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## Superfund Chaos Theory: What Happens When the Lower Federal Courts Don't Follow the Supreme Court

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# SUPERFUND CHAOS THEORY: WHAT HAPPENS WHEN THE LOWER FEDERAL COURTS DON'T FOLLOW THE SUPREME COURT

Steven Ferrey\*

## ABSTRACT

*There is legal chaos in the national Superfund. The Supreme Court reversed decisions of eleven federal circuit courts in United States v. Atlantic Research Corp. There is no instance in modern Supreme Court history where the Court reversed every federal circuit court in the country, as it did in Atlantic Research. The Supreme Court's reversal was through a unanimous decision. This was extraordinary: It not only reversed the entire legal interpretation of one of America's most critical statutes, but also re-allocated billions of dollars among private parties.*

*The Supreme Court, when it rendered its decision, seemed to be rectifying a bottleneck in Superfund remediation of hazardous waste. However, in the decade since this Supreme Court decision, several federal trial and circuit courts have circumvented the Supreme Court command. This article illustrates how the lower federal courts have done this without violating Article III of the Constitution, by re-defining a one-word term.*

*The practical impact has been chaos in hazardous substance remediation across the U.S., affecting an estimated 600,000 contaminated waste sites. There are huge dollar impacts: addressing the 350,000 remaining contaminated sites in the U.S. would cost up to one-quarter trillion dollars, or an expenditure of \$6-8 billion annually.*

*This Article analyzes how the lower federal courts have circumvented the Supreme Court decisions, with particular focus on decisions and legal prestidigitiation in the most recent four years. This lower court inversion of the law is without much basis in law, and resurrects exactly what the Supreme Court thought it had overruled unanimously. What transpired in enforcement in the*

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*lower courts is not what the Supreme Court's opinion contemplated. This Article examines the method by which the lower federal courts have created an ongoing legal mechanism to circumvent the most important Supreme Court holding in a critical area of the economy.*

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### I. CIRCUMVENTING THE SUPREME COURT

There is legal chaos in the national Superfund program.<sup>1</sup> Recent lower court decisions create no judicial order or consistency of implementation.

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1. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), is also commonly known as the "Superfund." This is discussed in more detail *infra* Section II.

The Supreme Court in *United States v. Atlantic Research Corp.*<sup>2</sup> reversed decisions of eleven federal circuit courts—every appellate court that had decided a case.<sup>3</sup> How rare is this? There is no instance in modern Supreme Court history where the Court reversed every federal circuit court in the country, as it did there.<sup>4</sup> Further, it, in effect, reversed the courts of appeal in a unanimous Supreme Court opinion.<sup>5</sup>

There is a tortuous judicial history. Every federal court of appeals in the country had closed access for private parties to CERCLA Section 107 cost recovery, fundamentally frustrating private clean up of U.S. hazardous waste. Then, the Supreme Court issued a unanimous opinion to reopen this broad legal boulevard, by overturning the unanimous decisions of every federal appellate court.<sup>6</sup> This was extraordinary: It not only reversed the circuit court interpretations of one of America's most essential statutes, but also reallocated billions of dollars among private parties. However, in the decade since this Supreme Court decision, several federal trial and circuit courts have openly circumvented the Supreme Court's command, to reopen CERCLA Section 107 cost recovery to private parties.

Can this lower court circumvention happen under Article III of the Constitution? The Supreme Court, in its *Atlantic Research* decision, did not define an ordinary adverb used in its opinion that it thought was not subject to ambiguity: "voluntarily."<sup>7</sup> However, when billions of dollars are involved, every undefined term is subject to reconstruction and interpretation. Lower court re-interpretation of "voluntarily" has created uneven and contradictory terrain in the national legal landscape.

The Superfund's two cost recovery mechanisms, Sections 107 and 113, are not identical, or even similar, cost redistribution mechanisms for plaintiffs who incur costs to remediate hazardous waste.<sup>8</sup> They impose funda-

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2. *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007). This case affirmed that CERCLA allows potentially responsible parties to recover cleanup costs from other potentially responsible parties via an avenue previously closed by all other circuit courts. *Id.*

3. See discussion *infra* Section II.C. and accompanying notes.

4. Research undertaken by attorney Helene Newberg, a research assistant, looking at this precise question, working in conjunction with the librarians at Suffolk University Law School, was unable to document a situation where the Supreme Court unanimously effectively overturned opinions of all federal circuit courts covering all 50 states, or find any documentation of this having happened before. In *Atlantic Research*, the Supreme Court affirmed the Eighth Circuit's opinion in *Atl. Research v. UGI Utilities, Inc.*, 459 F.3d 827 (8th Cir. 2006), which was rendered after *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). There, the Eighth Circuit had reversed itself to open up private PRP access to Section 107 cost recovery and bring the appeal to the Supreme Court.

5. *Atl. Research*, 551 U.S. 128.

6. *Id.* at 131.

7. *Id.*

8. See *infra* Section II.B.

mentally opposed types of liability, they require different standards of proof, and their different statutes of limitations are often fatal to claimants.<sup>9</sup> Section 113 can leave a party with no legal remedy whatsoever because of lack of prior litigation against the claiming party.<sup>10</sup> These two statutory cost recovery provisions are not interchangeable.<sup>11</sup> They alter the outcome of how billions of dollars of waste liability are allocated in America.<sup>12</sup>

What is the impact of lower court subterfuge of a unanimous Supreme Court opinion that consciously reversed all of these same lower federal courts? The impact of some recent lower court decisions has been to discourage private party remediation (99% of all U.S. cleanup activities) of hazardous waste sites.<sup>13</sup> These inconsistent lower court decisions have created confusion and chaos in hazardous substance remediation across the United States, affecting an estimated 450,000–600,000 contaminated waste sites in the U.S.<sup>14</sup> There are huge financial impacts: Addressing remaining contaminated sites in the U.S. would cost up to one-quarter trillion dollars,<sup>15</sup> or an expenditure of \$6-8 billion annually for forty years.<sup>16</sup> For every single site EPA remediates itself, private parties clean up 100 sites.<sup>17</sup> Private party cost recovery through Superfund is the critical artery that must support the vital signs of the cost recovery process.

The Supreme Court decision did not control all residual discretion exercised by the lower courts, though. Several lower federal courts have circumvented the core element of the Supreme Court's decision by re-defining

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See U.S. EPA SCIENCE ADVISORY BOARD, SUPERFUND BENEFITS ANALYSIS 2005 (2006) [hereinafter SUPERFUND BENEFITS ANALYSIS], [https://yosemite.epa.gov/sab/SABPRODUCT.NSF/58ADDDDF28999BAC18525710100554A0F/\\$File/superfund\\_sab-adv-06-002.pdf](https://yosemite.epa.gov/sab/SABPRODUCT.NSF/58ADDDDF28999BAC18525710100554A0F/$File/superfund_sab-adv-06-002.pdf).

14. *Id.*; see also OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-ITE-252, SUPERFUND STRATEGY (U.S. Congress 1985); William Hyatt, *CERCLA Contribution; The Confusion Continues*, American College of Environmental Lawyers (Feb. 28, 2014), <http://www.aacol.org/post/2014/02/28/CERCLA-Contribution;-The-Confusion-Continues.aspx>; Robby Sanoff, *CERCLA's Confusion Between Section 107 and Section 113*, Law & the Environment (Feb. 24, 2015), <http://www.lawandenvironment.com/2015/02/24/cerclas-confusion-between-section-107-and-section-113/>.

15. See U.S. EPA, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS viii (2004). This lists includes: 125,000 leaking underground storage tanks, 6,400 Department of Defense Facilities, 3,800 Resource Conservation and Recovery Act "Corrective Action" sites, 736 National Priority List Superfund sites, 5,000 Department of Energy sites, and 150,000 sites that will be addressed by state remediation programs. *Id.* at 1–5.

16. *Id.* at viii.

17. Steven Ferrey, *Inverting the Law: Superfund Hazardous Waste Liability and Supreme Court Reversal of All Federal Courts*, 33 WM. & MARY ENVTL. L. POL'Y REV. 633, 687 (2009).

a term that the Supreme Court thought needed no definition.<sup>18</sup> The lower federal courts that did not choose to follow the *Atlantic Research* decision have done so by implementing one of three interpretive mechanisms in order to circumvent CERCLA Section 107's private party cost recovery:

- Defining costs incurred as not “voluntarily” undertaken,<sup>19</sup>
- disqualifying costs incurred at a point in time after settlement with EPA,<sup>20</sup> or
- reverting to the overturned rationale of choosing a prudential ability to disqualify claims.<sup>21</sup>

Each of these three legal mechanisms employs a different theory, but equally circumvents the Supreme Court's key decisions on Superfund liability. Section II examines the two relevant cost recovery provisions of the Superfund statute, focusing on their critical differences. Section II.C. analyzes the 2004 and 2007 Supreme Court watershed decisions that overturned the federal circuit courts' holdings that had closed off Section 107 recovery for potentially responsible parties (PRPs).

These two Supreme Court decisions sought to right the listing U.S. Superfund vessel. Sections III through V analyze how the lower federal courts have since circumvented and compromised the Supreme Court's 2007 decision.<sup>22</sup> Section III asks “what's in a word?” In particular, some lower courts have creatively defined the term used by the Supreme Court, “voluntarily,” to disqualify a very large portion of the class of private parties for

18. See *infra* Section III.

19. See *id.* This chapter examines how courts have differed on what is or is not “voluntarily” undertaking a cleanup and seeking to recover these costs under Section 107, such that certain courts, but not others, have used this term to circumvent the Supreme Court's basic holding.

20. See *infra* Section IV. This chapter examines how certain courts, but not others, have cut off application of the Supreme Court's basic holding by disqualifying costs incurred after a private claimant's settlement with EPA.

21. See *infra* Section V. This chapter examines how some courts have reverted to the rationale prior to the key Supreme Court decision to again assert that a lower court can make a prudential election to require plaintiffs to only make a claim under Section 113 and not Section 107 for various, now very suspect, reasons.

22. This article considers the most recent four years when more profound disarray has occurred. When the original *Atlantic Research* opinion was issued, an article tracked its clear direction. Ferrey, *supra* note 17, at 633. The first missteps were tracked. Steven Ferrey, *The Superfund Cost Allocation Liability Conflicts Among the Federal Courts*, 11 VT. J. ENVTL. L. 249 (2009–10) [hereinafter Ferrey, *Superfund Cost Allocation Liability Among the Federal Courts*]. The confusion in the first 5 years after the *Atlantic Research* decision was also examined. Steven Ferrey, *Toxic “Plain Meaning” and “Moon-shadow”: Supreme Court Unanimity and Unexpected Consequences*, 24 VILL. ENVTL. L.J. 1 (2013) [hereinafter Ferrey, *Toxic “Plain Meaning” and “Moon-shadow”*].

which the Supreme Court reestablished legal cost recovery access in *Atlantic Research*.

Section IV analyzes the second mechanism by which some lower federal courts block the *Atlantic Research* decision. Some lower federal courts allow cost recovery for costs incurred before a settlement with the government, and disqualify and block costs incurred thereafter. Other federal courts disagree. This appears to be a false distinction not embodied in the statute, based on timing of when the expenditure is made.

Section V examines trial courts and circuit courts that block private party access to Section 107 Superfund cost recovery, contrary to *Atlantic Research*, based on nothing but their own discretion. Shifting plaintiffs to Section 113 of the Superfund imposes a much more significant burden and often no, or at least less, remuneration on good faith plaintiffs than allowing their use of Section 107. Notably, in the two 2004 and 2007 Supreme Court decisions, the Court mandated just the opposite balance, opening up Section 107 and restricting Section 113. This inversion of the law by lower federal courts, based on judicial discretion, and not the Superfund statute, is exactly what the Supreme Court thought it had overruled unanimously.

This article analyzes different federal courts' applications or rejections of each of these three mechanisms to circumvent the Supreme Court's *Atlantic Research* decision. Section III, IV, and V compare and contrast elements of each legal mechanism. A notable distinction is that one mechanism operates on the timing of remediation expenditures, another on how settlers craft their settlements, and the third on the prudential preferences of certain courts. Each mechanism renders Section 107 of CERCLA allocation of hazardous substance response costs unavailable to "any . . . parties" for whom the Supreme Court declared the statute clearly provided a remedy under the plain meaning of Section 107. These three mechanisms circumvent plain meaning and create an inconsistent patchwork of jurisprudence in federal courts. Section VI contrasts and integrates the impacts of all of the new theories recently created by the lower courts regarding Superfund cost recovery. Section II next examines what Superfund does and does not provide as a matter of statute.

## II. SUPERFUND LIABILITY UNDER CERCLA'S UMBRELLA

### A. *The Federal Statute*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the "Superfund," was enacted by Congress in 1980 to protect public health and the environment from

hazardous substances released into the environment.<sup>23</sup> Under CERCLA Sections 104 and 106(a), respectively, the Federal Government is empowered to either clean up a contaminated area itself, or compel the responsible parties to perform the cleanup.<sup>24</sup> Under either circumstance, the cost incurred during the cleanup process will be recoverable by the EPA from potentially responsible parties (PRPs) under Section 107 of the statute in a cost-recovery action brought by the U.S. government.<sup>25</sup> Section 9607(a)(4)(B) of CERCLA makes all PRPs liable for “any . . . necessary costs of response incurred by any other person.”<sup>26</sup>

The language in Section 107 does not clearly state whether a private party may seek cost recovery against other private or government PRPs, after it is found liable under CERCLA.<sup>27</sup> Yet, before Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA), courts consistently held that a PRP could sue another private party PRP under Section 107(a)(4)(B) for either cost-recovery or contribution.<sup>28</sup> In SARA, Congress amended CERCLA Section 113 to mirror Section 107, and codified the federal courts’ interpretations.<sup>29</sup> SARA expressly grants private parties the right to seek cost contribution during or after a cost recovery or EPA judicial enforcement action, or after settling its CERCLA liability with the United States or a state “in an administrative or judicially approved settlement.”<sup>30</sup> Given the strict liability imposed by CERCLA for cost re-

23. U.S. EPA, *Superfund History*, EPA.GOV, <https://www.epa.gov/superfund/superfund-history> (last visited Aug. 27, 2016).

24. 42 U.S.C. §§ 9604, 9606(a) (2014). These sections provide a framework for the President, his or her delegated agent, EPA, or Attorney General to initiate “federal abatement and enforcement actions” against private responsible parties. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) (explaining in general relevant parties’ rights and responsibilities under CERCLA provisions).

25. 42 U.S.C. § 9607.

26. 42 U.S.C. § 9607(a)(4)(B).

27. See 42 U.S.C. § 9607.

28. 42 U.S.C. § 9607(a)(4)(B). The statute provides that “any person who accepts or accepted any hazardous substances . . . shall be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan.” *Id.* Using the plain language approach in interpreting the statute, the courts held that PRPs are “any other person” who can recover liability costs under Section 107(a)(4)(B). See Ferrey, *supra* note 17, at 639–40 (noting Section 107(a) did not clearly define whether or not PRPs can recover under this section); see also Ronald G. Aronovsky, *A Preemption Paradox: Preserving The Role Of State Law In Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225, 240 (2008) (noting before Section 113 passed, courts allowed PRPs using Section 107 to recover against other PRPs); Steven Ferrey, *Allocation & Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 59 (1994) (arguing for infusion of common law equity principles despite explicit exclusion in language of statute).

29. See 42 U.S.C. § 9613.

30. 42 U.S.C. § 9613(f)(1), (f)(3)(B).



covery and the limited resources of both private parties and the government for prosecutions, settlement of liability is often the most expeditious solution.<sup>31</sup>

To encourage liability settlement with the federal government, Section 113(f)(2) also provides a liability shield against contribution claims regarding the same matter addressed in the settlement agreement.<sup>32</sup> So, once a party settles through an approved settlement with the government, it insulates itself: (1) from future suit by either the federal or state governments; and (2) from suit by other private parties, directly or in counterclaims. These are important shields, and lawyers would counsel their clients to obtain this protection before seeking contribution from other private parties. This protection would immunize their clients against any counterclaims raised by the parties sued.

