—the court rejected the Government's claims that allowing section 107 actions against settling PRPs would eviscerate PRPs' incentive to settle).

101. *Id.*

102. *See* 42 U.S.C.A. § 9613(f)(2) (stating that PRPs "shall not be liable for claims for contribution *regarding matters addressed in the settlement*" (emphasis added)). Before *Atlantic Research*, this was the only loophole that PRPs could use to bring a 113 claim against other PRPs who had already settled with the government—to challenge the settlement as not covering the subject matter of the claim.

PRPs as barred by 113) would possibly result in an inequitable settlement scheme. For if PRPs were to be protected from all CERCLA suits brought by other PRPs, there would inevitably be a stampede to settle with the EPA, which in light of the EPA's limited resources, could unjustly leave some PRPs performing cleanups with no other PRP's to seek contribution from; a race to the (EPA's) doorstep so-to-speak.

Although reducing the incentive to settle with federal or state government, the court's interpretation of the settlement bar is a necessary and very practical result of Congress' language. And as so aptly put by Justice O'Connor in *Aviall*, the principle still stands that, ". . . perhaps Congress should have used different language. That's our problem. We can't make it up."[103]

IV. Conclusion

The addition of section 113 to CERCLA by way of the Superfund amendments resulted in two contribution actions that were invariably tangled. Over time the courts have established rules that untangle the remedies by imposing additional limitations and that help direct traffic appropriately between the two. Regrettably, there is a situation in which these rules operate to stifle a PRP's ability to recover its cleanup costs; the consent decree and administrative order. Primarily, the courts' interpretations of section 107 and 113 have resulted in a focus on voluntariness and reimbursement, with the prior being the more problematic.

This comment has argued that, by discarding the "voluntariness" element in section 107 where such cleanup was compelled, PRPs that satisfy the plain statutory language of section 107 will retain the ability to recover costs from other PRPs who share cleanup responsibility. This argument is both equitable, and entirely consistent with CERCLA's purpose.

This comment has also argued that consent decrees are in essence settlements within the meaning of section 113(f)(B)(3), and should thus satisfy one of the required conditions for PRPs to pursue contribution actions under section 113. However, in line with the majority of courts, administrative orders should not satisfy this condition, as they unlikely constitute a civil action within the meaning of section 113.

Based on these arguments, the answer to the Court's consent decree problem—whether recovery should be had under section 107, 113, or both—is that *it should allow both*. By allowing recovery under 107 for only those costs incurred during cleanup under 107, and under 113 for

103. Oral Argument of Petitioner, Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004).