



ARTICLE

The Common Law of Liable Party CERCLA Claims

Justin R. Pidot* & Dale Ratliff†

Abstract. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 transformed environmental law by imposing joint and several strict liability on those who contaminate the environment, referred to as potentially responsible parties (PRPs). Under the auspices of CERCLA, the U.S. Environmental Protection Agency (EPA) has overseen cleanup at thousands of sites, protecting public health and natural resources and returning land to productive use. But thousands more sites require attention.

The best opportunity for the continued success of CERCLA lies in the EPA's ability to convince PRPs to enter settlements and agree to fund cleanups. CERCLA encourages settlement by protecting settling parties from contribution claims brought by other PRPs. Recent doctrinal developments, however, threaten to substantially undermine that incentive because now some PRPs—typically the least cooperative—may bring “cost recovery” actions, which appear to evade the protection against contribution claims.

This Article exposes this appearance as an illusion. Courts have long recognized that common law principles govern cost recovery claims. Where the government sues on behalf of the public, those principles render PRPs jointly and severally liable. But the common law treats claims brought by joint tortfeasors—like PRPs—differently. Such claims are quintessential contribution claims, and they are therefore barred.

Few courts or commentators have addressed the nature of PRP cost recovery claims. Yet this issue requires urgent attention to ensure that the EPA's CERCLA program remains viable in the current political reality. This Article analyzes common law principles, statutory language, and case law and identifies a path forward. Recognizing that PRP cost

* Associate Professor, University of Denver Sturm College of Law. I would like to thank the lawyers at the U.S. Environmental Protection Agency and the U.S. Department of Justice with whom I have discussed the ideas contained in this Article over the years.

† Environmental Associate, Hogan Lovells US LLP. I would like to thank my coauthor for suggesting this topic and providing me with the opportunity to engage with this interesting issue. I would also like to thank all the participants in the University of Denver Environmental Law Workshop for their feedback and assistance, and in particular the late Fred Cheever for his time, insight, and thoughtful commentary during the early stages of this project. The views expressed in this Article are ours alone and do not represent the views of my firm or its clients.

Common Law of CERCLA Claims
70 STAN. L. REV. 191 (2018)

recovery claims are contribution claims reinvigorates CERCLA's settlement incentives while ensuring that each statutory provision retains importance and meaning.

Table of Contents

Introduction..... 194

I. Environmental Remediation of Contaminated Sites..... 200

 A. Liable Parties..... 201

 B. Cleanups..... 203

 C. Recoverable Costs..... 209

 D. Statutory Contribution 211

II. Evolution of CERCLA Lawsuits 215

 A. 1980-1986: Establishing Joint and Several Liability in Government Suits.... 215

 B. 1986-2004: Limiting PRPs to Statutory Contribution Claims 218

 C. 2004-2007: Reestablishing PRP Cost Recovery Rights 221

III. Settlement Incentives at Risk..... 223

 A. The Nature of Unilateral Administrative Orders..... 224

 B. The Exclusivity of the Contribution Remedy 225

IV. The Nature of PRP Cost Recovery Actions..... 229

 A. Scant Judicial Attention to the Nature of PRP Cost Recovery Claims..... 229

 B. Inherent Flexibility of Cost Recovery Liability 232

 C. Contribution, Not Joint and Several Liability, Is the Appropriate
 Common Law Rule for PRP Cost Recovery Actions 235

 1. The common law of joint and several liability 235

 2. The common law of contribution..... 239

 3. PRP cost recovery actions as common law contribution claims 243

V. Restoring CERCLA Settlement Incentives 248

 A. The Virtue of PRP Cost Recovery Suits as Contribution Claims..... 248

 B. The Permissibility of Construing PRP Cost Recovery Actions as
 Contribution Claims..... 252

 1. The lessons of *Cooper Industries* and *Atlantic Research* 252

 2. The remaining vitality of private party cost recovery claims
 under section 107(a) and statutory contribution claims under
 section 113(f)..... 257

Conclusion..... 261

Appendix A 263

Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Act) of 1980 transformed environmental law by imposing joint and several strict liability on those responsible for contaminating the environment.¹ The Act pursues two primary goals: (1) ensuring the effective and efficient cleanup of contaminated sites; and (2) shifting the cost of cleaning up those sites to the parties responsible.² Under the auspices of CERCLA, the U.S. Environmental Protection Agency (EPA) has ensured remediation of thousands of sites across the country, and state agencies have remediated thousands more.³ Government agencies then bring “cost recovery” claims under CERCLA seeking reimbursement from the parties responsible for contamination.⁴ As a result of this work and those lawsuits, properties once too polluted to use have become vibrant and productive once more,⁵ and billions of dollars of taxpayer funds have been recovered.⁶