### B. Section 107 Liability is Not Section 113 Liability

Before 2004, parties were fighting over whether Section 107 or the new Section 113 contribution right, added to CERCLA in 1986 amendments, should be used to allocate liabilities among PRPs.<sup>33</sup> Plaintiffs favored Section 107 because where the harm cannot be proved to be divisible, it can impose joint and several liability on defendants.<sup>34</sup> Joint and several liability, when applicable, strictly imposes 100% of total waste site cleanup liability on any and all PRPs who are successfully sued.<sup>35</sup> A settling PRP also strategically can choose which and how many non-settling defendants to sue as a private party under Section 107.<sup>36</sup> It is much easier for a plaintiff to prove damages against a lesser number of defendants than bearing the burden of proof severally against every one of often thousands of non-settling PRPs.<sup>37</sup>

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31. See generally *Superfund Cleanup Activities: Hearing Before the S. Subcomm. on Superfund, Waste Control and Risk Assessment* (statement of Lois J. Schiffer, Assistant Att’y Gen., Env’t and Nat. Res. Div, Dep’t of Justice, Mar. 21, 2000), <https://www.justice.gov/archive/enrd/59380.htm>.

32. 42 U.S.C. § 9613(f)(2).

33. See Aronovsky, *supra* note 28, at 242–43.

34. *Id.* at 239 n.72.

35. See Cornell University Law School, Legal Information Institute, *Joint and Several Liability*, [https://www.law.cornell.edu/wex/joint\\_and\\_several\\_liability](https://www.law.cornell.edu/wex/joint_and_several_liability) (last visited Oct. 1, 2016) (“When two or more parties are *jointly and severally liable* for a tortious act, each party is independently liable for the full extent of the injuries stemming from the tortious act. Thus, if a plaintiff wins a money judgment against the parties collectively, the plaintiff may collect the full value of the judgment from any one of them. That party may then seek contribution from the other wrong-doers.”).

36. STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATION 454 (7th ed. 2016).

37. *Id.*

The defendant, in contrast, favored Section 113 of CERCLA because it only imposes several liability on PRP defendants.<sup>38</sup> Under Section 113(f)(1) the courts have allocated response costs among responsible parties using equitable factors that they deem appropriate.<sup>39</sup> Yet under Section 113(f), plaintiffs must prove the proportionate share of liability and costs for each and every defendant severally.<sup>40</sup> Furthermore, liability is never completely shifted from the PRP plaintiff; rather, the plaintiff retains its equitable share of the cleanup costs, as well as the share of any PRP against whom the plaintiff cannot sustain its burden.<sup>41</sup> As proving apportionment of all liability is challenging, the plaintiff often absorbs significant ‘orphan shares’ of liability.<sup>42</sup>

If liability under Section 113(f) is merely several regarding an individual defendant, the plaintiff bears the burden to prove the proportionate share of liability for each and every defendant.<sup>43</sup> CERCLA Sections 107 and 113 are not similar legal mechanisms. They provide fundamentally opposed and different types of liability, statutes of limitations, and requirements of proof, all of which change case outcomes.<sup>44</sup>

Section 107 is preferable to Section 113 for most plaintiffs due to the availability of joint and several liability, a doubly long statute of limitations period compared to Section 113,<sup>45</sup> the necessity only to name and prosecute a few and not all liable parties, and traditionally the unavailability of equitable defenses to defendants (beyond the statutorily prescribed defenses).<sup>46</sup> In addition, there is no express statutory prohibition against equitable considerations applied to claims adjudicated under Section 107.<sup>47</sup> Finally, Sec-

38. *Id.*

39. 42 U.S.C. § 9613(f)(1) (2014); *e.g.*, *Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp. 2d 251, 264 (D. Conn. 2003) (citing *Goodrich Corp. v. Town of Middlebury*, 311 F.3d 154, 168 (2d Cir. 2002)).

40. *See Ferrey*, *supra* note 17, at 641.

41. *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998).

42. *Ferry*, *supra* note 17, at 657.

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

44. *FERREY*, *supra* note 36, at 454.

45. *Compare* 42 U.S.C. § 9607, *with* 42 U.S.C. § 9613.

46. *See FERREY*, *supra* note 36, at 453–56 (noting differences between Sections 107 and 113).

47. *See United States v. Hardage*, 116 F.R.D. 460, 465 (W.D. Okla. 1987) (allowing equitable factors raised as defense to bar government’s Section 107 claims). This opinion, however, is not followed by many other courts. *E.g.* *United States v. NCR Corp.*, No. 10-C-910, 2012 WL 5831201, at \*2 (E.D. Wisc. Nov. 16, 2012) (“[T]he case is from the Jurassic period (in CERCLA years) and has not been followed elsewhere.”); *United States v. Webzeb Enterprises, Inc.*, 809 F. Supp. 646, 658 n.18 (S.D. Ind. 1992).

tion 107 is less likely to result in the plaintiff absorbing “orphan shares” of unfunded PRP liability.<sup>48</sup>

What both CERCLA Sections 107 and 113 share, if used offensively by a party after it settles its liability with the government, is an automatic shield against claims or counterclaims by other private parties or the government.<sup>49</sup> Congress provided protection from additional future liability to all settling PRPs in a judicially- or administratively-approved settlement.<sup>50</sup> This protection extends to future actions prosecuted by both private PRPs and the government, but only for matters covered by the settlement pursuant to Section 113(f)(2).<sup>51</sup> Contribution protection is effective as soon as a settlement is signed, and it is not dependent on the fulfillment of any duties undertaken by the settlor.<sup>52</sup> A settlement with the government confers absolute protection against counterclaims by non-settling defendants,<sup>53</sup> whether or not this optional provision is inserted in a consent decree.<sup>54</sup> In order to ensure this protection, however, the settling PRP must settle via a consent decree, as opposed to responding to a unilateral administrative order from EPA under Section 106.<sup>55</sup> This distinction is critical, as plaintiffs must first be sued in order to use Section 113, something Section 107 does not require.

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48. See FERREY, *supra* note 36, at 448–49 (providing example of orphan share allocation).

49. 42 U.S.C. § 9613(f)(2).

50. *Id.*

51. *Id.* “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.” *Id.* This applies to any settlement of any kind of government claim. *Id.* Invariably, EPA brings Section 107 claims because it has incurred response costs, and does not bring Section 113 claims, and this is the claim that PRPs settle with the government. FERREY, *supra* note 36, at 421–22. Since other PRPs who do not expend money for cleanup only have a Section 113 contribution claim and not a Section 107 response cost claim, Section 107(f) blocks any claim of the other PRPs against the settling party. *Id.* at 459–60 (explanation 2a).

52. *Dravo Corp. v. Zuber*, 13 F.3d 1222, 1226 (8th Cir. 1994) (holding that, pursuant to Section 122(a), *de minimis* settlors receive automatic and instantaneous contribution protection subject to a condition subsequent to fulfill duties).

53. 42 U.S.C. § 9613(f)(2).

54. *Id.* This contribution protection occurs when a settlement is either judicially or administratively approved. Some precedent holds that this protection operates as a complete bar to its contribution claims. See, e.g., *Comercia Bank-Detroit v. Allen Indus.*, 769 F. Supp. 1408, 1413–14 (E.D. Mich. 1991); *United States v. Pretty Prods.*, 780 F. Supp. 1488, 1493–94 (S.D. Ohio 1991); *Allied Corp. v. Frola*, 730 F. Supp. 626, 639 (D.N.J. 1990); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 675 (D.N.J. 1989). Under this theory, such protection could not be waived by the beneficiary of the protection.

55. See *Dravo*, 13 F.3d at 1225–28.

Therefore, no prudent PRP would spend large amounts of money beyond its own share of responsibility to clean up a third-party site. Without a prior or simultaneous settlement with the government to bar all future government or third-party claims, a private party has not screened itself off from future litigation or counterclaims in its own litigation.<sup>56</sup> Section 113, while available, may be of limited use if the statute of limitations accompanying Section 113 has expired, there was no prior litigation and settlement with the government, or that litigation and settlement is not with an appropriate level of government.<sup>57</sup>

### C. *The Evolution of Precedent*

Prior to 1994, none of the circuit courts had directly addressed the issue of whether a PRP had standing under Section 107 to recover cleanup costs, and the Supreme Court had only touched upon the question as a background issue.<sup>58</sup> District courts split on whether a PRP could elect between a Section 107 and a Section 113 claim.<sup>59</sup> More than a dozen primarily trial court decisions found no legislative barrier to a Section 107 action by private plaintiff parties.<sup>60</sup> The author published an article in 1994 that con-

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56. See 42 U.S.C. § 9613(f)(2) (providing contribution protection to private parties who settle with government).

57. See 42 U.S.C. § 9613.

58. See *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) (not answering the question of whether only “innocent” parties had standing under Section 107 cost-recovery claims; rather, merely holding that Section 107 did not provide for the award of attorney’s fees).

59. For examples of district courts that had allowed PRPs to raise a Section 107 claim, see *Cos. for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994); *United States v. SCA Servs. of Ind., Inc.*, 849 F. Supp. 1264, 1270 (N.D. Ind. 1994); *Transp. Leasing Co. v. California*, 861 F. Supp. 931, 937–38 (C.D. Cal. 1993). For examples of district courts that have held that PRPs may not use Section 107 to recover response costs, see *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1362–65 (D.N.J. 1996); *Kaufman v. Unisys Corp.*, 868 F. Supp. 1212, 1214–16 (N.D. Cal. 1994).

60. *E.g.*, *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993) (affirming *Amcast Indus. Corp. v. Detrex Corp.*, 36 ERC 1355 (N.D. Ind. 1992)); *General Electric Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415 (8th Cir. 1990); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159 (W.D. Ky. 1995); *Bethlehem Iron Works, Inc. v. Lewis Indus.*, 891 F. Supp. 221 (E.D. Pa. 1995); *United States v. Atlas Minerals & Chems.*, Civ. A. No. 91-5118, 1995 WL 510304 (E.D. Pa. Aug. 22, 1995); *Walkill v. Tesa Tape Inc.*, 891 F. Supp. 955 (S.D.N.Y. 1995); *SCA Servs.*, 865 F. Supp. 533; *Cos. for Fair Allocation*, 853 F. Supp. at 579–80; *Oshtemo v. American Cyanamid Co.*, No. 1:92:CV:843, 1993 WL 561814, at \*2 (W.D. Mich. Aug. 19, 1993); *Barton Solvents, Inc. v. Sw. Petro-Chem, Inc.*, Civ. A. No. 91-2382-GTV, 1993 WL 382047, at \*2 (D. Kan. Sept. 14, 1993); *Transp. Leasing*, 861 F. Supp. at 938; *Virginia v. Peck Iron Metal Co.*, 814 F. Supp. 1269 (E.D. Va. 1992); *United States v. Kramer*, 757 F. Supp. 397, 413–14 (D.N.J. 1991) (no distinction between government or “any other person” employing Section 107 for cost recovery); *Kelley v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990); *United*

cluded that the legally correct interpretation of CERCLA by appellate courts going forward was that Section 107 was available to all private parties.<sup>61</sup>

That article did not sway the appellate courts. Beginning in 1994 there began a decade of cascading federal circuit opinions, each in essence concluding that when Congress stated “every other person” could use Section 107, it actually meant that “no other person” could use Section 107. During the next decade, each of the eleven federal circuits (excluding the D.C. Circuit, which did not hear a case with this dispute), barred most plaintiffs from using CERCLA’s Section 107 cost recovery mechanism: the Seventh<sup>62</sup> (July 1994), the First<sup>63</sup> (Aug. 1994), the Tenth<sup>64</sup> (Mar. 1995), the Eleventh<sup>65</sup> (Sept. 1996), the Third<sup>66</sup> (May 1997), the Ninth<sup>67</sup> (July 1997), the

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States v. Hardage, 750 F. Supp. 1460, 1495 (W.D. Okla. 1990); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1119 (N.D. Ill. 1988); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 915–16 (N.D. Okla. 1987); United States v. Hardage, 116 F.R.D. 460 (W.D. Okla. 1987).

61. Ferrey, *supra* note 28.

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

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

64. United States v. Colo. & E.R.R. Co., 50 F.3d 1530, 1535 (10th Cir. 1995) (denying plaintiff’s ability to proceed under Section 107 and finding claim instead controlled by Section 113(f)).

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

66. New Castle Cty. v. Halliburton Nus Corp., 111 F.3d 1116, 1126 (3d Cir. 1997) (denying plaintiff’s cost recovery claim under Section 107 because plaintiff was potentially responsible person).

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

Fifth<sup>68</sup> (Aug. 1997), the Fourth<sup>69</sup> (Apr. 1998), the Sixth<sup>70</sup> (Aug. 1998), the Second<sup>71</sup> (Sept. 1998), and the Eighth (Aug. 2003).<sup>72</sup>

Thus, notwithstanding the author's law review article at NYU in 2004 cautioning that PRPs could employ Section 107 of CERCLA for private cost recovery actions,<sup>73</sup> the Federal Courts of Appeals uniformly barred Section 107 cost recovery by private parties.<sup>74</sup> To do so, in effect, they had to conclude that when Congress stated "every other person"<sup>75</sup> could use Section 107, it actually did not mean to say this.

Many of the federal circuit opinions overruled their trial courts to arrive at restrictive statutory interpretations regarding the federal structure of incentives for private hazardous substance cleanup.<sup>76</sup> These eleven circuit court opinions closed off the primary path to share or allocate hazardous waste cleanup costs, without any compelling legislative history, contrary to the principles articulated in all other federal hazardous waste jurisprudence, and contrary to the accepted canons of statutory construction.<sup>77</sup>

## 1. Cooper v. Aviall

The Supreme Court finally had a CERCLA private cost recovery dispute to settle in 2004. In *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>78</sup> the Supreme Court held that a private party cannot initiate a claim under Section 113(f)(1) against other PRPs for contribution of their share of hazard-

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

69. *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (discussing validity of Section 107 claim and allocation of responsibility and costs).

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

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

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

73. *Ferrey*, *supra* note 28.

74. *See supra* notes 62–72; *FERREY*, *supra* note 36, at 437.

75. 42 U.S.C. § 9607(a)(2) (2014).

76. *See, e.g.*, *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) (overruling *OHM Remediation Servs. v. Evans Cooperage Co., Inc.* 116 F.3d 1574 (5th Cir. 1997)).

77. *See generally* LARRY M. EIG & CONG. RESEARCH SERV., *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* (2011), <https://www.fas.org/sgp/crs/misc/97-589.pdf>; *Ferrey*, *supra* note 17, at 639–40, 710–15.

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

ous waste cleanup costs, unless and until that plaintiff itself had been sued by or settled with the government under Section 107(a) or Section 106 of CERCLA.<sup>79</sup> The two dissenters in this decision sought to go further in the opinion and address whether there was a private right to cost recovery under Section 107(a); Justice Ginsberg, joined by Justice Stevens, would have ruled on the Section 107 issue notwithstanding it not being briefed to the Court.<sup>80</sup> However, because Cooper had been forced to drop its alternative Section 107 claim after the initiation of litigation, the issue was neither briefed nor addressed in the circuit court opinion on review, and therefore, was not before the Court.<sup>81</sup> This decision cut off Section 113 as an effective cost reallocation route where there had not been prior litigation with the government or where there was an EPA administrative order rather than litigation.

Eliminating one of two routes to share cost responsibility for hazardous waste cleanup caused a nationwide crisis, especially because eleven federal circuits had previously cordoned off the only other recovery route, Section 107.<sup>82</sup> The combination of *Cooper v. Aviall* and eleven circuits closing off Section 107 recovery paralyzed the nation's hazardous waste cleanup effort.<sup>83</sup>

After *Cooper* the Second and Eighth Circuits reversed their prior holdings, and reopened Section 107 to PRPs.<sup>84</sup> It appears the hope was to break gridlock, and encourage voluntary hazardous waste remediation. But other circuits continued to hold that PRPs could not recover cleanup costs under

79. *Id.* at 166–67. The only two dissenters in this decision, Justices Ginsburg and Stevens, did not oppose the core outcome of the case, but rather they intended to go further with a discussion of whether or not the private parties can recover under Section 107 before found liable under CERCLA. *See id.* at 172–74 (urging the Fifth Circuit to reconsider applicability of Section 107).

