

# ELR

## NEWS & ANALYSIS

### *United States v. Atlantic Research: The Supreme Court Almost Gets It Right*

by Jeffrey M. Gaba

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*Editors' Summary: Cooper Industries v. Aviall Services, a 2004 U.S. Supreme Court case, challenged the legal community's understanding of rights of cost recovery under CERCLA, ruling that PRPs who voluntarily cleaned up property did not have a cause of action in contribution under §113(f). However, earlier this year, in United States v. Atlantic Research Corp., the Court held that PRPs who voluntarily clean up contaminated properties may have a right of recovery under §§107(a)(4)(B) or 113(f). In this Article, Jeffrey M. Gaba explores the issues left unresolved or convoluted by these two opinions. He begins with background on the private rights of cost recovery under CERCLA, and then parses these two decisions. He concludes by encouraging the Court to reconcile the different parts of CERCLA to create a coherent set of rights to cost recovery for PRPs.*

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In *United States v. Atlantic Research Corp.*,<sup>1</sup> a unanimous U.S. Supreme Court held that §107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>2</sup> provides a direct right of cost recovery to potentially responsible parties (PRPs) who voluntarily clean up property. For those of us raised on CERCLA, this would seem an unremarkable proposition. For the first 20 years of CERCLA's existence, it was universally held that PRPs had a right of cost recovery. Following the adoption of an express right of contribution in §113(f), there was some confusion about the appropriate cause of action that a PRP should assert, and most courts held that PRPs could only sue in contribution under §113(f). But that a right of cost recovery of some sort existed was an article of faith. Countless millions of dollars changed hands on this proposition; countless real estate transactions were negotiated based on this assumption.

In 2004, however, the Supreme Court taught us the limits of faith. In *Cooper Industries v. Aviall Services*,<sup>3</sup> the Supreme Court upset this widely held assumption by holding that PRPs who voluntarily cleaned up property did not have a cause of action in contribution under §113(f). Given prior case law limiting PRPs to an action under §113, there was reason to believe that a right of cost recovery under

CERCLA would no longer be available to PRPs who voluntarily remediated contaminated property. CERCLA's powerful incentive to clean contaminated property without government involvement was in question.

In *Atlantic Research*, the Court restored our faith. Following *Cooper Industries* and *Atlantic Research*, it seems clear that PRPs who voluntarily clean up property have a direct right of cost recovery under §107(a)(4)(B) and PRPs who have reimbursed costs paid by other PRPs or the government through a civil action or government settlement have a right of contribution under §113(f).

The Supreme Court got it right. Almost. There are a number of issues that still lurk in the interstices of these opinions. These include the proper cause of action to be asserted by PRPs who expend money to remediate property under a government administrative order or as part of a government settlement. Further, the Court's treatment of the issue has raised real concerns about the effectiveness of "contribution protection" that has been a cornerstone of settlements with the government. *Atlantic Research* has revived the right of private cost recovery under CERCLA, but there are still matters to be resolved.

#### **I. The Private Rights of Cost Recovery Under CERCLA**

When CERCLA was adopted in 1980, its liability provisions were contained in §107. Section 107(a)(1)-(4) defined the four classes of PRPs and provided that they would be liable for: (1) all response costs incurred by the federal and state governments not inconsistent with the national contingency plan (NCP); and (2) any other necessary response

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1. 127 S. Ct. 2331, 37 ELR 20139 (2007).

2. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

3. 543 U.S. 157, 34 ELR 20154 (2004).

costs incurred by “any other person” consistent with the NCP.<sup>4</sup> PRP liability under §107 was held to be strict and joint and several.<sup>5</sup>

There was no doubt that under §107(a)(4)(A) the government could recover its cleanup costs from PRPs. Further, in the first years following adoption of CERCLA, courts generally held that parties who were themselves PRPs could sue under §107(a)(4)(B) to recover their cleanup costs.<sup>6</sup> The courts allowed PRPs to recover their costs under §107 even if the cleanup was voluntary and without government involvement.<sup>7</sup>

Courts, however, perceived a problem. PRPs who had not cleaned up property but who were being held liable in cost recovery actions under §107 were seeking cost recovery from other PRPs. This arose either in litigation by PRPs who had previously been held liable in an earlier §107 action or by PRPs who brought third-party claims against other PRPs in an original §107 action. In a number of these cases, federal courts found that PRPs who had been held liable (or who were being sued) had an implied right of contribution to seek an allocation of costs with other PRPs.<sup>8</sup> The implication of a right of contribution also provided a basis for an equitable allocation of costs among PRPs where liability under §107 was otherwise joint and several.