1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2016)); see RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 107-09* (2004). CERCLA is frequently referred to as “Superfund.” See, e.g., *Superfund: CERCLA Overview*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/FQ4P-P492> (archived Oct. 6, 2017). The common law principle of joint and several liability holds that “[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.” 4 RESTATEMENT (SECOND) OF TORTS § 875 (AM. LAW INST. 1979). In the context of CERCLA, any one party responsible for hazardous substances in the environment is liable for cleaning up the site at which those hazardous substances are located or reimbursing the entirety of the government’s cost of carrying out such a cleanup. See *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 665, 675 (7th Cir. 2014) (citing 42 U.S.C. § 9606) (explaining that if a liable party “caused the incurrence of *some* response costs within” the affected site, then it “may be held liable for *all* response costs” there).
2. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).
3. See Ronald G. Aronovsky, *Foreword: CERCLA and the Future of Liability-Based Environmental Regulation*, 41 SW. L. REV. 581, 583 (2012).
4. See 42 U.S.C. § 9607(a)(4)(A). “Cost recovery” claims refer to the claims authorized under section 107 of CERCLA whereby a party that has incurred “response costs,” which are costs associated with remediating a contaminated site, may seek reimbursement for those costs from a party liable for contamination at the site. See, e.g., *Bernstein v. Bankert*, 733 F.3d 190, 200-01 (7th Cir. 2013).
5. See, e.g., U.S. EPA, EPA-560-F-07-213, *A Brownfields Intervention Results in the New Shreveport Convention Center* (2007), <https://perma.cc/T76V-LYM9>.
6. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-841R, *SUPERFUND: FUNDING AND REPORTED COSTS OF ENFORCEMENT AND ADMINISTRATION ACTIVITIES 15 tbl.2* (2008) (identifying over \$7 billion in past and future costs recovered from Superfund enforcement at sites listed on the National Priorities List (NPL) between 1979 and 2007). The NPL contains “sites of national priority among the known releases or threatened releases of hazardous substances, pollutants, or contaminants” and is “intended primarily to guide the EPA in determining which sites warrant further investigation.” See *Superfund: National Priorities List (NPL)*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/W9JZ-37ZH> (archived Oct. 6, 2017).

Much work remains. The EPA has identified thousands more sites requiring cleanup,⁷ and the agency receives, on average, more than 1000 reports of releases of hazardous substances into the environment each year.⁸ As of fiscal year 2013, more than 39 million people—about 13% of the nation’s population—lived within three miles of a site the EPA has designated as a priority for efforts to address contamination.⁹

Contaminated sites can pose complex, costly problems. Consider, for example, the Lower Passaic River in New Jersey. Approximately 100 industrial facilities released more than 100 different hazardous substances into the river, including polychlorinated biphenyls (PCBs), dioxin, heavy metals, pesticides, and other contaminants.¹⁰ The effects of these substances on human health and the environment can be severe. The EPA estimated that consumption of fish from the Lower Passaic River may lead to four additional incidents of cancer per 1000 people and cause other health problems as well.¹¹ Contaminants also harm benthic invertebrates and fish along with birds and mammals that feed in and along the river.¹² The multifaceted approach to remediation the EPA selected includes dredging 3.5 million cubic yards of contaminated sediment and constructing an engineered cap along the river bottom to prevent remaining contaminants from entering the aquatic ecosystem.¹³ The effort is anticipated to cost \$1.3 billion and take six years to complete.¹⁴ After

-
7. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-252, SUPERFUND: EPA SHOULD TAKE STEPS TO IMPROVE ITS MANAGEMENT OF ALTERNATIVES TO PLACING SITES ON THE NATIONAL PRIORITIES LIST 16 (2013) (identifying 3402 sites reported to the Superfund program as eligible for listing on the NPL).
 8. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-633T, HAZARDOUS WASTE CLEANUP: OBSERVATIONS ON STATES’ ROLE, LIABILITIES AT DOD AND HARDROCK MINING SITES, AND LITIGATION ISSUES 3 (2013) (“[O]ver 40,000 potential hazardous release sites have been reported to the Superfund program over the past 30 years . . .”).
 9. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-812, SUPERFUND: TRENDS IN FEDERAL FUNDING AND CLEANUP OF EPA’S NONFEDERAL NATIONAL PRIORITIES LIST SITES 9 (2015). This statistic measures the proximity of the population to sites on the NPL that are not federal facilities, or “nonfederal NPL sites,” which account for 90% of all sites on the NPL. See *id.* at 1.
 10. See Press Release, U.S. EPA, EPA Finalizes Passaic River Cleanup, One of the Largest Superfund Projects in EPA History Will Protect Peoples [sic] Health and the Environment (Mar. 4, 2016), <https://perma.cc/VVT5-T9TG> (noting that more than 100 pollutants have been identified in the Lower Passaic River and that “[a]pproximately 100 companies are potentially responsible”); see also U.S. EPA, NO. 396055, RECORD OF DECISION: LOWER 8.3 MILES OF THE LOWER PASSAIC RIVER 3 (2016) [hereinafter U.S. EPA, LOWER PASSAIC RIVER ROD] (selecting response actions for Lower Passaic River).
 11. U.S. EPA, LOWER PASSAIC RIVER ROD, *supra* note 10, at 28-29.
 12. *Id.* at 38.
 13. *Id.* at 80.
 14. *Id.* at 88.