80. *Id.* at 172. Justice Ginsburg's dissent notes that in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the Supreme Court in *dicta* stated that Section 107 “unquestionably provides a cause of action for [PRPs].” *Id.* at 172. Justices Scalia and Thomas, dissenting in *Key Tronic*, but in the majority in *Cooper*, also favored a private right of action under Section 107. Justice Ginsberg noted that in *Key Tronic* “no Justice expressed the slightest doubt that § 107 indeed enables a PRP to sue other covered persons for reimbursement . . . of cleanup costs.” *Id.*

81. *Id.* at 174 (following plain meaning of Section 113 language).

82. *See supra* notes 62–72.

83. *See Ferrey, supra* note 17, at 636 (“The decisions of these circuit courts paralyzed hazardous waste clean-up across the nation.”).

84. *See Ferrey, The Superfund Cost Allocation Liability Conflicts Among the Federal Courts, supra* note 22, at 267–70 (noting the Second and Eighth Circuit Courts’ “U-turn” after the *Cooper* decision).

Section 107.<sup>85</sup> Nonetheless, these two circuit court reversals created a circuit split that the Supreme Court could resolve.

## 2. Atlantic Research

In 2007, the Supreme Court did resolve CERCLA liability allocation among PRPs in *Atlantic Research*.<sup>86</sup> Using the plain language of Section 107, the Supreme Court reversed the original decisions of all eleven circuits' previous decisions and reopened Section 107 to PRPs.<sup>87</sup> The Court also addressed key distinctions on the use of both provisions. Although Sections 107 and 113 are complementary, for a PRP who incurred costs to satisfy a settlement agreement with the government or a court judgment, Section 113 will be the exclusive remedy.<sup>88</sup> Section 107 will be the exclusive remedy for a PRP who voluntarily incurred cleanup costs.<sup>89</sup>

The Supreme Court's decision in *Atlantic Research*, clarified that "any . . . person" voluntarily incurring remediation costs is entitled to utilize the Superfund's Section 107 cost recovery mechanism, did not define the critical issue of what was a "voluntary" expenditure.<sup>90</sup> The Supreme Court also clarified that "a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a)."<sup>91</sup> The Supreme Court noted that voluntarily incurred costs may only be allocated by recourse to Section 107; however, the line between what is and is not voluntary was not defined.<sup>92</sup>

And this lack of definition of a common term would render the Court's decision subject to lower federal court inconsistency and fundamentally dif-

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85. See *id.* at 270–71 (noting some circuits followed the Third and Fifth Circuits' opinions and held that Section 107 was not available to PRPs).

86. *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (affirming a 2006 post-*Aviell* opinion of the 8th Circuit, *Atl. Research v. UGI Utilities, Inc.*, 459 F.3d 827 (8th Cir. 2006), which had reversed itself to open up private PRP access to Section 107 cost recovery).

87. See *Atl. Research*, 551 U.S. at 135–36 (holding "any other person" in Section 107(a)(4)(B) meant to include any other persons who are not the United States, a State, or an Indian tribe). The court also noted that Sections 107 and 113 provide two distinctive remedies: Section 107 provides cost recovery to a PRP to recover cleanup costs, and Section 113 "authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a)." *Id.* at 139–40.

88. *Id.* at 139.

89. *Id.* at 139 n.6.

90. *Id.* at 132.

91. *Id.* at 139 (describing allocation of costs sought to be paid under Section 107).

92. *Id.* at 141 (affirming lower court decision in line with author's opinion which did not define the term "voluntarily").



ferent interpretation. While many circuits did show clear movement in response to the *Cooper* and *Atlantic Research* opinions, some circuits struggled with whether or not “voluntary” cleanup included remediation after entering a consent decree with the government.<sup>93</sup>

“Voluntary” has proven to not be a commonly understood word.<sup>94</sup>

#### D. Recent Vectors of Judicial Interpretation

Although some courts initially continued to prevent Section 107 cost recovery remedies for private PRPs despite the ruling in *Atlantic Research*,<sup>95</sup> some courts in the past four years have been more supportive of private party access to Section 107 cost recovery.<sup>96</sup> In determining whether cost recovery or contribution applies, courts have sorted through different factors, none of which were required to be considered by the Supreme Court decision in *Atlantic Research*:

- The “voluntary” nature of the costs incurred;<sup>97</sup>
- whether the parties had entered into a settlement or consent decree with state or federal governments, which some courts deem to affect the “involuntariness” of the future cleanup; however, prior litigation is the necessary statutory trigger for private party Section 113 contribution claims after the *Cooper* decision;<sup>98</sup> and

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93. Compare *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646–48 (W.D. Mich. 2009) (holding that a plaintiff who was required to pay cleanup costs pursuant to consent decree could not bring a cost recovery claim), and *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1042–43 (E.D. Wisc. 2008) (holding cleanup costs incurred pursuant to a consent decree were not incurred voluntarily), and *Reichhold, Inc. v. U.S. Metals Refining Co.*, Civ. No. 03-453 (DRD), 2008 WL 5046780, at \*7 (D.N.J. Nov. 20, 2008) (interpreting “voluntary” as having responded to no litigation or order on the record), and *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 401 (N.D.N.Y. 2006) (holding plaintiff who entered consent decree could not bring Section 107 claim), with *Schaefer v. Town of Victor*, 457 F.3d 188, 201–02 (2d Cir. 2006) (holding that Section 107 is available to parties who conducted cleanup pursuant to consent decrees).

94. See *infra* Section II.D.

95. Ferrey, *Toxic “Plain Meaning” and “Moon-shadow,” supra* note 22, at 2.

96. See *infra* Sections IV.A.1–B.1, V.A.1–V.B.1.

97. See, e.g., *Litgo N.J., Inc. v. Comm’r N.J. Dep’t of Env’tl. Prot.*, 725 F.3d 369, 392 (3d Cir. 2013); *Bernstein v. Bankert*, 702 F.3d 964, 981–84 (7th Cir. 2012), *amended on reh’g*, 733 F.3d 190 (7th Cir. 2013); *LWD PRP Grp. v. ACF Indus., LLC*, No. 5:12-CV-00127-JHM, 2014 WL 901648, at \*6 (W.D. Ky. Feb. 7, 2014); *United States v. D.S.C. of Newark Enters., Inc.*, No. 09-2270 (MLC), 2013 WL 2658929, at \*19–21 (D.N.J. June 12, 2013); *Queens W. Dev. Corp. v. Honeywell Int’l, Inc.*, No. 10-4876, 2011 WL 3625137, at \*8–11 (D.N.J. Aug. 17, 2011).

98. See, e.g., *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013); *Bernstein*, 702 F.3d 964; *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1235–37 (11th Cir. 2012); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 599 (8th Cir. 2011);

- the nature of the contemplated remedies and liabilities imposed by the two CERCLA sections – possibility of joint and several, strict liability under Section 107 cost recovery contrasted with the ability to apportion costs under Section 113 contribution.<sup>99</sup>

While some courts examined all three of these issues to reach their decisions, others focused on a single issue regarding the applicability of the different CERCLA remedies. Since *Cooper*, there must be a civil action against a private PRP for it to initiate a Section 113 contribution action against other parties, so as to spread its cleanup liability.<sup>100</sup> Federal courts are split on whether an administrative order on consent (AOC) entered by the government with a private party allows a private plaintiff to use Section 113 contribution actions against other liable parties.<sup>101</sup> Unilateral administrative orders can qualify as civil actions to satisfy the prerequisite for a PRP's contribution claim under Section 113(f)(1) in some courts; however, the majority of decisions hold that an AOC does not qualify as it is not the result of a "civil action."<sup>102</sup> Under this rationale, an AOC is only a pre-litigation agency resolution or settlement; it does not settle a contested adjudicatory proceeding.

This article next analyzes each of these three considerations individually, segregating the district court and appellate decisions that addressed each issue, and examining how courts facing similar facts reached different outcomes.

W.R. Grace & Co. v. Zotos Int'l, Inc., 559 F.3d 85 (2d Cir. 2009); Ford Motor Co. v. Mich. Consol. Gas Co., 993 F. Supp. 2d 693, 697 (E.D. Mich. 2014); Carolina Power & Lighting Co. v. Alcan Aluminum Corp., No. 5:08-CV-460, 2013 WL 1246833, at \*1 (E.D.N.C. Mar. 27, 2013); Cyprus Amax Minerals Co. v. TCI Pac. Commc'ns, Inc., No. 11-CV-0252-JED-PJC, 2013 WL 6238485 (N.D. Okla. Dec. 3, 2013); BFI Waste Sys. v. City of Belvidere, No. 09 C 50061, 2011 WL 9105930, at \*2 (N.D. Ill. Mar. 15, 2011).

99. NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 690 (7th Cir. 2014); *Solutia*, 672 F.3d at 1235–37; Whittaker Corp. v. United States, No. CV 13-1741 FMO (JCx), 2014 WL 631113, at \*1 (C.D. Cal. Feb. 10, 2014); Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 923 F. Supp. 2d 1086, 1093 (S.D. Ohio 2013); Tennessee v. Roan Holdings, Ltd., 835 F. Supp. 2d 527 (E.D. Tenn. 2011).

100. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165–66 (2004).

101. See, e.g., *Bernstein*, 702 F.3d at 981–84, amended on reh'g, 733 F.3d 190 (7th Cir. 2013); *Centerior Serv. Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344, 351–52 (6th Cir. 1998) (holding that potentially responsible parties could not bring joint and several cost recovery action, but were restricted to action for contribution); *LWD PRP Grp.*, 2014 WL 901648, at \*6; *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 840–41 (W.D. Tenn. 2006) (holding that unilateral administrative orders can qualify as civil actions).

102. See, e.g., *Carrier Corp.*, 460 F. Supp. at 840–41 (holding that unilateral administrative orders can qualify as civil actions); see also *Centerior Serv.*, 153 F.3d at 351–52 (holding that potentially responsible parties could not bring joint and several cost recovery action, but were restricted to action for contribution).

### III. THE “VOLUNTARY” NATURE OF PLAINTIFFS’ COST INCURSION: A NEW META SCREEN

#### A. *In the Federal Appellate Courts*

Clearly, some of the eleven courts of appeals whose CERCLA decisions were overturned by *Atlantic Research* did not want to follow the Supreme Court command to open up Section 107 cost recovery actions to private parties. One way to circumvent *Atlantic Research* would be to seize upon an undefined term in the Court’s opinion; namely, whether costs were “voluntarily” incurred.

Following *Atlantic Research*, several federal appellate courts have emphasized the ‘voluntariness’ of incurred costs when tasked with determining whether a party may pursue Section 107 cost recovery, Section 113 contribution, both, or neither. Although the word “voluntary” appears nowhere in the text of either Sections 107 and 113,<sup>103</sup> it has become a lynchpin in circuit court arguments that favor preclusion of Section 107 for private parties’ cost recovery claims. How a court determines whether actions are voluntary after a party enters a protective settlement with the government (in order to obtain contribution protection) can present a problem for PRPs pursuing Section 107 cost recovery claims. The common-sense settlement approach can end up eliminating access to Section 107 cost recovery in some, though not all, circuits.

Of the many lower federal court cases that have followed and cited the *Atlantic Research* Supreme Court decision, the Seventh Circuit decision in *Bernstein v. Bankert* is one of the more cogent in clarifying when private party cleanup costs are “voluntary” versus “compulsory.”<sup>104</sup> In this case, the plaintiff, a trustee of a trust formed to fund the cleanup of a CERCLA site originally sought Section 107 cost recovery from the defendant owners of the site (who owed money to the trust).<sup>105</sup> Defendant had previously entered into two AOCs with the EPA and the state environmental agency.<sup>106</sup> Although the district court ruled that the trustee’s only available remedy was for contribution under Section 113 because of these settlement agreements, the federal appeals court disagreed.<sup>107</sup>

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103. 42 U.S.C. §§ 9607, 9613 (2014).

104. *Bernstein v. Bankert*, 702 F.3d 964, 981–84 (7th Cir. 2012), *amended on reh’g*, 733 F.3d 190 (7th Cir. 2013).

105. *Id.* at 969.

106. *Id.* at 970. The trustee claimed both contribution and cost recovery remedies under both CERCLA and the state environmental statute after the trust had entered into two separate consent decrees, one in 1999 that had been fully complied with and completed and another in 2002 which had not yet been completed. *Id.* at 970–71.

107. *Id.* at 977–78.

The court explained that the defendants had misinterpreted *Atlantic Research* with respect to “voluntarily” incurred costs compared to “compulsory” costs incurred by the plaintiff PRP.<sup>108</sup> The defendant’s contention that Section 107 claims can only apply to voluntarily incurred costs “impos[es] a requirement not evident on the face of the statute” and “arguably violates fundamental rules of statutory construction.”<sup>109</sup>

The default position of the Court in *Atlantic Research* was that Section 107 was reopened for private party cost recovery.<sup>110</sup> *Bernstein* implies that *Atlantic Research* wanted to clarify that claims for costs voluntarily incurred cannot be brought as contribution claims under Section 113, as per *Cooper*, which requires prior compulsion by suit.<sup>111</sup> Rather, such voluntarily incurred costs are only recoverable through cost recovery claims under Section 107.<sup>112</sup> This is different than interpreting the Supreme Court’s language as going a step further to imply that claims for voluntarily incurred costs with no private government settlement are covered by Section 107’s cost recovery remedy.

Other courts have found that directly paying remediation expenditures makes them “voluntarily” incurred expenditures, allowing private party access to Section 107. Courts in the Third Circuit have found many PRP cleanup actions to be “voluntary,” and therefore entitled to use Section 107 cost recovery.<sup>113</sup> In *Litgo N.J., Inc. v. Commissioner New Jersey Department of Environmental Protection*, the United States Court of Appeals for the Third Circuit reaffirmed that Sections 107 and 113 are procedurally distinctive remedies not uniformly available to all claimants.<sup>114</sup> Relying on *Atlantic Research*, the court held that the plaintiff was entitled to bring a lawsuit to recover its response costs against the defendants under Section 107.<sup>115</sup> The court came to this outcome because the plaintiffs bore the costs of remediation when it hired environmental consultants to carry out cleanup plans without any imposed CERCLA liabilities.<sup>116</sup>

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108. *Id.* at 969–72.

109. *Id.* at 983 (citing *E.I. DuPont de Nemours and Co. v. United States*, 508 F.3d 126, 133 n.5 (3d Cir. 2007)).

110. *See* *United States v. Atlantic Research Corp.*, 511 U.S. 128 (2007).

111. *See* *Bernstein*, 702 F.3d at 981.

112. *Id.* at 982.

113. *See, e.g.*, *Litgo N.J., Inc. v. Comm’r N.J. Dep’t of Env’tl. Prot.*, 725 F.3d 369, 392 (3d Cir. 2013); *United States v. D.S.C. of Newark Enters., Inc.*, No. 09-2270 (MLC), 2013 WL 2658929, at \*5–6 (D.N.J. June 12, 2013); *Queens W. Dev. Corp. v. Honeywell Int’l, Inc.*, No. 10-4876, 2011 WL 3625137, at \*2–4 (D.N.J. Aug. 17, 2011).

114. *Litgo*, 725 F.3d at 392.

115. *Id.*

116. *Id.* at 391–92.