There was, however, a problem with this implied right of contribution. The Supreme Court in two nonenvironmental cases had substantially limited the ability of federal courts to fashion federal implied rights of contribution, and the legitimacy of the CERCLA implied right of contribution was in doubt.<sup>9</sup>

In the 1986 Superfund Amendments and Reauthorization Act (SARA), the U.S. Congress “clarified and confirmed” the right of contribution in CERCLA.<sup>10</sup> In §113(f), Congress

provided two express provisions authorizing contribution. Section 113(f)(1), titled “Contribution,” provided that any person could seek contribution from any other PRPs “during or following” any civil action under §§106 or 107.<sup>11</sup> Additionally, §113(f)(3)(B) provided that persons who had resolved all or part of their liability to the United States or a state “in an administratively or judicially approved settlement” may seek contribution from nonsettling PRPs.<sup>12</sup> Thus, following the 1986 SARA Amendments, CERCLA contained two possible causes of action for PRPs who had incurred response costs: a direct cost recovery action under §107(a)(4)(B) and an action for contribution under §113(f). The Supreme Court described these two sections as creating “similar and somewhat overlapping” remedies.<sup>13</sup>

There were at least three possible consequences arising from the choice of cause of action. First, liability under §107(a)(4)(B) had generally been found to be joint and several while courts, in a contribution action under §113(f), were to “equitably allocate” costs among PRPs. In other words, the implication was that plaintiffs bringing an action under §107(a) would be entitled to recover all of their response costs, while plaintiffs suing in contribution under §113(f) would only be entitled to recover an equitable portion of their costs.

Second, §113(g) provided separate statutes of limitations for actions brought under §§107 and 113. Section 113(g)(2) provided a three- or six-year statute of limitations for actions brought under §107 measured from the date of completion of a removal action or initiation of on-site remediation work for a remediation action.<sup>14</sup> In contrast,

of contribution under CERCLA. *See, e.g.*, H.R. REP. NO. 99-253, pt. I. at 59, 79 (1985).

11. 42 U.S.C. §9613(f)(1). Section 113(f)(1) can be charitably described as oddly drafted. In relevant part it provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. §9613(f)(1). Whereas the first sentence implies that a right of contribution can arise only “during or following” a civil action, the last sentence seems to imply a right of contribution “in the absence of a civil action.” This confusion was resolved by the Supreme Court in *Cooper Indus. v. Aviall Serv.*, 543 U.S. 157, 34 ELR 20154 (2004), which held that the first sentence meant what it said. Section 113(f)(1) created an express right of contribution that could be asserted only during or following a civil action brought under §§106 or 107 of CERCLA.

12. 42 U.S.C. §9613(f)(3)(B).
13. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816, 24 ELR 20955 (1994).
14. Section 113(g)(2)(A) provides a three-year statute of limitations for recovery of costs incurred in removal actions measured from the date of completion of the removal action. 42 U.S.C. §9613(g)(2)(A). Section 113(g)(2)(B) provides a six-year statute of limitations for remedial actions measured from the initiation of “physical on-site construction.” 42 U.S.C. §9613(g)(2)(B). If the remedial action is commenced within three years of completion of a removal action, the removal action costs may be recovered in the action brought under the six-year statute of limitations to recover remedial action costs. 42

4. 42 U.S.C. §9607(a).

5. *See, e.g.*, *United States v. Monsanto Co.*, 858 F.2d 160, 19 ELR 20085 (4th Cir. 1988). The imposition of “joint and several” liability under §107 arises not from an express statutory provision, but from legislative history indicating that CERCLA was to be interpreted in accordance with “traditional and evolving” principles of common law. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 13 ELR 20986 (S.D. Ohio 1983). The Supreme Court, however, has indicated that courts may have the authority to impose other than joint and several liability under §107. *Cooper Indus.*, 543 U.S. at 169-70.

6. *See, e.g.*, *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 16 ELR 20754 (9th Cir. 1986); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 12 ELR 20915 (E.D. Pa. 1982). *See generally* Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOL. L.Q. 181 (1986).

7. *See, e.g.*, *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 18 ELR 21348 (5th Cir. 1988); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 17 ELR 20775 (N.D. Okla. 1987); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 15 ELR 20577 (D. Del. 1985).

8. *See, e.g.*, *United States v. New Castle County*, 642 F. Supp. 1258, 16 ELR 21007 (D. Del. 1986); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 15 ELR 20346 (E.D. Mo. 1985); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 15 ELR 20523 (D. Col. 1985); *Chem-Dyne Corp.*, 572 F. Supp. at 802. Courts alternatively found a basis for implying a right of contribution under the provisions of §107 or generally under federal common law.

9. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981). In light of these cases, the Supreme Court in *Cooper Indus.* characterized the implied right of contribution under CERCLA as “debatable.” *Cooper Indus. v. Aviall Serv.*, 543 U.S. 157, 162, 34 ELR 20154 (2004).

10. Pub. L. No. 99-499, 100 Stat. 1613 (1986). The legislative history for SARA indicates Congress’ intent to “clarify” and “confirm” a right

§113(g)(3) provided a three-year statute of limitations for actions under §113 measured from the date of entry of judgment or settlement.<sup>15</sup>

Finally, Congress, in §113(f)(2), had provided “contribution protection” for persons that entered settlement agreements with the government.<sup>16</sup> Contribution protection encouraged settlement by providing some certainty of the extent of liability of settling parties. Settling parties would not only resolve their liability to the government, but also get protection from imposition of additional costs by non-settling parties who might otherwise sue them for contribution. There was some concern following SARA that PRPs could avoid the consequences of contribution protection by suing for cost recovery under §107(a)(4)(B), rather than contribution under §113(f).<sup>17</sup>

Courts of appeal dealt with the §§107 and 113 issue by uniformly holding that PRPs could sue only under §113(f).<sup>18</sup> In general, the courts held that an action among jointly liable PRPs was a “quintessential” action for contribution and therefore governed by §113.<sup>19</sup> These holdings had the neat consequence of eliminating a choice of causes of action by PRPs and ensuring the integrity of contribution protection. No court of appeals precluded a PRP from seeking cost recovery, and PRPs had been allowed to seek contribution regardless of whether they had incurred costs following a government settlement, government order, or voluntarily.<sup>20</sup> The effect of these decisions was simply to allocate PRPs’ actions to §113.<sup>21</sup>

## II. The Cooper Revolution

In *Cooper Industries*,<sup>22</sup> the Supreme Court rocked the established view of CERCLA. *Cooper Industries* began as a garden-variety CERCLA action. Aviall was the current landowner that, after some pressure from the state, undertook a

cleanup of its property. Although it had contributed to some of the contamination, the prior owner, Cooper Industries, also had released hazardous substances at the site. Aviall sued Cooper Industries in federal district court seeking, among other things, cost recovery under CERCLA. The district court, however, dismissed the CERCLA claim holding that Aviall did not have an action for contribution under §113(f)(1) since it had not incurred costs “during or following” a civil action as provided in §113(f)(1).<sup>23</sup> This decision was affirmed by a panel of the U.S. Court of Appeals for the Fifth Circuit, but then reversed in a 10-3 decision by the Fifth Circuit sitting en banc.<sup>24</sup> The en banc decision held that a PRP who had incurred response costs had a right of contribution under §113(f) even in the absence of a civil action. Despite the fact that there was no split in the circuits on this issue, the Supreme Court, at the urging of the U.S. Department of Justice (DOJ), granted certiorari.

The Supreme Court held that a right of contribution under §113(f)(1) was only available “during or following” a civil action under CERCLA.<sup>25</sup> Although the majority opinion, written by Justice Clarence Thomas, was endorsed by seven Justices, all nine agreed that an action for contribution under §113(f)(1) could only be brought during or following a civil action. In other words, PRPs who had voluntarily cleaned up property had no right of contribution under CERCLA. The majority declined to consider whether an alternative right of cost recovery existed under §107(a)(4)(B) or whether there was an implied right contribution available to PRPs not eligible for contribution under §113(f). Rather, the Court remanded the case for further consideration of these issues.<sup>26</sup> Two Justices, in dissent, would have affirmed the Fifth Circuit en banc decision based on their conclusion that §107 provided an alternative cause of action.<sup>27</sup>

*Cooper Industries* created something of a firestorm within the environmental world. The decision had eliminated a right of contribution under §113 by PRPs who voluntarily incurred cleanup costs; prior court of appeals decisions had eliminated the right of PRPs to sue under §107. Thus, there was considerable doubt as to whether, following *Cooper Industries*, PRPs who voluntarily cleaned up property had any federal cause of action under CERCLA to recover some portion of cleanup costs from other PRPs.

## III. Atlantic Research to the Rescue

Within two years of the decision in *Cooper Industries*, four courts of appeals had issued opinions addressing the issue of whether PRPs had a cause of action under §107. Unanimous opinions in U.S. Court of Appeals for the Second Circuit,<sup>28</sup>

U.S.C. §9613(g)(2)(B). In general, “removal” actions are defined as shorter term, immediate responses; “remedial” actions generally are longer term, permanent responses. Compare 42 U.S.C. §9601(23) (definition of “removal”), with 42 U.S.C. §9601(24) (definition of “remedial”). The term “response action” is defined to include both removal and remedial actions. 42 U.S.C. §9601(25).