After the United States Court of Appeals for the Ninth Circuit reversed its previous holdings denying private party access to Section 107, which it had held prior to *Atlantic Research*, one of that circuit's district courts disagreed. In *Chartis Specialty Insurance Co. v. United States*<sup>117</sup> a district court expressly reaffirmed that a PRP can initiate suit pursuant to Section 107 if it incurred cleanup costs voluntarily, and that Section 107 imposes joint and several liability against the defendant.<sup>118</sup> The court also closely followed the holding in *Atlantic Research*, and rejected the defendant's arguments that joint and several liability will help a PRP escape CERCLA liability, or that it is unfair to shift the burden to prove apportionment to the defendant.<sup>119</sup>

Finally, in 2014, the Fourth Circuit, in *Madison University Mall LLC v. Chapel Hill Tire Co.*, relied on *Cooper* and *Atlantic Research* to point out the gap created between the holdings of these two Supreme Court cases.<sup>120</sup> Certain costs, such as those incurred pursuant to consent decrees, are not "voluntary" but also are not reimbursing the costs of another party.<sup>121</sup> If there is no prior suit, some other courts have denied access to both Section 113, and if not voluntary, to Section 107 cost recovery.<sup>122</sup>

### B. In the Federal District Courts

The lower federal courts are split on this "voluntary" question. The Western District of Kentucky was reluctant to shut out a PRP's Section 107 cost recovery remedy in a 2014 decision regarding the cleanup of an incineration site in Calvert City, Kentucky.<sup>123</sup> In *LWD PRP Group v. ACF Industries, LLC*, the EPA's Emergency Response and Removal Branch (ERRB) began cleanup of the LWD incinerator site and entered into an Agreement and Order on Consent for Removal Action (Removal Action AOC) with a number of PRPs, including the plaintiffs.<sup>124</sup> The LWD PRP group claimed to have paid over \$9.5 million in response costs, some of which was volunta-

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117. *Chartis Specialty Ins. Co. v. United States*, No. C-13-1527 EMC, 2013 WL 3803334, at \*17-18 (N.D. Cal. July 19, 2013).

118. *Id.*

119. *Id.* at \*18.

120. *See* *Madison Univ. Mall v. Chapel Hill Tire Co.*, No. 1:14-CV-169, 2014 WL 3696263 (M.D.N.C. July 23, 2014).

121. *Id.* at \*2.

122. *See, e.g.,* *Litgo N.J., Inc. v. Comm'r N.J. Dep't of Env'tl. Prot.*, 725 F.3d 369, 392 (3d Cir. 2013); *LWD PRP Grp. v. ACF Indus., LLC*, No. 5:12-CV-00127-JHM, 2014 WL 901648 (W.D. Ky. Feb. 7, 2014); *MPM Silicones, LLC v. Union Carbide*, 931 F. Supp. 2d 387, 395-96 (N.D.N.Y. 2013).

123. *LWD PRP Grp. v. ACF Indus., LLC*, No. 5:12-CV-00127-JHM, 2014 WL 901648, at \*6 (W.D. Ky. Feb. 7, 2014) (denying motion to dismiss, granting leave to amend).

124. *Id.* at \*1.

rily incurred while they were negotiating with the Kentucky Department of Environmental Protection (KDEP) and before the agreement was finalized.<sup>125</sup> Plaintiff's grievances derived from two "Settlement Agreement[s] for Recovery of Past Response Costs" agreements entered with the EPA, as well as voluntary response costs regarding activities encouraged by the Kentucky Department of Environmental Protection at the LWD Incinerator Site.<sup>126</sup>

Although the court found that the LWD PRP group failed to specify what costs were incurred voluntarily and which costs were related to the AOC entered with the EPA, it would not dismiss the case, and allowed the plaintiffs to amend their complaint to specify the origin of the costs.<sup>127</sup> In 2015, plaintiff's Third Amended Complaint was dismissed by the Western District Court of Kentucky pursuant to Federal Rule of Civil Procedure 12(b)(6), as a portion of the costs under the plaintiff's Third Amended Complaint were time-barred.<sup>128</sup> In assessing these claims, the court determined that the recent Sixth Circuit decision in *Hobart Corp. v. Waste Management* was controlling.<sup>129</sup> Based on these factors, the court determined that the statute of limitations for an action of contribution expired three years after the effective date of the settlement agreement pursuant to Sec-

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125. *Id.* at \*5 (quoting *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007) ("We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f).").

126. *Id.* Compl. 9.

127. *LWD PRP Grp.*, 2014 WL 901648, at \*6.

128. *LWD PRP Grp. v. ACF Indus. LLC*, No. 5:12-CV-00127-GNS-HBB, 2015 WL 1143019, at \*14 (W.D. Ky. Mar. 12, 2015). Specifically, defendants alleged that the contribution claim, at least insofar as the payment made by plaintiff to the EPA under one of the agreements reached between plaintiffs and the EPA, was barred by CERCLA Section 113(b). *Id.* at \*8.

129. *Id.* at \*12; *see also Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757, 768 (6th Cir. 2014) (delineating a four factor test). The first factor was the requirement that the party "ha[s] resolved [its] liability." *Id.* The second factor was that the ASAOC stated that the parties "agree[d] that [the ASAOC] constitute[d] an administrative settlement for purposes of § 113(f)(2) of CERCLA." *Id.* at 769. The third factor was that the ASAOC was titled an *Administrative Settlement Agreement*. *Id.* The final factor was that the ASAOC contained provisions which, taken in concert, intended to resolve the appellants' liability to the government. *Id.*

tion 113(g)(3),<sup>130</sup> which was two years before the complaint was filed. Thus, the action for contribution under section 113(f) was expired.<sup>131</sup>

Yet in June 2015, the Western District Court of Kentucky granted plaintiff's motion for reconsideration of plaintiff's Third Amended Complaint.<sup>132</sup> Upon further review of that plaintiff's motion, the court determined that the holding of the Sixth Circuit applied narrowly—to recovery under the Administrative Settlement Agreement Order and Consent Removal Action (“ASAOCRA”) only—and not to recovery sought as to EPA Past Costs AOCs, or money owed to the Kentucky Department of Environmental Protection.<sup>133</sup> The court reached this determination because the defendants failed to “offer any explanation as to why the costs separate from those associated with the ASAOCRA are similarly situated despite the fact that they arose three years or more after the signing of the ASAOCRA and are expenses incurred for activities separate from those covered by the ASAOCRA.”<sup>134</sup> The defendants were not able to rebut the presumption that recovery sought under EPA Past Costs AOCs, or money owed to the Kentucky Department of Environmental Protection, were not part of ASAOCRA and therefore not time barred.<sup>135</sup> Thus, the court granted the plaintiffs leave to file their Fourth Amended Complaint.<sup>136</sup>

In addition to allowing the plaintiffs the opportunity to specify the amount of voluntarily incurred remediation costs, the court also did not overturn an aspect of its previous 2014 ruling, which held in the plaintiff's favor regarding the use of the word “requiring” in their complaint.<sup>137</sup> While the defendants argued that the costs incurred by the plaintiffs were related to “activities that KDEP [was] requiring to be conducted” and were therefore compelled and not voluntary for purposes of Section 107 cost recovery, the court held otherwise.<sup>138</sup> Citing both *Atlantic Research* and *ITT Indus-*

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130. *LWD PRP Grp.*, 2015 WL 1143019, at \*8.

131. *Id.* at \*14.

132. *See* *LWD PRP Grp. v. ACF Indus. LLC*, No. 5:12-CV-00127-GNS-HBB, 2015 WL 3539357, at \*9, \*13 (W.D. Ky. June 3, 2015). Plaintiffs again sought recovery for: (1) costs pursuant to 42 U.S.C. § 9607(a)(4), (Section 107(a)(4) of CERCLA), (2) contribution pursuant to 42 U.S.C. §§ 9613(f)(1) and (f)(3)(B), (Section 113(f)(1) and (f)(3)(B) of CERCLA), and; (3) declaratory relief pursuant to 42 U.S.C. § 9613(g)(2), (Section 113(g)(2) of CERCLA). *See* Third Amended Complaint at 671–701, *LWD PRP Grp. v. ACF Indus. LLC* (2015) (No. 5:12-CV-00127-JHM-HBB), 2014 WL 1757382.

133. *See* *LWD PRP Grp.*, 2015 WL 3539357, at \*12.

134. *Id.* Defendants wanted the court to hold that the statute of limitations expired on all past cost recovery, without demonstrating that those costs were part of ASAOCRA. *Id.*

135. *Id.*

136. *Id.* at \*13.

137. *LWD PRP Grp. v. ACF Indus., LLC*, No. 5:12-CV-00127-JHM, 2014 WL 901648, at \*6 (W.D. Ky. Feb. 7, 2014).

138. *Id.*

tries, Inc. v. BorgWarner, Inc., 506 F.3d. 452, the court declared that the use of the word “‘requiring’ does not indicate that the costs were compelled.”<sup>139</sup>

Finally, in November 2015, defendant’s last motion to dismiss plaintiff’s Fourth Amended Complaint seeking past and future voluntary response costs under section 107 was denied.<sup>140</sup> This case has continued this thread and is still vital as to plaintiff’s Section 107 cost recovery claim. It also illustrates how years of amended complaints and procedural motions avoided addressing Section 107 claims, so as to eliminate longer statutes of limitation. This would have avoided cost recovery on procedural bases.

The Northern District of New York ruled similarly on the availability of a PRP’s contribution claim under Section 113(f) in *MPM Silicones, LLC v. Union Carbide*.<sup>141</sup> MPM Silicones acquired a contaminated site from Union Carbide, which had previously used the location as a dump for hazardous waste but did not report this to regulators.<sup>142</sup> After having acquired the site, MPM incurred costs as they cleaned up the waste that was solely attributable to Union Carbide.<sup>143</sup> MPM Silicones then sued Union Carbide, simultaneously seeking both Section 107 cost recovery and Section 113 contribution claims for the costs it had incurred and expected to incur in cleaning the site.<sup>144</sup>

Pursuant to *Cooper*, the court dismissed the plaintiff’s Section 113 contribution claim since MPM Silicones had not been sued by the EPA under Sections 106 or 107 and not yet determined its liability under CERCLA.<sup>145</sup> Although the court maintained the more common determination that only

139. *Id.* at \*7 (“When the facts are construed in the light most favorable to the LWD PRP Group, the use of the word ‘requiring’ could simply indicate that the LWD PRP Group was voluntarily incurring costs due to fears of potential liability.”) (citing *Solutia, Inc. v. McWane, Inc.*, 726 F.Supp.2d 1316, 1340–41 (N.D. Ala. 2010) (“the distinction between compelled and voluntary cleanups is in some measure artificial; virtually all cleanups are performed by a party who is at least facing the specter of potential liability under CERCLA.”) (quotation marks omitted) (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 136–37 (2007))).

140. *See* *LWD PRP Grp. v. ACF Indus. LLC*, No. 5:12-CV-00127-GNS-HBB, 2015 WL 6755314 (W.D. Ky. Nov. 4, 2015).

141. *MPM Silicones, LLC v. Union Carbide*, 931 F. Supp. 2d 387, 390 (N.D.N.Y. 2013).

142. *Id.* at 391.

143. *Id.*

144. *Id.* Apart from CERCLA claims, the plaintiff filed a number of state law claims, among which were claims for contribution and cost recovery. The court ruled that CERCLA did not preempt the state law claim for cost recovery as it did not disrupt CERCLA’s settlement scheme. *Id.*

145. *Id.* at 395–96 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007)). The court explained the availability of cost recovery and contribution remedies, stating that they are not both simultaneously available and do not represent options but rather remedies for specific instances. *Id.* at 395–96. Even though the plaintiff failed to



one of the two CERCLA sections is available to a PRP under a given set of facts, rather than both Sections 107 and 113 simultaneously, it did not, however, dismiss the plaintiff's Section 107(a) claim for cost recovery.<sup>146</sup> It allowed the cost recovery claim to stand because the plaintiffs had voluntarily incurred costs in cleaning up the site and had not been forced to pay anything as a result of a settlement agreement with either the state environmental agency or the EPA.<sup>147</sup>

A similar scenario arose in the District of New Jersey, in *Queens West Development Corp. v. Honeywell Intern, Inc.*<sup>148</sup> This plaintiff also asserted both Section 107 cost recovery and Section 113 contribution claims for voluntarily incurred cleanup costs caused by the defendant's legal predecessors, although it had not yet been sued or entered into a settlement agreement with the state or federal regulator.<sup>149</sup> As a result, the court determined that the proper remedy for the plaintiffs was a cost recovery action under Section 107, since the plaintiff had voluntarily incurred their costs rather than having been compelled to pay for the cleanup under a consent decree or administrative settlement.<sup>150</sup>

The Central District of California further explained the importance of the procedural triggers to a contribution claim under Section 113 in the case of *Whittaker Corp. v. United States*.<sup>151</sup> There, the plaintiff site owner, Whittaker Corp., attempted to recover a portion of the costs it had incurred under Section 107 as voluntary costs not related to the settlement agreement it reached years after these particular costs were incurred.<sup>152</sup> Although Whittaker argued that it is the nature of the costs that should determine which of the two sections of CERCLA should apply, the court relied on language from the *Atlantic Research* decision that specifically stated that "PRPs that have been subject to §§ 106 or 107 enforcement actions are

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properly allege their claims as alternatives, the court allowed their Section 107 claim to stand and dismissed the Section 113 contribution claim. *Id.*

146. *Id.* at 404.

147. *Id.* at 401-04.

148. *Queens W. Dev. Corp. v. Honeywell Int'l, Inc.*, No. 10-4876, 2011 WL 3625137 (D.N.J. Aug. 17, 2011).

149. *Id.* at \*1-2 (plaintiffs argued that they had already or would soon in the future, resolve their liability for any of the cleanup with the government).

150. *Id.* at \*11 (also noting that the plaintiffs do not contend that they are a PRP since they deny any responsibility for the release of the hazardous material, and as a result are closed off from a Section 113 contribution claim which is open only to PRP's).

151. *Whittaker Corp. v. United States*, No. CV 13-1741, 2014 WL 631113 (C.D. Cal. Feb. 10, 2014).

152. *Id.* at \*17.

still required to use § 113, thereby ensuring its continued vitality.”<sup>153</sup> The court summarized the issue stating, “[a] party’s procedural circumstances, not the nature of its alleged costs, will determine whether a party may pursue a contribution action under section 113(f)(1).”<sup>154</sup>

In *Consolidated Edison Co., Inc. v. UGI Utilities, Inc.*, decided before *Atlantic Research*, the Second Circuit addressed whether a PRP could recover voluntary response costs under Section 107.<sup>155</sup> Predicting the holdings in *Atlantic Research*, the court held that Section 107(a) allows PRPs to recover from other PRPs and CERCLA did not “require that the party seeking necessary costs of response be innocent of wrongdoing.”<sup>156</sup> While *Consolidated Edison* did not expressly resolve the issue of voluntary versus involuntary cost incursion by a private party, it did state: “It *may* be that when a party expends funds for cleanup solely due to the imposition of liability through a final administrative order, it has not, in fact, incurred ‘necessary costs of response’ within the meaning of section 107(a).”<sup>157</sup>

These courts each have expressly reaffirmed that Sections 107 and 113 are two distinctive remedies, available in two different situations, on different facts. After *Cooper*, Section 113 contribution can only be used by a private party after it has been sued by EPA. Conversely, Section 107 is used whenever there has not been prior EPA litigation. The two Supreme Court decisions state that whether there has been a prior EPA suit, against the private party now seeking a remedy, decides whether Sections 107 or 113 is used. The Second Circuit opened up equitable considerations in Section 107 as suggested by the Supreme Court in *Cooper*, by reiterating that a PRP who gets sued as a defendant under Section 107 can bring a counterclaim under Section 113 for contribution if it can prove its proportion of the liability. Private plaintiffs have not been prevented from recovering in an

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153. *Id.* at \*19–20 (citing *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1042 (E.D. Wis. 2008) (quoting *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 (2007))). The *Whittaker* court explained that such language “suggests that courts need not engage in an analysis of the particular costs sought but should instead focus on a PRP’s specific procedural status, i.e., whether or not it has been subject to an enforcement action.” *Id.*

154. *Id.* at \*21–22; *see also Sandvik, Inc. v. Hampshire Partners Fund VI, L.P.*, No. 13-4667 (SDW) (MCA), 2014 WL 1343081, at \*5 (D.N.J. Apr. 4, 2014) (where the Federal District Court for New Jersey also highlighted the procedural distinctions between Section 107 and Section 113 in denying the plaintiffs’ contribution claim, citing the Supreme Court’s unambiguous holding in *Atlantic Research* providing that a party may not bring a Section 113(f)(1) contribution claim in cases where the plaintiff has not been sued under Sections 106 or 107).

155. *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 100 (2d Cir. 2005).

156. *Id.*

157. *Id.* at 101 (emphasis added).

adequately pled claim for cost recovery.<sup>158</sup> It follows that when Congress added the Section 113(f) contribution claim in the 1986 SARA amendments to what already existed in the original 1980 Section 107 cost recovery claim, it logically was Congress' intent to have at least one of these two cost-shifting options, or perhaps both, always potentially available to private parties.

#### IV. COSTS INCURRED AFTER SETTLEMENT AGREEMENTS AS A NEW DISQUALIFICATION FACTOR

##### A. *In the Federal Appellate Courts*

Costs incurred by parties who have entered into a consent decree or administrative consent order with the government have often been deemed by lower courts, post-*Atlantic Research*, as "compelled" costs rather than voluntary.

This reasoning can create a double-bind, depending on the circuit. If costs are deemed "compelled" rather than voluntary, entering into such a settlement agreement, the legally logical first step, can shut off a cost recovery claim under Section 107, leaving only contribution claims under Section 113.<sup>159</sup> This is often not a viable avenue: Section 113 is not available if there has not been prior government suit against the party.<sup>160</sup> And even where there is a claim from the government short of traditional litigation, when a party enters into an administrative settlement or consent decree to resolve the claim, the question courts often face is whether this counts as prior litigation.<sup>161</sup> A footnote in *Atlantic Research* admitted that there is the possibility of potential "overlap" between remedies of Sections 107 and 113.<sup>162</sup> Specifically, the Supreme Court left open the status where a party entered into a settlement order and incurred response costs:

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158. See *New York v. Solvent Chem. Co.*, 453 Fed. Appx. 42, 46 (2d Cir. 2011) (citing *Consol. Edison Co., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 104 (2d Cir. 2005) (finding that the party would not be prevented from recovery when it adequately pled a claim for cost recovery under Section 107(a) but had erroneously cited Section 113(f)(1) in its complaint)).

159. See discussion *infra* Section IV.A.2 and accompanying notes.

160. *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 165–66 (2004).

161. See, e.g., *Bernstein v. Bankert*, 702 F.3d 964, 981–84 (7th Cir. 2012), *amended on reh'g*, 733 F.3d 190 (7th Cir. 2013); *Centerior Serv. Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344, 351–52 (6th Cir. 1998) (holding that potentially responsible parties could not bring joint and several cost recovery action, but were restricted to action for contribution); *LWD PRP Grp. v. ACF Indus., LLC*, No. 5:12-CV-00127-JHM, 2014 WL 901648, at \*6 (W.D. Ky. Feb. 7, 2014); *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 840–41 (W.D. Tenn. 2006) (holding that unilateral administrative orders can qualify as civil actions).

162. *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007).

[T]he PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). Thus, at a minimum, neither remedy swallows the other, contrary to the Government's argument.<sup>163</sup>

In resolving this open issue, it is important to note two things:

- The decision to settle with the government is voluntary, never compelled. Parties have a choice. If voluntarily entered, costs incurred from that settlement are the result of a voluntary agreement, even if the agreement has enforceable binding effect. In the author's experience over decades with CERCLA matters, every CERCLA attorney typically would advise its client to settle with the government before initiating any Section 107 or 113 private party litigation, in order to:
  - Remove the government as a party in interest in such subsequent legal actions, and/or to
  - Take advantage of the Section 113(f)(2) contribution protection "shield" which automatically benefits any party settling with the government under an administratively- or judicially-approved settlement.<sup>164</sup>
- If not careful, courts could create a gap in their restrictions around Sections 107 and 113 applicability that cuts off both legal options for a private party to allocate liability fairly, under either Sections 107 or 113, to other responsible parties, undermining Congressional intent discussed above to provide at least one, and perhaps both, avenues to private parties.

## 1. No Automatic Disqualification of Section 107

The *Bernstein* decision offers some guidance in how to close this potential gap, where a private party has no recourse to any cost-recovery provision.<sup>165</sup> In *Bernstein*, the court explained that the mere participation of a

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163. *Id.*

164. *See* 42 U.S.C. § 9613(f)(2) (2014).

165. *Bernstein*, 702 F.3d 964.

PRP in an AOC does not necessarily require the use of Section 113 as opposed to Section 107, as the statutory triggers required before a party avails itself of contribution under Section 113 are twofold: The PRP must either be subject to suit under CERCLA, or the PRP must have resolved its liability with the EPA or state agency through a settlement.<sup>166</sup> In the *Bernstein* case, the trust had only resolved its liability regarding its first AOC from 1999, but had not yet completed its duties under the second AOC from 2002, leaving its liability unresolved with respect to this later 2002 AOC.<sup>167</sup> As such, the trustee could still maintain a cost recovery action under Section 107 against other private parties, since the costs it incurred were necessary.<sup>168</sup> Furthermore, a Section 113 contribution claim was not available, as neither of the required triggers had been met.<sup>169</sup>

The Second Circuit addressed the issue of whether involuntary costs could be recovered under Section 107 in *W.R. Grace & Co.-Conn. v. Zotos International, Inc.*<sup>170</sup> In this case, a PRP looked to recover incurred costs pursuant to a consent order it had entered with New York's state environmental regulator.<sup>171</sup> Defendant argued that the plaintiffs' incurred costs were compelled because of the consent order, and therefore, not an allowed cost recovery under Section 107.<sup>172</sup> Rejecting the defendant's argument, the Second Circuit relied on the plain language of the statute; whether a party enters into a consent agreement before commencing remediation does not impact whether the party has incurred the response costs required under Section 107(a): "In the same manner that section 107(a) is not limited solely to 'innocent' parties . . . section 107(a) does not specify that only parties who 'voluntarily' remediate a site have a cause of action."<sup>173</sup> The plaintiff incurred the costs of remediation versus simply paying another PRP or agency a reimbursement for cleanup costs that another party incurred. The Second Circuit held that the plaintiffs did have a cost-recovery claim under Section 107(a), despite having a consent decree compelling performance.<sup>174</sup>

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166. See *id.* at 976.

167. See *id.* at 977-84.

168. See *id.* at 981.

169. See *id.*

170. *W.R. Grace & Co. v. Zotos Int'l, Inc.*, 559 F.3d 85 (2d Cir. 2009).

171. *Id.* at 87-88.

172. *Id.* at 91.

173. *Id.* at 92.

174. *Id.* at 96. *But see* *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 604 (8th Cir. 2011) (relying on *Atlantic Research* to conclude that response costs incurred pursuant to an administrative order containing penalties for failure to comply were not incurred voluntarily and, therefore, could not form the basis of a Section 107(a) claim).

## 2. Disqualification of Section 107

Before the *Bernstein* circuit court decision, the United States District Court for the Northern District of Illinois, in *BFI Waste Systems of North America, L.L.C. v. City of Belvidere*, considered for the first time whether or not “compelled costs incurred as a result of a consent decree are ‘incurred’ within the meaning of Section 107(a)(4)(B).”<sup>175</sup> Persuaded by the Third Circuit Court’s reasoning in *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*,<sup>176</sup> the court held that PRPs who incurred costs as a result of a consent decree were limited only to a contribution claim under Section 113(f).<sup>177</sup>

Both the district court in the initial decision, and the Seventh Circuit, subsequently in *Bernstein*, agreed that allowing settling PRPs to recover under Section 107 would help them avoid CERCLA liability by shifting the whole cost to other PRPs, while protecting them as plaintiffs from contribution claims and counter-claims brought by other PRPs under Section 113.<sup>178</sup> This illustrates the advantage of settling first with the government: One enjoys automatic statutory contribution protection,<sup>179</sup> which also can be drafted as a provision into the AOC or consent decree that is entered.

Of the decisions since *Atlantic Research*, the Eleventh Circuit’s decision in *Solutia, Inc. v. McWane, Inc.* rendered a particularly non-inclusive reading of distinctions negotiated in the settlement agreement between the PRP and the government. It determined that only a Section 113 contribution action is available to PRPs once a settlement order had been entered into by the parties seeking later cost recovery.<sup>180</sup> In *Solutia*, plaintiff PRPs sought Section 107 cost recovery and Section 113 contribution for response costs it incurred, after and contemplated by a CERCLA “Partial Consent Decree,” from other PRPs who had entered into a separate consent decree with the EPA in order to reimburse the agency for costs it incurred in cleaning up the contaminated site.<sup>181</sup> *Solutia* argued that although it agreed to clean certain areas of the contaminated site, their original consent decree with the

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175. *BFI Waste Sys. of N. Am. v. City of Belvidere*, No. 09 C 50061, 2011 WL 9105930, at \*2 (N.D. Ill. Mar. 15, 2011).

176. *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 227–29 (3d Cir. 2010) (holding Sections 107 and 113 did not overlap in the instant case).

177. *BFI Waste Sys.*, 2011 WL 9105930, at \*3.

178. *Id.*

179. 42 U.S.C. § 9613(f)(2) (2014).

180. *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1235–37 (11th Cir. 2012).

181. *Id.* at 1234. Plaintiffs contended that the EPA’s later settlement with the other PRP’s “undermined” their right to seek contribution claims from other PRP’s that was preserved in the original consent decree, but later agreed to cleanup specific areas of the contamination site. *Id.*

EPA only obligated it to clean up waste attributable to them, thereby making its cleanup of all other waste attributable to other PRPs “voluntary.”<sup>182</sup> The court rejected this argument and maintained that its agreement to clean up only specific areas constituted an obligation, compelling it to incur the costs and thus leaving Section 113 contribution as its exclusive remedy.<sup>183</sup>

The Eighth Circuit Court of Appeals ruled similarly in *Morrison Enterprises, LLC v. Dravo Corp.* In *Morrison*, a city and the successor owner of a contaminated site, Morrison Enterprises, were sued under CERCLA and subsequently entered into an AOC to clean up the site.<sup>184</sup> Both the city and Morrison stressed that Morrison undertook the cleaning of the contaminated site voluntarily, while the defendant, Dravo Corp., was the party legally liable for the contamination.<sup>185</sup> The court found that this interpretation ignored the fact that both plaintiffs had entered into agreements attempting to settle their liabilities for the site.<sup>186</sup> As a result of Morrison having been sued under Section 107(a) and both plaintiffs having settled their liabilities for the site with government agencies under various AOCs, the court refused to characterize any of their subsequent efforts as voluntary, and as a result denied the cost recovery claim under Section 107(a).<sup>187</sup>

There remains an open question regarding how settlement with a state authority under state law, not invoking CERCLA, affects future private party CERCLA claims. In *Trinity Industries v. Chicago Bridge & Iron Co.*, the Third Circuit considered whether or not a consent order pursuant to two Pennsylvania statutes constitutes a resolution of liability as required in Section 113 after *Cooper*.<sup>188</sup> The court consulted the Second Circuit’s holding in *W.R. Grace & Co. v. Zotos International, Inc.*, where the court held that “agreement to a consent order that resolved a plaintiff’s New York state-law claims did not authorize the plaintiff’s suit under § 113(f)(B)(3) because the

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182. *Id.* at 1238 n.10.

183. *Id.* at 1238–39.

184. *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 599 (8th Cir. 2011). Morrison entered into two AOCs in 1996 to clean up the site in question while the city entered into multiple other agreements to clean up the site in 1992, 1998, 2004, and 2007. *Id.*

185. *Id.* at 604.

186. *See id.* at 604–05.

187. *Id.* The court distinguished the city’s argument from the three cases it cited, *W.R. Grace & Co. v. Zotos International, Inc.*, 559 F.3d 85, 91–93 (2d Cir. 2009), *Kotrous v. Goss-Jewett Co., Inc.*, 523 F.3d 924, 934 (9th Cir. 2008), and *Schaefer v. Town of Victor*, 457 F.3d 188, 191–92, 201–02 (2d Cir. 2006). *Id.* Each case permitted a Section 107 action since the plaintiffs in those cases had not settled their Section 107 liability nor had they entered into a settlement as defined by CERCLA Section 113.

188. *See Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 133 (3d Cir. 2013).

consent order ‘did not resolve CERCLA claims that could be brought by the federal government.’<sup>189</sup> Nevertheless, the Third Circuit held that Section 113(f)(3)(B) “does not require resolution of CERCLA liability in particular.”<sup>190</sup> Therefore, allowing a settling PRP under such state statute subsequently to seek contribution under Section 113 will not enable it to impermissibly double-collect under CERCLA.<sup>191</sup>

## B. In the Federal District Courts

### 1. No Automatic Disqualification of Section 107

In the Eastern District of Michigan in *Ford Motor Co. v. Michigan Consolidated Gas Co.*, MichCon, a non-settling PRP, asserted a claim for Section 107 cost recovery for cleanup expenses it had incurred and would incur in the future.<sup>192</sup> The United States claimed that its consent decree with Ford prevented MichCon from asserting its Section 107 cost recovery claim since it considered “common law contribution claims to fall within the scope of the . . . [consent decree].”<sup>193</sup> The court noted that the real issues were: whether the earlier consent decree between Ford and the United States barred the non-settlor, MichCon, from asserting its own cost recovery claim; and whether MichCon’s status as a PRP required it to bring only a Section 113 contribution claim (which at that time of suit would have been time-barred by the much shorter Section 113 statute of limitation).<sup>194</sup> Finding the government’s argument that MichCon’s cost recovery claim was really a contribution claim unpersuasive, the court refrained from dismissing MichCon’s Section 107 claim because it was not a party to the consent de-

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189. *Id.* at 136 (citing *W.R. Grace*, 559 F.3d at 91).

190. *Trinity*, 735 F.3d at 137. The court reasoned that the two concerned Pennsylvania state statutes resembled CERCLA and referred to CERCLA provisions. *Id.* The remedies provided under the state statutes were either virtually identical or were the remediation of CERCLA. *Id.* at 136–37. It concluded:

We therefore agree with Trinity and the United States that § 113(f)(3)(B) does not require that a party have settled its liability under CERCLA in particular to be eligible for contribution. To begin with, we are persuaded by the lack of any indication to the contrary in the plain language of the statute itself. In addition, our case law in a related context compels this result.

*Id.*

191. *See id.* at 137.

192. *Ford Motor Co. v. Mich. Consol. Gas Co.*, 993 F. Supp. 2d 693, 697 (E.D. Mich. 2014).

193. *Id.* at 701.

194. *Id.* at 701–02 (summarizing the government’s argument as “(1) MichCon’s § 107(a) claim must be construed as a contribution claim because its status as PRP mandates that it cannot invoke joint and several liability and (2) therefore MichCon’s claim is barred by the SRA CD which prohibits a contribution claim ‘as may otherwise provided by law’”).



cree (which compelled action from the plaintiffs and not the defendants).<sup>195</sup> The court, in a subsequent opinion, found no authority for the proposition that “a party who has incurred voluntary costs and faces future potential liability for further costs in relation to a single hazardous site can ‘slice and dice’ the costs into separate claims.”<sup>196</sup>

When recently faced with a somewhat similar situation, the Eastern District of North Carolina also found that non-settling parties could maintain a cost recovery action under Section 107. In *Carolina Power & Lighting Co. v. Alcan Aluminum Corp.*, one of the defendants, PCS Phosphate (PCS), was not a party to the administrative settlement between the EPA and the plaintiff, Carolina Power and Light Company (CP&L).<sup>197</sup> However, PCS did enter a trust agreement with CP&L, and through that trust contributed to the cost of cleaning the contaminated site.<sup>198</sup> Defendant PCS claimed a right to cost recovery under Section 107(a) as its only available remedy, contending that it had not settled its liability with the EPA and so could not utilize Section 113(f)’s contribution remedy under the Supreme Court’s limitation on Section 113 in *Aviell v. Cooper*.<sup>199</sup>

The court explained that to determine whether Section 107 cost recovery or Section 113 contribution is available to the PRP, the two most important questions to ask are: “whether claimant has settled its liability through administrative or judicial action and whether claimant is seeking ‘contribution’ from defendants.”<sup>200</sup> In this case, the answer to both questions was no. The trust agreement between PCS and the other plaintiffs, as well as the remedy PCS sought, could not truly be considered a contribution claim, since PCS’s liability had not yet been determined.<sup>201</sup> Because PCS had not been sued by the government and did not settle with any government

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195. *Id.* at 704 n.9.