15. 42 U.S.C. §9613(g)(3).

16. 42 U.S.C. §9613(f)(2). This section provides that persons who entered into settlements with the government “shall not be liable for claims for contribution regarding matters address in the settlement.” 42 U.S.C. §9613(f)(2). Section 122(g)(5) provides comparable contribution protection for de minimis party settlements. 42 U.S.C. §9622(g)(5).

17. See, e.g., *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1304, 27 ELR 21211 (9th Cir. 1997).

18. *Cooper Indus. v. Aviall Serv.*, 543 U.S. 157, 586, 34 ELR 20154 (2004) (citing cases).

19. See, e.g., *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24, 29 ELR 20229 (2d Cir. 1998).

20. See, e.g., *Crofton Ventures Ltd. Partnership v. G&H Partnership*, 258 F.3d 292, 31 ELR 20841 (4th Cir. 2001) (right of contribution following state-ordered cleanup); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Co.*, 153 F.3d 344, 29 ELR 20065 (6th Cir. 1999) (right of contribution following federal administrative order); *Pinal Creek Group v. Newmont Mining Co.*, 118 F.3d 1298, 27 ELR 21211 (9th Cir. 1998) (right of contribution following voluntary cleanup).

21. The U.S. Court of Appeals for the Eighth Circuit, in its opinion in *Atlantic Research*, characterized these cases as “directing traffic” between §§107 and 113. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 832, 36 ELR 20164 (8th Cir. 2006).

22. 543 U.S. at 157.

23. *Aviall Serv. v. Cooper Indus.*, 2000 WL 31730 (N.D. Tex. 2000).

24. *Aviall Serv. v. Cooper Indus.*, 263 F.3d 134, 32 ELR 20069 (5th Cir. 2001).

25. *Cooper Indus.*, 543 U.S. at 168.

26. *Id.* at 170. The majority also declined to consider whether parties who clean up in response to a government administrative order had a right of contribution under §113(f)(1). *Id.* at 167 n.5.

27. *Id.* at 171 (Ginsburg, J., dissenting). The dissent, authored by Justice Ruth Bader Ginsburg, was joined by Justice John Paul Stevens. Although the dissent clearly found a cause of action under §107(a), it was somewhat ambiguous as to whether this cause of action arose as a right of contribution or a direct right of cost recovery. See *id.* at 170.

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

the U.S. Court of Appeals for the Seventh Circuit,<sup>29</sup> and the U.S. Court of Appeals for the Eighth Circuit<sup>30</sup> held that PRPs who voluntarily cleaned up property could seek cost recovery under §107. In a 2-1 decision, the U.S. Court of Appeals for the Third Circuit held that PRPs could not sue under §107, and thus PRPs who voluntarily clean up property had no cause of action under CERCLA.<sup>31</sup>

The Supreme Court granted certiorari to consider the Eighth Circuit opinion in *Atlantic Research*. The Eighth Circuit opinion was an interesting choice for two reasons. First, the Eighth Circuit had found a right of cost recovery under two alternative theories. The court held that PRPs either had a direct right of cost recovery under the plain language of §107(a)(4)(B) or as an implied right of contribution arising from §107. This assured that the Supreme Court would consider the full range of arguments in support of a PRP action under §107. Second, the defendant in *Atlantic Research* was the federal government. The DOJ had, since *Cooper Industries*, argued that there was no right of cost recovery for PRPs who voluntarily clean up property. One conspiracy theory held that the government's position was motivated by a desire to eliminate cost recovery actions against the government. Whatever the motivation, the DOJ argued in *Atlantic Research* that PRPs had no cause of action under §107.

Justice Thomas, writing for a unanimous court, held that §107(a)(4)(B) expressly provided a direct right of cost recovery by PRPs.<sup>32</sup> Section 107(a) provides that PRPs are liable to: (1) government entities; and (2) to "any other person," and the government argued that "any other person" referred to persons other than PRPs. The Court gave this argument short shrift, stating that it made "little textual sense."<sup>33</sup> Noting the parallel construction of §§107(a)(4)(A) and 107(a)(4)(B), the Court concluded that the reference to "any other person" distinguished those "persons," including PRPs, who could sue under §107(a)(4)(B), from the government entities, themselves defined in the statute as persons, who could sue under §107(a)(4)(A).<sup>34</sup> Further, the Court noted that, given the broad scope of the class of PRPs, "virtually all persons likely to incur cleanup costs" were likely to be PRPs, and, thus, if PRPs could not sue under §107, it was "unclear what party would."<sup>35</sup> Noting that there was some redundancy in their construction since §107(a)(4)(B) provided that those "other persons" could only recover "other costs," Justice Thomas noted that it is "appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity."<sup>36</sup>