196. *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-13503, 2015 WL 540253, at \*12 (E.D. Mich. Feb. 10, 2015). This decision relied heavily on *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014), in which the Sixth Circuit held that a party which resolves its Superfund liability to the government under the EPA’s new model administrative consent order is limited to a contribution action against third parties. *Id.* at 757.

197. *Carolina Power & Lighting Co. v. Alcan Aluminum Corp.*, No. 5:08-CV-460, 2013 WL 1246833, at \*1 (E.D.N.C. Mar. 27, 2013).

198. *Id.* at \*3 (after settling with the EPA, CP&L sought contribution from the defendants, pursuant to Sections 107(a) and 113(f), and in response PCS counterclaimed against plaintiffs and cross-claimed against other defendants seeking cost recovery based on their contribution to the removal action, pursuant to Section 107(a)).

199. *Id.* at \*5.

200. *Id.* at \*6 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007)).

201. *Id.* (citing *Bernstein v. Bankert*, 702 F.3d 964, 981–83 (7th Cir. 2012) (“recognizing that ‘the statutory trigger for a § [113(f)] contribution claim is . . . the resolution of liability through settlement,’ and holding, in part, that “[t]rustees [that] have been subjected

agency, PCS received no contribution protections under Section 113(f)(2), and could still be sued by EPA or other PRPs.<sup>202</sup> Without settling its liability, PCS could not seek contribution pursuant to the Court's distinction in *Cooper*, but was left with and rather could only seek cost recovery under Section 107(a) for voluntary expenses paid into the group trust to remediate the site.<sup>203</sup>

The reasoning appears correct, and necessary; namely, that Section 107 cost recovery should be the default always-available cost allocation alternative of the two CERCLA remedies. This follows from a key fact established in each of the Supreme Court opinions:

- Post-*Cooper*, in a significant number of factual situations, because there is no prior suit from the government, Section 113 contribution is not an available option for a private party.<sup>204</sup>
- In *Atlantic Research*, the Court did not state or suggest that the position taken subsequently by several lower federal courts was operative, e.g., that a settlement with the government prior to attempting to allocate cleanup costs *de facto*, renders future expenditures by the settling PRP not voluntarily incurred or ineligible for Section 107 cost recovery claims against other non-settling PRPs.<sup>205</sup>

The *CP&L* decision demonstrates that an agreement that does not settle a party's liability will not trigger the Section 113 contribution remedy prerequisite.<sup>206</sup> Additionally, the case also spoke to the effect of *Atlantic Research* regarding voluntary cleanup efforts by PRPs, when the court explained: "The purpose of the Supreme Court's holding in *Atlantic Research* was to alleviate concerns that responsible parties performing voluntary cleanups, without first being sued by the government under § 106 or § 107(a), would be penalized."<sup>207</sup> This interprets the Supreme Court decisions as opening Section 107(a) as the always-available fail-safe avenue for remediation cost reallocation.

In 2015, an appeal came before the Seventh Circuit, which determined that Federal Rule of Civil Procedure 11 was appropriate as a sanction for filing a complaint precluded by an unambiguous prior settlement agree-

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to no civil action [from the United States] under [§ 106 or § 107(a)]' could not seek contribution under § 113(f).").

202. *Id.*

203. *Id.*

204. *See Cooper v. Aviall*, 543 U.S. 157 (2004).

205. *See United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007).

206. *See Carolina Power & Lighting*, 2013 WL 1246833, at \*3.

207. *Id.* at \*6 (citing *Atl. Research*, 551 U.S. at 136–39).

ment.<sup>208</sup> This, for the first time, imposes judicial sanction for choosing either a Section 107 or 113 CERCLA cost-shifting remedy, which is later found to not comport with the current holdings or preferences of the particular Circuit. Since these preferences to disallow use of Section 107 cost recovery by private parties was an evolutionary journey of the various circuits between 1994 and 2004, which thereafter were overturned by the Supreme Court in its 2007 *Atlantic Research* decision, this holding increases the stakes without clarifying the standards. Strong sanctions for employing Section 107 CERCLA claims allowed by the Supreme Court but disfavored by a particular circuit, when other circuits have a contrary permissive stance, encourages forum shopping by claimants and higher stakes.

Some courts construe all costs incurred by a party that has entered a settlement or consent decree with the government as compelled expenditures not voluntarily undertaken, and thus precluding Section 107 cost recovery claims.<sup>209</sup> Yet the reimbursement payments for costs already paid or direct payments for costs incurred may allow for Section 107 cost recovery. In 2012, the Delaware federal bankruptcy court addressed this issue in *In re Crucible Materials Corp.*<sup>210</sup> In that case, the debtor PRP, Crucible Materials (Crucible), had entered into a settlement agreement with a second PRP, EPA, and the state environmental department for the cleanup of a contaminated site.<sup>211</sup> The debtor filed a claim for cost recovery under Section 107 against a second non-settling PRP.<sup>212</sup>

In siding with the trustee's claim for cost recovery, the court noted two important factors that weighed in favor of allowing Section 107 cost recovery. First, the court noted that Crucible's payments into a trust that funded both past and future cleanup costs for the site (while cleanup efforts were on-going), were not mere reimbursement to other parties, but rather payments made by Crucible that directly paid for the cleanup.<sup>213</sup> The second factor in favor of allowing Section 107 cost recovery was that Crucible had not been sued by any of the PRPs, the EPA, or the state environmental department, thereby cutting off its ability to seek contribution under Sec-

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208. *United States v. Rogers Cartage Co.*, 794 F.3d 854, 863 (7th Cir. 2015). In other words, because the settlement agreement was clear and unambiguous—the preclusion of filing a complaint is conduct that fits “squarely within the ambit of Rule 11.” *Id.*

209. *See* discussion *infra* Section IV.C.2.

210. *In re Crucible Materials Corp.*, No. 09-11582 (MFW), 2012 WL 5360945 (Bankr. D. Del. Oct. 31, 2012).

211. *Id.* at \*1–2.

212. *Id.* at \*2.

213. *Id.* at \*10.

tion 113.<sup>214</sup> The on-going nature of the cleanup, and the fact that Crucible had not been sued under CERCLA, meant that the trustee could still pursue a Section 107 cost recovery claim against other private parties.<sup>215</sup> This reinforces the holding of other courts, such as *CP&L* discussed above, which construe private party Section 107 cost recovery claims as the always open avenue to reallocate costs of remediation which are disproportionately absorbed by a subset of PRPs.

A court also can take the position that a settlement, alone, doesn't entirely resolve liability of the settling party. In *Allied Waste Transportation, Inc. v. John Sexton Sand & Gravel Corp.*, the owner of a landfill's entry into a state consent order was not found to restrict its Section 107 cost recovery action against a co-owner of the site.<sup>216</sup> Citing *Bernstein*, the court held that the entry of the consent order, alone, did not resolve Allied's liability: "[T]he resolution of Allied's liability is contingent on the completion of the work required by the Order."<sup>217</sup> Although not contradicting that a party's access to Section 107 cost recovery could have a finite life, this logic shifts the critical point of time from the beginning of settlement to the completion of the remediation work required by the settlement.

In *Chevron Environmental Management Co. v. BKK Corp.*, the United States District Court for the Eastern District of California reaffirmed and emphasized that a private party may seek cost recovery under Section 107 only when it "itself incurred cleanup costs," and people who reimbursed response costs by other parties could only seek a Section 113 contribution remedy.<sup>218</sup> This distinction seems appropriate. The court briefly addressed both the common law meaning of "voluntary" and the plain statutory language interpretation of what it means to resolve one's CERCLA liability.<sup>219</sup> The court found in favor of plaintiff and held that a consent decree is not "a

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214. *Id.* at \*9–10 (citing *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 225–27 (3d Cir. 2010) (explaining that in a strikingly similar fact pattern, a PRP was allowed to seek cost recovery under Section 107 as they had also funded a trust that paid for on-going cleanup efforts and had not been sued under Sections 106 or 107); see also Ferrey, *Toxic "Plain Meaning" and "Moon-shadow," supra* note 22 (discussing *Agere Sys.* and the interpretation of voluntarily incurred costs). *But see In re Lyondell Chem. Co.*, 442 B.R. 236 (Bankr. S.D.N.Y. 2011) (where the court found a Section 107(a) claim for cost recovery was appropriately categorized as "reimbursement").

215. *In re Crucible Materials Corp.*, 2012 WL 5360945, at \*9 ("[T]he general rule that payments satisfying a settlement agreement are not deemed 'costs incurred' does not apply here.").

216. *Allied Waste Transp., Inc. v. John Sexton Sand & Gravel Corp.*, No. 13 C 1029, 2016 WL 3443897 (N.D. Ill. June 23, 2016).

217. *Id.* at \*12 (citing *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013)).

218. *Chevron Env'tl. Mgmt. Co. v. BKK Corp.*, 880 F. Supp. 2d 1083, 1089 (E.D. Cal. 2012).

219. *Id.* at 1090.

satisfaction or release from liability for any conditions or claims arising as a result of past, current or future operations.”<sup>220</sup> The court interpreted narrowly whether or not a cleanup pursuant to a consent decree is “voluntary” and held that the “consent decree’s potential penalties do not equate to Chevron’s involuntary actions in that the penalties are discretionary.”<sup>221</sup>

## 2. Disqualification of Section 107

The far more common context in which courts have had to determine the availability of a Section 107 cost recovery claim arose in the Northern District of Oklahoma in *Cyprus Amax Minerals Co., v. TCI Pacific Communications, Inc.*<sup>222</sup> There the court dealt with the cleanup of contaminated grounds around the site of a smelting facility in Collinsville, Oklahoma.<sup>223</sup> After having been sued by the Oklahoma environmental agency, Cyprus and the state agency reached a settlement agreement in 2009 that required Cyprus to undertake cleanup activity at the site.<sup>224</sup> In 2011, Cyprus sued the defendants, TCI Pacific and CBS Operations, as PRPs under Section 107.<sup>225</sup> TCI moved to dismiss the action, alleging that Cyprus’s proper remedy was limited to a contribution claim under Section 113, because Cyprus incurred its cleanup costs while fulfilling the provisions of the consent decree, and argued that every court that had considered this issue since *Atlantic Research* has ruled similarly.<sup>226</sup>

Cyprus argued in rebuttal that its cost recovery claim should not be dismissed since the Tenth Circuit had not yet ruled on the availability of Section 107 relief when a party incurred costs pursuant to a consent decree or settlement agreement after the *Atlantic Research* decision.<sup>227</sup> The trial court disagreed.<sup>228</sup> Citing both post-*Atlantic Research* decisions from other circuits and the Tenth Circuit’s pre-*Atlantic Research* decision on the issue, the court found that to allow Section 107 cost recovery for a PRP which had not voluntarily incurred response costs, would: allow for an unfair windfall for the settling party, as it could assert joint and several liability against other non-settling PRPs; and negate the purpose of the subsequent 1986

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220. *Id.*

221. *Id.*

222. *Cyprus Amax Minerals Co. v. TCI Pac. Commc’ns, Inc.*, No. 11-CV-0252-JED-PJC, 2013 WL 6238485 (N.D. Okla. Dec. 3, 2013).

223. *Id.* at \*1.

224. *Id.*

225. *Id.*

226. *Id.* at \*4.

227. *Id.*

228. *Id.* at \*4–5.

SARA Superfund amendment codifying Section 113 contribution claims, which does not so favor private plaintiffs.<sup>229</sup>

Although a number of more recent cases have held open Section 107 cost recovery claims when a PRP entered into a settlement agreement with the government prior to beginning a cleanup, other courts still believe that any settlement makes all future expenditures “compelled,” and “compelled” costs cannot be recovered under Section 107 and can be sought only by contribution claims under Section 113. However, Section 113 after *Cooper* is now not available where the EPA has not sued the PRP initially.

In *Trinity Industries, Inc. v. Chicago Bridge and Iron Co.*, the Western District of Pennsylvania maintained a hard-line distinction between voluntary and compulsory costs once a consent agreement exists.<sup>230</sup> In this case, the owner plaintiff incurred cleanup costs pursuant to both a state court order and an administrative settlement with the state.<sup>231</sup> Plaintiff then filed a claim against the former owner for both Section 113 contribution and Section 107 cost recovery.<sup>232</sup> The court held that Trinity did not “incur” the costs itself since Trinity paid them after a court approved an administrative settlement, making them involuntary.<sup>233</sup> Here is the catch-22 of the holding: The district court also dismissed Trinity’s Section 113 contribution claims, holding that its consent decree with the state agency only settled its liability under state law rather than its federal liability under CERCLA.<sup>234</sup> Therefore, with no prior litigation with EPA, *Cooper* bars any recourse to Section 113. This “shut-out” of any remedy is problematic within a

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229. See *id.* (citing *Bernstein v. Bankert*, 733 F.3d 190, 206–07 (7th Cir. 2013); *Solutia Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236–37 (11th Cir. 2012); *Morrison Enters., LLC. v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010)) (quoting *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 228–29 (3d Cir. 2010) (“[Plaintiffs who had entered into consent decrees with the EPA] would not be subject to equitable allocation. They would have no liability because they would be able to assert joint and several liability against the other parties. This is a perverse result, since a primary goal of CERCLA is to make polluters pay.”)).

230. *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 867 F. Supp. 2d 754 (W.D. Pa. 2012).

231. *Id.* at 757–58.

232. *Id.* at 759.

233. *Id.* at 760–61 (quoting *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007) (“When a party pays to satisfy . . . a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred.”)) (citing *Agere Sys.*, 602 F.3d at 225 (explaining the ordinary meaning of “incur[ing]” a cost as “a bill one obligates oneself to pay”)).

234. *Id.* at 761–62.

Superfund scheme which included two avenues to re-allocate financial liability.<sup>235</sup>

When Trinity appealed this ruling to the Third Circuit Court of Appeals, however, its position received a somewhat more favorable view by the court. The appellate court determined that a PRP could still maintain a Section 113(f)(3)(B) claim for contribution, even if the settlement agreement did not resolve CERLA liability, as a contribution claim under that section “requires only the existence of a settlement resolving liability to the United States or a state ‘for some or all of a response action.’”<sup>236</sup> In clarifying its position, the court was persuaded by both the plain language of the statute, which makes no indication that contribution under Section 113 should be allowed only if paid before a paying party’s settlement, and case law that used the same approach for cost recovery actions under Section 107.<sup>237</sup> The court also noted that Pennsylvania law allowed for Commonwealth consent orders to simultaneously resolve a PRP’s liability under both Pennsylvania law and CERCLA.<sup>238</sup> The court discarded the older interpretation that only consent orders that specifically settled CERCLA claims could fully resolve a PRP’s CERCLA liability.<sup>239</sup>

Some circuit courts going forward clung to their reasoning prior to the *Atlantic Research* Supreme Court decision which overturned that prior circuit court reasoning limiting private party cost allocation using CERCLA Section 107. The Eleventh Circuit, in *Solutia Inc. v. McWane, Inc.*, is one of the courts to digress from the holdings of the days-prior *Cooper* decision.<sup>240</sup> In *Solutia Inc. v. McWane, Inc.*, the Eleventh Circuit considered whether or not CERCLA allows settling parties to recover cleanup costs under Section 107.<sup>241</sup> The court first recognized that cleanup costs incurred voluntarily

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235. This result, leaving no recourse to any statutory or common law remedies, was never contemplated in any legislative history or by the Supreme Court when it issued its historic 2004 and 2007 opinions on CERCLA. See *Cooper v. Aviall Serv.*, 543 U.S. 157 (2004); *Atl. Research*, 551 U.S. 128.

236. *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (quoting Section 113(f)(3)(B)) (explaining that Section 113 “does not state that the ‘response action’ in question must have been initiated pursuant to CERCLA—a requirement that might easily have been written into the provision”).

237. *Id.* at 136–37 (citing *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1275 (3d Cir. 1993), *overruled on other grounds by United States v. E.I. DuPont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005)).

238. *Id.* at 137 (“[U]nder Pennsylvania law, remediation pursuant to the LRA is remediation under CERCLA. Thus, the resolution of LRA claims necessarily means resolution of claims under CERCLA . . .”).

239. *Id.* at 138 (citing *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 126–27 (2d Cir. 2010)).

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

241. *Id.* at 1235.

and directly by a PRP should be recoverable only under Section 107(a)(4)(B), which could, under certain conditions, impose joint and several liabilities on the defendants.<sup>242</sup>

The court then declared that persons, who incurred response costs pursuant to a judicially approved consent decree, or settlement under CERCLA, may only seek contribution for reimbursement costs from other PRPs under Section 113.<sup>243</sup> Ultimately, it held that the settling plaintiff could only bring Section 113 claims against the defendant because allowing a settling plaintiff to bring Section 107 claims against other PRPs will grant them a chance with joint and several liability to escape their liability entirely and bar defendants from seeking contribution counterclaims against the plaintiff.<sup>244</sup> This is not what the Supreme Court stated in *Atlantic Research*.<sup>245</sup> Moreover, contribution protection, pursuant to Section 113(f)(2), can apply to any party who enters a judicially- or administratively-approved settlement, whether a subsequent action is brought not only pursuant to Section 107, but also pursuant to Section 113.<sup>246</sup> Notwithstanding this, the court stated that other courts have interpreted *Atlantic Research* as ruling that Section 113(f) is the sole remedy for parties compelled to incur cleanup costs due to a settlement or consent decree.<sup>247</sup>

#### V. STATUTORY INTERPRETATION: PREFERRING § 113 OVER § 107

A common argument cited by courts, both before and after the *Atlantic Research* decision of the Supreme Court, for the use of Section 113 contribution claims in lieu of Section 107 cost recovery claims, is that Section 107's potential application of joint and several liability can create inequitable results.<sup>248</sup> Joint and several liability can be especially potent if the party claiming cost recovery has already been sued under CERCLA and settled its liability, because Section 113(f)(2) of CERCLA provides for a contribution bar for any parties who have resolved their liability with the government in an appropriately approved settlement or order.<sup>249</sup> The outcome potentially could be that a party could settle its liability with the government and then sue another PRP for 100% of the response costs under Section 107. This allows a party to assert joint and several liability while being

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242. *Id.*

243. *Id.*

244. *Id.* at 1236–37.

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

246. *Id.* at 140.

247. *Solutia*, 672 F.3d at 1236–37.

248. For a discussion of joint and several liability, see *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

249. See also *supra* notes 51, 229 and accompanying text



immune to any counterclaims from the newly sued PRPs (which can only bring a Section 113 contribution claim, which would be barred).

This argument, commonly labeled the “contribution bar” argument, is based on the implication that Section 107 always imposes joint and several liability on defendants.<sup>250</sup> However, this is not true:

- CERCLA never mentions joint and several liability;<sup>251</sup> the final version of CERCLA deleted all reference to joint and several liability.<sup>252</sup>
- It is a discretionary element of federal common law.<sup>253</sup>
- It does not apply whenever the injury from contamination is divisible.<sup>254</sup>
- The most recent Supreme Court decision on CERCLA cautions that joint and several liability cannot be applied without first looking to divide the liability severally.<sup>255</sup>
- The Supreme Court suggested that the equitable factors employed in adjudicating Section 113 contribution claims also could be applied to Section 107 cost recovery claims.<sup>256</sup>

Courts have held that PRP liability is joint and several if a PRP does not offer evidence for dividing the harm of the contamination and the response costs.<sup>257</sup> Nevertheless, the use of Section 107 cost recovery when a Section 113 contribution claim is available is often discouraged as under-

250. *E.g.*, *Bernstein v. Bankert*, 702 F.3d 964, 980 (7th Cir. 2012).

251. *FERREY, supra* note 36, at 444.

252. *Id.*

253. *Id.*

254. *Id.* at 445–47.

255. *Burlington N. & Santa Fe R.R. v. United States*, 556 U.S. 599, 614 (2009).

256. *Id.*

257. *See, e.g.*, *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 673 (5th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 169–70 (4th Cir. 1988) (stating that it was sufficient for plaintiff to show that a waste similar to that sent by the defendants was found at the site), *cert. denied*, 490 U.S. 1106 (1989); *Colorado v. ASARCO, Inc.* 608 F. Supp. 1484, 1486 (D. Colo. 1985) (“It is clear, however, that the deletion of all references to joint and several liability from [CERCLA] did not signify that Congress rejected these standards of liability.”). *But see* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (stating that joint and several liability is not absolute under certain circumstances). Courts have used different standards when determining whether or not there exists a basis of divisibility. *See, e.g.*, *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 903 (5th Cir. 1993) (holding that joint and several liability should be imposed only in “exceptional circumstances” when the “expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability,” and that the court should not be dissuaded from dividing liability just because apportionment is difficult to determine with certainty).

mining the settlement scheme of CERCLA.<sup>258</sup> After the most recent 2009 Supreme Court opinion in *Burlington Northern*, which provided that courts, as their first inquiry, must divide the liability for individual PRPs if there is a basis asserted and proven to do so, this is a suspect conclusion.<sup>259</sup> And regardless of whether there was any basis in the statute or not, the Supreme Court in *Atlantic Research* inserted equitable factors into future Section 107 decisions of courts, which renders Section 107 as equitably flexible as Section 113.<sup>260</sup>

### A. In the Federal Appellate Courts

#### 1. No Automatic Disqualification of Section 107

In shedding more light on these policy arguments, the Seventh Circuit's *Bernstein* decision dismissed this so-called "contribution bar" argument (under which a judicially- or administratively-approved settlement with the government of a CERCLA matter bars suit by EPA or private parties) in favor of an argument of procedural distinctness (that Sections 107 and 113 were designed to address separate and distinct situations, not to be interchangeable options).<sup>261</sup> The court explained that the "contribution bar" argument is based on the assumption that when a party sues under Section 107 for cost recovery, joint and several liability may be imposed on the defendant.<sup>262</sup> From there, the argument proceeds based on the explicit contribution bar found in CERCLA Section 113(f)(2), which grants a party who settles with the federal or state government immunity from further legal contribution claims.<sup>263</sup>

The consequence of the contribution bar is that a party who has reached a settlement with the government could thereafter seek a cost recovery claim under Section 107, and shift all the liability onto the other, non-settling defendant PRPs.<sup>264</sup> The court noted, however, that this argument is based on the incorrect assumption that cost recovery under Section 107 necessarily imposes joint and several liability.<sup>265</sup> As the court explained "apportionment is proper where there is a reasonable basis for determining the

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258. See discussion *infra* Section V.A.2 and accompanying notes.

259. *Burlington Northern*, 556 U.S. at 614.

260. See *supra* text accompanying notes 235–239.

261. *Bernstein v. Bankert*, 702 F.3d 964, 980 (7th Cir. 2012).

262. *Id.* at 979.

263. *Id.*

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

265. *Bernstein*, 702 F.3d at 979.

contribution of each cause to a single harm.”<sup>266</sup> The Supreme Court later supported this perspective in *Burlington Northern*.<sup>267</sup>

While dismissing the “contribution bar” argument as an automatic disqualification, the court stated that the “procedural distinctness” of the remedies is a more persuasive reason to limit a PRP to one remedy or the other.<sup>268</sup> This line of reasoning was upheld by the Second Circuit in *Niagara Mohawk*, where the court explained that “to allow [a qualifying contribution plaintiff] to proceed under [Section 107(a)] would in effect nullify the SARA amendment.”<sup>269</sup> The *Bernstein* court agreed with this reasoning, holding that:

If [Section 107] already provided the rights of action contemplated by the SARA amendments, then the amendments were just so many superfluous words. The canons of statutory construction counsel against any interpretation that leads to that result.<sup>270</sup>

## 2. Disqualification of Section 107

The *Solutia* decision cites arguments regarding potential joint and several liability under Section 107 in restricting the plaintiff’s remedy to Section 113 contribution.<sup>271</sup> Emphasizing the existence of joint and several liability under certain conditions for Section 107 claims, the *Solutia* court explained that to allow settling parties, like the plaintiffs, to assert cost recovery claims under Section 107 potentially would effectively shift all their costs on to other PRPs.<sup>272</sup> The other PRPs would then be barred, due to Section 113(f)(2)’s counter-claim bar, from asserting claims for their own contribution costs against the plaintiffs.<sup>273</sup>

The plaintiffs argued that they should still have been allowed a Section 107 cost recovery remedy since the court could use prudential discretionary authority to equitably apportion liability between the parties, thus prevent-

266. *Id.* at 974. “As a result, counterclaim or no counterclaim, there is little to no danger that a defendant could be gamed into shouldering full liability, or more than his fair share . . . .” *Id.* (citing *Burlington N. & Santa Fe R.R. Co., v. United States*, 556 U.S. 599, 614 (2009)); see also *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 488 (N.D.N.Y. 2011) (discussing the possibility of apportionment of costs under Section 107(a)).

267. *Burlington Northern*, 556 U.S. at 614.

268. *Bernstein*, 702 F.3d at 979.

269. *Niagara Mohawk Power Corp. v. Chevron U.S.A.*, 596 F.3d 112, 128 (2d Cir. 2010).

270. *Bernstein*, 702 F.3d at 979.

271. *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1235–37 (11th Cir. 2012).

272. *Id.* at 1236–37.

273. *Id.* at 1237.

ing the inequitable outcome of shifting their entire costs to the other PRPs.<sup>274</sup> The Supreme Court decision in *Atlantic Research* supports a court's ability to exercise such equitable authority when applying Section 107, notwithstanding that it is not explicitly found in CERCLA.<sup>275</sup> Despite the Section 113(f)(2) contribution protection statutorily afforded settling parties against other government or private claims, the *Atlantic Research* Court assumed that plaintiffs using Section 107 would not be immune from litigation counterclaims pursuant to Section 113.<sup>276</sup> Such counterclaims would provide a mechanism for a court to equitably apportion *de novo* the total cost burden among co-liable litigants.<sup>277</sup> The Supreme Court observed that an equitable allocation of response costs could be achieved by bringing "a Section 113(f) counterclaim,"<sup>278</sup> and noted that the Section 113(f)(2) "settlement bar does not by its terms protect against cost recovery liability under Section 107(a)."<sup>279</sup> The Supreme Court stated that "a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim."<sup>280</sup>

The *Solutia* court, however, found that such a determination "would require this Court to challenge the Supreme Court's assumption in *Atlantic Research* that Section 107(a) provides for joint and several liability" and "require substantial reworking of CERCLA's remedial scheme."<sup>281</sup> However, CERCLA actually says nothing about joint and several liability.<sup>282</sup> This 2012 circuit opinion also seems to ignore the other 2009 Supreme Court CERCLA opinion, which limits any application of joint and several liability,<sup>283</sup> as well as the reinsertion of equitable factors in Section 107 cost recovery determinations in *Atlantic Research*.<sup>284</sup> Joint and several liability is established by federal court precedent on a case-by-case basis, and limited only to situations where the harm is determined to be indivisible,<sup>285</sup> as further clarified by the Supreme Court in 2009 in *Burlington Northern*.<sup>286</sup>

274. *Id.*

275. *See* United States v. Atl. Research Corp., 551 U.S. 128, 138–40 (2007).

276. *See id.* at 140.

277. *See id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1237 n.7 (11th Cir. 2012).

282. FERREY, *supra* note 36, at 444–45.

283. *Compare* Burlington N. & Santa Fe. R.R. v. United States, 556 U.S. 599, 614 (2009), *with* FERREY, *supra* note 36, at 444.

284. *See Solutia*, 672 F.3d 1230.

285. *United States v. Monsanto Co.*, 858 F.2d 160, 169–70 (4th Cir. 1988); FERREY, *supra* note 36, at 444–45.

286. *Burlington Northern*, 556 U.S. at 614.

## B. In the Federal District Courts

### 1. No Automatic Disqualification of Section 107

Although the Circuit Court ruling in *Bernstein* favors the “procedural distinctness” approach, federal trial courts still have expressed concern regarding the potential skirting of liability by PRPs who may seek recovery under Section 107’s joint and several liability provision. In *Chartis Specialty Insurance Co. v. United States*, the Northern District of California examined the availability of Section 107 joint and several liability after the *Atlantic Research* ruling.<sup>287</sup> That court clarified that although a PRP’s use of a Section 107 claim against a fellow PRP (holding them jointly and severally liable) could at first shift all the costs for the cleanup to the other defendant PRP, such a claim did not entirely avoid the equitable factors considered in a contribution claim.<sup>288</sup> In examining the Ninth Circuit’s interpretation of *Atlantic Research*, the court determined that PRPs are able to bring Section 107 claims holding other PRPs jointly and severally liable because the sued PRPs would then be able lodge a counterclaim under Section 113.<sup>289</sup> Despite the government’s argument that requiring a defendant in their position to file a Section 113 counterclaim equates to burden shifting onto the defendant, the court ruled consistently with *Atlantic Research*, which specifically allowed for such a procedure and outcome.<sup>290</sup>

While the potential for inequitable shifting of recovery costs often makes a cost recovery action under Section 107 an especially strong remedy, the Northern District of New York, in *New York State Electric & Gas Corp. v. FirstEnergy Corp.*, explained that an apportionment of cost may be appropriate in certain circumstances.<sup>291</sup> Not making any automatic disqualification of use of Section 107, the court explained that although joint and several liability generally applies to cost recovery actions under Section 107(a), “[t]his does not mean . . . that there is no apportionment to be made between PRPs under section 107(a).”<sup>292</sup> The court did not automatically disqualify Section 107, and cited the subsequent Supreme Court opinion in

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287. See *Chartis Specialty Ins. Co. v. United States*, No. C-13-1527 EMC, 2013 WL 3803334, at \*16 (N.D. Cal. July 19, 2013). In *Chartis*, the plaintiffs, an arms manufacturer and its insurer, sought recovery from the United States under Section 107 for costs they had incurred in remediating a polluted site as the U.S. was liable for the release of the pollution. *Id.*

288. *Id.* at \*17.

289. *Id.*

290. *Id.* at \*18. “While the government may be disadvantaged by such burden shifting, such a scenario was explicitly contemplated by the courts in *Atlantic Research* . . .” *Id.*

291. See *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 488 (N.D.N.Y. 2011).

292. *Id.*

*Burlington Northern*,<sup>293</sup> which upheld the apportioning of liability between parties under Section 107(a).<sup>294</sup> In *FirstEnergy*, the court held that:

A PRP may avoid joint and several liability by proving that the harm caused by that party is distinct from the harm caused by other PRPs and additionally “proffer[ing] a reasonable basis for determining the proportional contribution . . . to what may be conceived of as a single harm at each site.”<sup>295</sup>

The court also noted, however, that according to *Burlington Northern*, the “[e]quitable considerations [applicable to allocation under Section 113(f)] play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of damages jointly caused by the PRPs.”<sup>296</sup>

Although opinions in the Fourth Circuit did not expressly adopt the *Cooper* and *Atlantic Research* opinions in their decisions, the courts recognized that Section 107 allows PRPs to recover potentially all costs from other PRPs, and the defendant is entitled to bring a Section 113 claim against both the plaintiff and other third parties.<sup>297</sup> In *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, the district court entered judgment in favor of the plaintiff and held that the defendant was jointly and severally liable for all costs already incurred by the plaintiff, plus interest.<sup>298</sup> Without relying on *Cooper* or *Atlantic Research* expressly, the court held that a PRP may bring a Section 107 claim against other PRPs.<sup>299</sup> The court noted that proving divisibility can be difficult, but nevertheless declined to apportion

293. *Id.* at 489 (citing *Burlington N. & Santa Fe. R.R. v. United States*, 556 U.S. 599 (2009)).