The existence of separate causes of action under §107(a) and §113(f) would not, in the Court's view, provide PRPs

with a choice of cause of action since the sections established "complementary yet distinct" rights.<sup>37</sup> The Court based this distinction, in part, on the "traditional sense" of common-law contribution.<sup>38</sup> Quoting *Black's Law Dictionary*, the Court described contribution as a tortfeasor's right to collect from others responsible for the same tort after the tortfeasor "has paid more than his or her proportionate share."<sup>39</sup> Where a PRP had paid more than its share of an existing obligation, either through a judgment in a §107 civil action or by paying money to the government in a settlement agreement, its action against other PRPs was a contribution action subject to §113(f).<sup>40</sup> In contrast, §107(a) "permits cost recovery (as distinct from contribution) by a party that has incurred cleanup costs."<sup>41</sup> In the Court's view, a party who pays to satisfy a settlement agreement or court judgment "does not incur its own costs of response. Rather it reimburses other parties for costs that those parties have incurred."<sup>42</sup> Thus, parties who directly incur costs are subject to §107(a); parties who reimburse others for previously incurred response costs are limited to an action for contribution under §113(f).<sup>43</sup> Given this clear distinction, parties would be subject to the appropriate statute of limitations and liability standard determined by whether their action arose under §§107 or 113.

The Court also dealt with two other concerns arising from a PRP's right of cost recovery under §107. First, the Court considered the consequence of providing for joint and several liability in action by a PRP under §107(a)(4)(B). Although the standard of liability might be joint and several, a direct cost recovery action under §107 would not, in the Court's view, entitle a PRP to recover an inequitable share of costs. Defendant PRPs in such an action could file a counterclaim for contribution against the plaintiff under §113(f), and this would allow the court to equitably allocate costs between them.<sup>44</sup> Therefore, whether the action arises under §§107 or 113, courts would have the power to equitably allocate costs among PRPs.

Second, the Court considered the effect of a direct right of cost recovery under §107 on the "contribution protection" afforded to settling parties under §107(f)(2). Although the Court acknowledged that the contribution protection provision "does not by its terms protect against cost-recovery liability under §107(a)," the Court doubted that this "supposed loophole" would discourage settlement.<sup>45</sup> Since courts could allocate costs based on equitable principles, a court "would undoubtedly consider any prior settlement as part of the liability calculus."<sup>46</sup> Further, settling PRPs still would obtain significant protection from contribution sought by other PRPs. Finally, settling PRPs would also obtain the "inherent benefit" of finally resolving its liability to the govern-

29. *Metropolitan Water Reclamation Dist. of Greater Chicago v. North Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 37 ELR 20010 (7th Cir. 2007).

30. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 823, 36 ELR 20164 (8th Cir. 2006).

31. *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 36 ELR 20180 (3d Cir. 2006).

32. *United States v. Atlantic Research*, 127 S. Ct. 2331, 2335-37, 37 ELR 20139 (2007).

33. *Id.* at 2336.

34. *Id.*

35. *Id.*

36. *Id.* at 2337.

37. *Id.*

38. *Id.* at 2338.

39. *Id.* (quoting BLACK'S LAW DICTIONARY 353 (8th ed. 1999)).

40. *Id.*

41. *Id.*

42. *Id.*

43. In a critical footnote, discussed *infra*, the Court acknowledged that this analysis created the possibility that under certain circumstances there might still be an overlap between §§107 and 113. *Id.* at 2338 n.6.

44. *Id.* at 2339.

45. *Id.*

46. *Id.*

ment.<sup>47</sup> In light of these continuing benefits, the Court thought that permitting PRPs to seek cost recovery under §107 would not “eviscerate” the contribution protection set forth in §113(f)(2).

In light of its conclusion that §107(a)(4)(B) provides an express right of cost recovery, the Court stated that it “need not address” the alternative holding of the Court of Appeals that §107 contains an additional implied right of contribution for PRPs not eligible to seek contribution under §113(f).<sup>48</sup>

#### IV. Clarity and Confusion Following *Atlantic Research*

##### A. What Is Clear: Voluntary Cleanups and Reimbursement

A few basic points are clear following *Atlantic Research* and *Cooper Industries*. PRPs who voluntarily cleanup property have a direct right of cost recovery under §107(a)(4)(B), and they may not sue in contribution under §113(f). Their §107 action is subject to the three- or six-year statutes of limitation specified in §113(g)(2). Although their initial action may be based on joint and several liability, courts may equitably allocate costs if the defendant properly counterclaims under §113(f)(1).