294. *Burlington Northern*, 556 U.S. at 614.

295. *FirstEnergy*, 808 F.2d at 488 (quoting *United States v. Alcan Aluminum*, 315 F.3d 179 (2d Cir. 2003), *cert. denied*, 540 U.S. 1103 (2004)).

296. *Id.* at 489 n.35 (quoting *Burlington Northern*, 556 U.S. at 615). *But see* *Litgo N.J., Inc. v. N.J. Dep’t of Env’tl. Prot.*, 725 F.3d 369, 383 (3d Cir. 2013).

After identifying PRPs, courts allocate response costs based on equitable factors.

An operator who has participated in remediation without slowing or interfering with that process likely will not be assessed a large share of the remediation costs, if it is assessed any at all. An operator who *has* delayed with remediation, however, may still receive a share of the remediation costs in accordance with CERCLA’s purpose of encouraging prompt cleanup.

*Id.* (citations omitted).

297. *See, e.g.*, *S.C. Elec. & Gas Co. v. UGI Utils., Inc.*, No. 2:06-cv-02627-CWH, 2012 WL 1432543, at \*135 (D.S.C. Apr. 11, 2012); *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 507 (D.S.C. 2011).

298. *Ashley II*, 791 F. Supp. 2d at 507.

299. *Id.* at 481. If the harm is indivisible, the liability under CERCLA Section 107(a) will be joint and several. *Id.*

the liability when lacking a reasonable basis, and held that the appropriate remedy is imposing joint and several liability.<sup>300</sup> In *South Carolina Electric & Gas Co. v. UGI Utilities, Inc.*, it was held that a defendant may pose a Section 113 contribution counterclaim against the plaintiff using Section 107 for cost recovery as first articulated in *Atlantic Research*.<sup>301</sup>

The United States District Court for the Southern District of Illinois followed a different path. In its decision in *Conocophillips Pipe Line Co. v. Rogers Cartage Co.*, the court declined to follow Second and Third Circuits' post-*Atlantic Research* holdings<sup>302</sup> that limited the defendant PRPs' right to assert direct claims against other PRPs under Section 107.<sup>303</sup> The court reasoned that because the defendant in a cost recovery lawsuit can bring Section 113 counterclaims against the plaintiff to mitigate any potential inequity in the allocation of costs, the *Atlantic Research* opinion should be interpreted to fully open Section 107 litigation without disqualification to any private party, regardless of distinct facts or procedural circumstances.<sup>304</sup>

After the United States Court of Appeals for the Sixth Circuit distinguished between Sections 107 and 113 in *ITT Industries v. BorgWarner, Inc.*,<sup>305</sup> the district courts in the Sixth Circuit consistently held that Section 107(a) will apply to a party which has itself "incurred" cleanup costs, as opposed to reimbursing costs paid by other parties, which is appropriately covered under Section 113(f).<sup>306</sup> This seems like an appropriate analysis. However, one court reaffirmed its holdings that Section 113 is the only remedy available to settling parties.<sup>307</sup> And any party would be ill advised to not settle before attempting any cost recovery or contribution action.

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300. *Id.* at 482. The defendant who seeks Section 113 contributions against the plaintiff and other PRPs bears the burden to prove divisibility. *Id.*

301. *S.C. Electric*, 2012 WL 1432543, at \*136.

302. *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 225–26 (3d Cir. 2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010).

303. *Conocophillips Pipe Line Co. v. Rogers Cartage Co.*, No. 3:11-cv-497-DRH-DGW, 2012 WL 1231998, at \*3 (S.D. Ill. Apr. 12, 2012).

304. *Id.*

305. *ITT Indus. v. BorgWarner, Inc.*, 506 F.3d 452, 456 (6th Cir. 2007).

306. *Id.*; *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 923 F. Supp. 2d 1086, 1091–93 (S.D. Ohio 2013); *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 840 F. Supp. 2d 1013, 1021 (S.D. Ohio 2011); *Tennessee v. Roane Holdings Ltd.*, 835 F. Supp. 2d 527, 533–34 (E.D. Tenn. 2011).

307. *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646–48 (W.D. Mich. 2009). On remand, the Western District of Michigan held that the plaintiff, who incurred cleanup costs pursuant to a consent decree, could not bring a Section 107 claim for that site. *Id.* at 648.

## 2. Disqualification of Section 107

As noted earlier, the Central District of California used the “procedural distinctness” theory to determine a PRP’s appropriate cost reallocation remedy in *Whittaker Corp. v. United States*.<sup>308</sup> The Ninth Circuit overruled a district court to hold that just because a company has been sued under CERCLA does not limit it only to use of a Section 113 contribution action to recover cleanup costs at a separate, but related, site.<sup>309</sup> A Section 107 cost recovery claim could be pursued by military contractor Whittaker Corp. against the federal government at one site in California, even though it was sued by other parties for contamination at an adjacent site, since its expenditures incurred were separate.<sup>310</sup>

The Eastern District of Tennessee found this reasoning of burden-shifting persuasive in limiting a party’s remedy to Section 113 contribution when it had entered into an AOC and consent decree with the state.<sup>311</sup> In *Tennessee v. Roan Holdings, Ltd*, the court acted in line with other district courts that prevented parties who settled their liability under an AOC from seeking cost recovery under Section 107.<sup>312</sup> This court relied on the reasoning in *Agere* that explained the potential for an “inequitable” shifting of costs onto other PRPs when the claimant had already settled with a governmental agency.<sup>313</sup>

In a more recent decision, *NCR Corp. v. George A. Whiting Paper Co.*, the court was faced with deciding once more whether Sections 107 or 113 was a more suitable remedy for a private party plaintiff.<sup>314</sup> This court followed its previous decision in *Bernstein* stating:

[i]f a party already has been subjected to an action under section 106 or 107, or has ‘resolved its liability to the United States or a

308. See *supra* notes 151–154 and accompanying text; *Whittaker Corp. v. United States*, No. CV 13-1741 FMO (JCx), 2014 WL 631113, at \*1 (C.D. Cal. Feb. 10, 2014). “PRPs that have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality.” *Id.*

309. *Whittaker Corp. v. United States*, No. 14-55385, 2016 WL 3244838 (9th Cir. June 13, 2016).

310. *Id.* at \*9.

311. *Tennessee v. Roan Holdings, Ltd.*, 835 F. Supp. 2d 527 (E.D. Tenn. 2011).

312. *Id.* This is similar to *Centerior Service. Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344, 351–52 (6th Cir. 1998), and *LWD PRP Group v. ACF Industries, LLC*, No. 5:12-CV-00127-JHM, 2014 WL 901648, at \*6 (W.D. Ky. Feb. 7, 2014), both holding that potentially responsible parties could not bring joint and several cost recovery action but were restricted to action for contribution.

313. *Roan Holdings*, 835 F. Supp. 2d at 539–40 (citing *Agere Sys., Inc. v. Advanced EIntl. Tech. Corp.*, 602 F.3d 204, 227–28 (3d Cir. 2010)).

314. *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 690 (7th Cir. 2014), *reh’g denied* (2014).



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,' it must proceed under section 113(f).<sup>315</sup>

The Court also followed *Cooper* by concluding that “a party that has not been subjected to an enforcement or liability action, and that is not party to a settlement, may proceed under section 107(a).”<sup>316</sup> Thus, the court is restricting actions to Section 113 contribution actions in lieu of Section 107 actions, only when all the requirements to bring a Section 113 claim are present.<sup>317</sup> Instead of restricting access to Section 107, the court is requiring use only of Section 113 when the requisites for its use are present.

In *Hobart Corp. v. Waste Management of Ohio*, a district court construed the *Atlantic Research* opinion to “not overrule decisions holding that claims for costs incurred in performing a cleanup pursuant to a judicial or administrative settlement are limited to a contribution action under § 113(f).”<sup>318</sup> Persuaded by the Seventh Circuit opinion in *Bernstein*, the court held that if a party resolved its liability under administrative or judicially approved settlements, “a contribution claim under § 113(f)(3)(B) is the only possible avenue of recovery.”<sup>319</sup> This restricts claims to Section 113 if there has first been a settlement with the government, which also triggers contribution protection for the settlor(s).

Following the Sixth Circuit, the Eighth Circuit recognized that Sections 107 and 113 provide two distinctive remedies to PRPs, where Section 107 allows a person to seek cost recovery from any other person who is liable or potentially liable under Section 107(a), and Section 113(f)(3)(B) authorizes “[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” to seek contribution from any person who has not so resolved its liability.<sup>320</sup> The

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315. *Id.* at 690–91 (citing *Bernstein v. Bankert*, 733 F.3d 190, 201–02 (7th Cir. 2012)).

316. *NCR Corp.*, 768 F.3d at 690–91.

317. *Id.* at 691 (“Thus, although a strict reading of the phrase ‘necessary costs of response’ in Section 107(a) might suggest that parties who pay pursuant to an enforcement action might be able to sue under Section 107(a), this court—like our sister circuits—restricts plaintiffs to Section 113 contribution actions when they are available.”); *Bernstein*, 733 F.3d at 206; *see also* *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767–68 (6th Cir. 2014) (agreeing with *Bernstein* that Sections 107(a) and 113(f) provide mutually exclusive remedies).

318. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 923 F. Supp. 2d 1086, 1093 (S.D. Ohio 2013) (quoting *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 647 (W.D. Mich. 2009)).

319. *Id.* at 1093.

320. *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011).

court also held that Section 113(f) would be the *exclusive* remedy for parties who were compelled to incur costs pursuant to an administratively or judicially approved settlement under Section 106 or 107.<sup>321</sup>

The legislative history does not suggest that the availability of Section 113 automatically disqualifies private plaintiff use of Section 107. Cost recovery was initially drafted into the statute for “any other person” in 1980.<sup>322</sup> Section 113 contribution claims were not added until 1986. Therefore, in 1980 when Section 107 was the only cost allocation mechanism in the newly enacted CERCLA, there was no Section 113 contribution provision in the statute. Arguing that Section 107 cost recovery was meant to be available to “any other party” only if the not yet in existence Section 113 contribution was not available, does not follow logically or under any canons of statutory construction.<sup>323</sup> Section 107 cost recovery is distinct procedurally from the subsequently added Section 113 contribution action.<sup>324</sup>

## VI. CHAOS IN THE BASE TERRAIN

The Supreme Court’s decision in *Atlantic Research* clarified that “any . . . party” voluntarily incurring waste remediation costs can use Superfund’s Section 107 cost recovery provision. In *Atlantic Research*, the plain meaning of the “any . . . party” statutory language was unanimously found to be unambiguous and contrary to how every federal circuit court had interpreted the language. However, probably because the Supreme Court did not think “voluntarily” was an ambiguous term, the court did not define its use of the term. Many lower federal courts have employed their discretion to supply the definition of this term in a way that frustrates consistent implementation of the Supreme Court’s momentous unanimous decision. There is no plain meaning of “voluntarily” to various lower federal courts. And the chaos that this and other legal mechanisms have created across all the U.S. federal courts affect thousands of the multi-party sites among an estimated 450,000-600,000 contaminated waste sites.<sup>325</sup>

As set forth in Sections III-V, some lower federal courts have rendered decisions not granting private party access to Section 107, by differing on what is or is not “voluntarily” undertaking a cleanup,<sup>326</sup> by disqualifying costs incurred at points in time after a private claimant’s settlement with

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321. *Id.*

322. 42 U.S.C. § 9607 (1980).

323. *See* Ferrey, *supra* note 17, at 710–15.

324. *See, e.g., Morrison*, 638 F.3d at 603.

325. SUPERFUND BENEFITS ANALYSIS, *supra* note 9; Office of Technology Assessment, *supra* note 14; *see also* Hyatt, *supra* note 14.

326. *See supra* Section III.

EPA,<sup>327</sup> and/or by rationale that the instant court prefers Section 113 to Section 107.<sup>328</sup> This final rationale, for a court to simply prefer Section 113, should have been stricken by *Atlantic Research's* reinforcement of Section 107's plain language, which opens at the private plaintiff's election this cost-recovery avenue to "any . . . party."

This is not just form, it is substance. The Superfund's Sections 107 and 113 are not similar cost redistribution mechanisms for plaintiffs who clean up hazardous waste: they can impose fundamentally opposed and different types of liability, one requires successfully suing all other responsible parties while the other does not, and they have often fatally different statutes of limitations. There are several decisions where a CERCLA private party claimant was restricted to Section 113 under which its 3-year statute of limitations then defeated the claim, though the 6-year statute of limitations under Section 107 would have allowed the claim. Using one of these sections can leave no legal remedy at all because of lack of prior EPA litigation against the claiming party.<sup>329</sup> These statutory provisions are not interchangeable to plaintiffs and change how billions of dollars of waste liability are allocated in America.

The Supreme Court opinion in *Cooper v. Aviall* prohibits a private party from initiating a contribution claim under Section 113(f)(1) of CERCLA against other PRPs, unless and until that plaintiff first has been sued for response costs by (or settled with) the government under Sections 107(a) or 106 of CERCLA. Even when a case meets this *Cooper*-defined requirement for use of Section 113, it may be of limited practical use, because of Section 113's much shorter statute of limitations, necessity to prove each claim individually and severally against every last PRP to recover in full, and lack of the possibility to impose joint and several liability. Because Section 113, post *Cooper*, is now in many cases not available or impractical when available, Section 107 cost recovery becomes the key avenue for hazardous remediation cost redistribution.

The impact of several of the decisions highlighted above, frustrating voluntary private party cleanup and cost recovery under Section 107, is significant in a system which depends as much on voluntary action as on law.<sup>330</sup> Private party remediation is the backbone that supports U.S. waste cleanup: for every site on which EPA traditionally leads the cleanup, private

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327. See *supra* Section IV.

328. See *supra* Section V.

329. See *supra* Section II.C.1 (examining the 2004 Supreme Court decision in *Cooper* eliminating access to Section 113 if there has not been prior litigation or settlement).

330. See *supra* Sections III.A & B, IV.A.2 & B.2, V.A.2 & B.2.

parties clean up 100 sites.<sup>331</sup> A report by the EPA found that addressing 350,000 remaining contaminated sites in the U.S. would cost up to one-quarter trillion dollars.<sup>332</sup> This would require an expenditure of \$6-8 billion annually—from all sources—over the next three decades.<sup>333</sup> The Congressional Office of Technology Assessment estimated that there are as many as 600,000 contaminated waste disposal sites nationwide.<sup>334</sup>

As set forth herein, there is now selective lack of private party access, within certain federal court districts and states, and within certain circuit courts of appeals, to Section 107 cost recovery. This results from the Court in *Atlantic Research* not thinking it necessary to define one adverb, leaving “voluntarily” as a critical interpretive point in lower court decisions. This selective interpretation of *Atlantic Research* in the lower courts has created chaos and inconsistency in hazardous waste remediation. The federal circuit courts continue to differ in their interpretations of CERCLA right of cost allocation and recovery, even after two Supreme Court opinions. The chaos among the circuits encourages forum shopping for litigation involving CERCLA cost recovery.

A decade after the 2007 *Atlantic Research* decision, under divergent theories, many courts evade application of its basic holding. In certain circuits, it is difficult to discern any reopening of Section 107 consistent with *Atlantic Research*. The opposite has occurred in some circuits, breeding inter-circuit inconsistency and confusion. With no future Superfund case on this issue pending before the Supreme Court, it is unavoidable and inevitable that the chaos continues.

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331. Ferrey, *supra* note 17, at 687.

332. U.S. EPA, *supra* note 15, at 1–5.

333. *Id.* at viii

334. Office of Technology Assessment, *supra* note 14; *Pollution Locator: Other Contaminated Sites*, SCORECARD: THE POLLUTION INFORMATION SITE, [http://scorecard.goodguide.com/env-releases/def/land\\_other\\_sites.html](http://scorecard.goodguide.com/env-releases/def/land_other_sites.html) (last visited Sept. 26, 2016); SUPERFUND BENEFITS ANALYSIS, *supra* note 9.