In contrast, PRPs who have reimbursed the government or other PRPs for previously incurred response costs following either a civil judgment or government settlement may sue for contribution under §113(f). Such a contribution action will be subject to the three-year statute of limitations provision of §113(g)(3). In a §113(f) contribution action, the court will have the authority to equitably allocate costs.

##### B. What Is Less Clear: Response Costs Following a Unilateral Administrative Order or Settlement

There are two circumstances not addressed in either *Cooper Industries* or *Atlantic Research* in which PRPs may incur costs they wish to recover under CERCLA: costs incurred in response to a government administrative order and costs incurred for remedial work under a settlement agreement. Under the Court’s analysis in *Atlantic Research*, it is likely, but not certain, that courts will conclude that such costs may only be recovered through an action under §107(a)(4)(B). Limiting cost recovery in these circumstances creates some procedural problems, but also neatly addresses any problems regarding the applicable statute of limitations.

##### 1. Costs Incurred Under an Administrative Order

Under CERCLA, persons may be subject to a unilateral administrative order (UAO) issued by the U.S. Environmental Protection Agency under §106 that compels them, with draconian consequences for noncompliance, to take specified response actions. In *Cooper Industries*, the Supreme Court expressly declined to consider whether PRPs who incurred costs in response to a UAO could sue for contribu-

tion under §113(f)(1).<sup>49</sup> Subsequent courts concluded that they could not.<sup>50</sup>

Compulsory cleanups are, however, significantly different from voluntary cleanups. Unlike voluntary cleanups, cleanups in response to a formal UAO are obviously undertaken under government compulsion, and, in a real sense, extinguish possible liability of other PRPs by eliminating the basis for further government action. In this respect, there is an argument to be made that compulsory cleanups, unlike voluntary cleanups, justify a right of contribution under traditional common-law concepts.

Nonetheless, both the language of §113(f) and the Court’s analysis in *Atlantic Research* indicate that costs incurred in response to a UAO may only be recovered in an action under §107(a). First, a right of contribution under §113(f)(1) arises only during or following a civil action. As several courts have held, a UAO is simply not a civil action, and therefore, under the plain language reading of the Court in *Cooper Industries*, it is hard to claim that there is an express right of contribution created by §113(f)(1). Second, the Court’s logic in *Atlantic Research* almost compels this conclusion. In the Court’s view, contribution arises only if a tortfeasor has paid or reimbursed a party for previously established liabilities. Persons who directly expend costs for remediation, rather than reimbursing others, have incurred costs within the meaning of §107(a). Since parties subject to a UAO directly incur response costs and do not reimburse expenditures made by others, their cause of action is likely to arise exclusively under §107(a)(4)(B). Limiting their cause of action to §107(a) is also, as discussed below, consistent with the statute of limitations provisions of §113(g).

##### 2. Costs Incurred Under a Settlement Agreement

A far more problematic issue is the appropriate cause of action available to PRPs who have incurred response costs by undertaking remediation under the terms of an approved settlement agreement. In footnote six of *Atlantic Research*, the Court identified this circumstance as one in which their may be overlapping remedies under §§107 and 113. The Court stated that

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.<sup>51</sup>

Although the plain language of §113(f)(3)(B) suggests that these costs can be recovered in a contribution action, both the logic of *Atlantic Research* and the statute of limitations provisions of §113(g) suggest that PRPs seeking to recover these costs will be limited to an action under §107.

Consider a typical situation addressed in a settlement agreement. In most cases, the government will have incurred some response costs investigating or taking initial response actions at a site. A settlement will generally involve

49. *Cooper Indus. v. Aviall Serv.*, 543 U.S. 157, 168 n.5.

50. *See, e.g., Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006); *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005).

51. *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2338 n.6, 37 ELR 20139 (2007) (citation omitted).

47. *Id.*

48. *Id.* at 2339 n.8.

an agreement by settling PRPs both to reimburse the government for its past costs and to undertake further response actions at the site.

There seems no doubt that, under §113(f)(3)(B), PRPs who have reimbursed the government may seek contribution from nonsettling PRPs to recover portions of these costs.

The problem arises as to the proper cause of action for costs directly incurred by a PRP to remediate a site under the terms of a settlement agreement. The language of §113(f)(3)(B) suggests that it provides a right of contribution for these costs. Section 113(f)(3)(B) provides a right of contribution to a party who has “resolved its liability to the United States or a State for some or all of a response action or some or all of its costs of such action” in a proper settlement agreement. The language of this section certainly suggests a right of contribution by parties who have either (1) reimbursed the government for “some or all of [the government’s] costs or (2) agreed to undertake a further response action and therefore resolved the parties’ liability to the government for “some or all of a response action.” The Court, however, stated that Congress, when it used the word contribution, intended to use it in its traditional sense. Therefore, it is possible that the right of contribution under §113(f)(3)(B) might not extend to costs directly incurred in an agreed response action.

Furthermore, the logic of *Atlantic Research* suggests that such costs are not recoverable in an action for contribution. In the Court’s view, contribution arises when a party has reimbursed others and cost recovery arises when a person has directly incurred response costs. The Court suggested that this neat dichotomy might result in overlapping causes of action for costs incurred under a settlement agreement.

The provisions of the statute of limitations in §113(g) may justify avoiding any overlap of causes of action. The provisions of §113(g) expressly distinguish between actions for contribution under §113 and actions for cost recovery under §107. Under §113(g)(3), an action for contribution must be brought within three years after entry of judgment or administrative order. This time period makes sense if the settlement requires payment of past costs; it makes less sense if the settlement requires performance of on-site remedial work that may not be completed within three years of settlement.

In contrast, §113(g)(2), applicable to cost recovery under §107, establishes a statute of limitations measured from the date of completion of certain on-site remediation work. This obviously makes sense when the costs that are being recovered involve construction or other remedial work that may be continuing long after the date of settlement. In the pre-*Cooper Industries* world, a number of courts that had limited PRPs to an action for contribution under §113 had found it necessary to apply the §107 statute of limitations to actions brought under §113.<sup>52</sup> This was done through some creative, and somewhat artificial, characterizations of the relationship between §§107 and 113. No other option was possible given the unavailability of a PRP right of cost recovery under §107 and the inapplicability of the contribution statute of limitations to actions involving on-site remedial work.

Following *Atlantic Research*, however, PRPs directly incurring response costs now have a cause of action under §107. Limiting parties who directly incur response costs, whether voluntarily, pursuant to a UAO, or pursuant to settlement agreement, to an action under §107 rationalizes the application of the §113(g) statute of limitations without the artifices employed by earlier cases. It is consistent with the Court’s rationale and a credible construction of §113(f)(3)(B). An exclusive cause of action under §107 simply makes more sense that some alternative overlapping remedy.

Procedurally, there would be no problem in pleading two causes of action; past costs paid under a settlement agreement would be clearly distinguishable from remediation costs incurred complying with the terms of the agreement. There would, however, be one consequence arising from the application of the statutes of limitation provisions themselves. Under §113(f)(3), settling parties must bring an action for contribution within three years of settlement. At that point, they may still be incurring response costs as part of remedial work. This means that settling PRPs might be forced to bring an initial contribution action to recover the costs they have paid the government and a subsequent cost recovery action addressing their response costs.

This may be a consequence but not a concern. It is common in CERCLA practice to bring an initial action to establish the liability of the defendants prior to incurring all response costs. An initial §113 action would also include a claim under §107 for the costs that have been initially incurred. A determination of liability at that point would facilitate settlement of those future costs. Indeed, the only consequence of this approach would be a requirement that settling PRPs file their initial action within three years of settlement or risk losing the right of contribution for the amounts paid to the government.

### C. What Is Wrong: Contribution Protection

The most troubling part of the Court’s analysis in *Atlantic Research* was its cavalier treatment of “contribution protection.” As noted, Congress provided for contribution protection under §113(f)(2) to encourage settlement by limiting the liability of settling parties. Prior to *Cooper Industries*, one reason that courts had limited PRPs to an action for contribution was to preserve this incentive; if PRPs can only sue for contribution, then “contribution protection” protects settling PRPs from *all* CERCLA claims by nonsettling PRPs.<sup>53</sup> With the resurrection of a distinct right of cost recovery in §107(a)(4)(B), *Atlantic Research* also resurrected the issue of whether contribution protection would also bar §107 claims by nonsettling parties.

In *Atlantic Research*, however, the Supreme Court, with virtually no analysis, indicated that contribution protection under §113(f)(2) would not preclude an action for cost recovery under §107(a). The Court’s entire treatment of this issue was its observation that §113(f)(2) “does not by its terms protect against cost recovery liability under section 107”; it characterizes this as a “supposed loophole.”<sup>54</sup> Although the Court “doubts” that its conclusion

52. See, e.g., *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 31 ELR 20369 (5th Cir. 2000); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 27 ELR 21465 (10th Cir. 1997).

53. See, e.g., *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187, 27 ELR 21465 (10th Cir. 1997); *In re Reading Co.*, 115 F.3d 1111, 27 ELR 21075 (3d Cir. 1997).

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

will “eviscerate” settlement incentives,<sup>55</sup> the Court clearly underestimates the consequence of the loss of contribution protection.

The Court indicated that trial courts will “undoubtedly” take the settlement into account in allocating liability in any §107 action. The Court may not have doubts, but in a trial in which parties are allowed to present evidence relating to equitable allocation, it is far from certain that a settling PRP can be assured that it will not be required to pay more than the amount specified in the government settlement. Settlement will thus not buy the certainty as to the settling party’s liability than previously provided by contribution protection.

Even if trial courts will generally limit liability based on past settlement agreements, there is another significant consequence of the loss of contribution protection. It is one thing to have a defense to liability through “contribution protection” and thus be able to avoid litigation through a motion for summary judgment. It is quite another to be subject to liability under §107 and therefore be required to proceed through trial in the hopes of a final equitable allocation by the court.

This problem need not arise. In the years following adoption of §113(f)(2), a number of courts extended contribution protection to bar nonsettling PRPs from asserting a variety of claims against settling parties.<sup>56</sup> One court, addressing the argument that contribution protection should not bar a claim for “independent cost recovery,” stated, the “words of the contribution bar such claims no matter what they are called.”<sup>57</sup>

In the oral argument in *Atlantic Research*, Justice Ruth Bader Ginsburg identified this simple solution. She suggested that to “harmonize” §§107 and 113, courts could “honor the agreement” between the settling parties and the government by barring actions under §§107 and 113. In her

words, “If someone has settled and is protected by virtue of the settlement, then when someone else tries to go after that same person the court could say: We have to make the statute work and we’re going to honor the settlement.”<sup>58</sup>

The Court, through its narrow “traditional” characterization of contribution, has made it more difficult to extend contribution protection to §107 claims, but it is not a great stretch to say both that a §107 cost recovery claim has sufficient characteristics of contribution to justify its bar under §113(f)(2).<sup>59</sup> In fact, the Court specifically stated that it did not reach the question of whether PRPs had an “implied right of contribution” under §107.<sup>60</sup> If such an implied right of contribution were found to exist, it would be no great stretch to conclude that the contribution bar precluded a §107 contribution claim. The problem, of course, is the Court’s identification of an express right of cost recovery under §107 independent of any such implied right. Perhaps, the Court’s preservation of the possibility of an implied right contribution is enough of an opening for future courts to conclude that contribution protection also bars §107 claims.

Whatever the rationale, extension of contribution protection to PRP claims under §107 would complete the return to those preexisting, happy days of a stable understanding of CERCLA liability.

## V. Conclusion

*Atlantic Research* was an important step in ensuring that the remedial objectives of CERCLA are satisfied. By providing PRPs a mechanism to ensure an equitable allocation of cleanup costs, the Court preserved an incentive to voluntary cleanup. The lingering uncertainties in the opinion can be resolved to create a coherent set of rights to cost recovery that reconciles the different parts of this notoriously confusing and complex statute.

55. *Id.*

56. *See, e.g.,* *City and City of Denver v. Adolph Coors Co.*, 829 F. Supp. 340 (D. Colo. 1993) (settlement bars “response cost” claim as well as claim for contribution); *Davro Corp. v. Zuber*, 804 F. Supp. 1182 (D. Neb. 1992) (contribution protection provided to de minimis party settlements under §122(g)(5) bars “independent response cost claim” cost recovery by nonsettling party for costs incurred in response to administrative order). *See also* *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 92, 20 ELR 20845 (1st Cir. 1990) (section 113(f)(2) also bars claims for indemnification by nonsettling parties).

57. *Davro Corp. v. Zuber*, 804 F. Supp. at 1189.

58. Transcript of Oral Argument at 25-26, *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562), available at [http://supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-562.pdf](http://supremecourtus.gov/oral_arguments/argument_transcripts/06-562.pdf).

59. Several courts had applied contribution protection to bar §107 claims by nonsettling parties because, in their view, a cost recovery action was essentially an action for contribution. *See, e.g.,* *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 23 ELR 21493 (D. Colo. 1993); *Transtech Indus., Inc. v. A&Z Septic Clean*, 798 F. Supp. 1079, 25 ELR 21493 (D.N.J. 1992).

60. *Atlantic Research*, 127 S. Ct. at 2339 n.8.