implementation of the remedy, the EPA estimates that the additional risk of cancer will decrease significantly from four in 1000 to between one in 10,000 and one in 1 million people.¹⁵

Despite the ongoing need, the EPA's financial resources and political will are in jeopardy. Congress has routinely underfunded the EPA's work cleaning up contaminated sites,¹⁶ and the Trump Administration has threatened the EPA with dramatic further cuts of funding and staff.¹⁷ While Scott Pruitt, the EPA Administrator, has identified the CERCLA program as among those he supports,¹⁸ it's hard to imagine that he will authorize the agency to issue orders requiring uncooperative polluting industries to engage in cleanups costing hundreds of millions of dollars or more.¹⁹

Congress recognized that environmental remediation could be costly and contentious. It amended CERCLA only six years after the statute's enactment to reduce litigation and create incentives for liable parties, referred to as potentially responsible parties (PRPs), to enter settlements with federal and state agencies to fund and carry out necessary cleanup activities.²⁰ These incentives are created by interlocking provisions that on the one hand authorize contribution lawsuits among PRPs to spread cleanup costs—which this Article will refer to as statutory contribution claims—and on the other hand protect settling parties from contribution lawsuits.²¹ PRPs have responded well. The Government Accountability Office (GAO) found that

15. *Id.* at 90-91.

16. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 13 fig.3, 16, 18 & tbl.1 (identifying a declining trend in EPA appropriations and noting that as a result the EPA delayed work at some sites).

17. See Alex Guillén, *Sources: White House Proposes to Cut EPA Budget by Quarter*, POLITICO (Feb. 27, 2017, 7:10 PM EST), <https://perma.cc/39DN-QY2R>.

18. Brady Dennis, *Here's One Part of the EPA That the Agency's New Leader Wants to Protect*, WASH. POST (Mar. 2, 2017), <https://perma.cc/AG8E-TYGT>.

19. Cf. Scott Fallon, *Feds Pursuing Polluters for \$1.38B Passaic River Cleanup*, DEMOCRAT & CHRON. (Rochester, N.Y.) (Mar. 4, 2016, 6:57 PM ET), <https://perma.cc/9V7K-RU7V> (discussing the Obama Administration's efforts to compel hundreds of responsible parties to pay for a \$1.38 billion federal Superfund cleanup).

20. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of the U.S. Code); see also *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1184 (3d Cir. 1994) ("Congress amended CERCLA because it wanted to encourage early settlement.").

21. See 42 U.S.C. § 9613(f) (2016). At common law, the term "contribution" refers to the right of a joint tortfeasor who discharged a common liability to sue another joint tortfeasor to recover an equitable share of liability. See 4 RESTATEMENT (SECOND) OF TORTS § 886A (AM. LAW INST. 1979). The statutory right to contribution provided in CERCLA shares features with, but is distinct from, the contribution right provided by common law liability rules. See *infra* Part V.B.2. The most important statutory provisions are included in Appendix A below.

between 1994 and 2007, the number of CERCLA cases filed annually decreased by about one-half, a result attributed in part to changes in the EPA's "enforcement process to further promote settlements with responsible parties, especially settlements negotiated prior to filing a case in court."²²

Since 2007, the success of the settlement approach to CERCLA has been under threat. Previously, settling PRPs could rest easy in the knowledge that the statute protected them from any future lawsuit brought by another PRP, a result derived from courts' uniform view that all PRP lawsuits were governed by the statutory right to contribution codified by sections 113(f)(1) and 113(f)(3)(B).²³ In two decisions, *Cooper Industries, Inc. v. Aviall Services, Inc.*²⁴ and *United States v. Atlantic Research Corp.*,²⁵ the Supreme Court upended CERCLA litigation by first limiting claims under section 113(f) to PRPs that have either been sued under CERCLA or entered a settlement with the United States or a state,²⁶ and second authorizing other PRPs to pursue claims under a different section of CERCLA, section 107(a), which enables suits for cost recovery.²⁷ In the wake of these cases, PRPs faced the prospect that even if they entered a settlement with the government, they might be vulnerable to a cost recovery suit brought by other PRPs and dragged into litigation that could last years or even decades.²⁸

This Article reveals that contrary to the fears of regulators and settling parties, allowing PRP cost recovery claims under section 107(a)(4)(B)²⁹ will not

22. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-656, SUPERFUND: LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 7 (2009).

23. 42 U.S.C. § 9613(f)(1), (f)(3)(B); see, e.g., *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 828 (7th Cir. 2007) ("Every circuit to decide the issue held that, after [Congress amended CERCLA in 1986], PRPs were precluded generally from seeking joint and several cost recovery under [CERCLA] § 107(a), and that any claim seeking to shift costs from one responsible party to another must be brought as a § 113(f) claim for contribution."). For the 1986 amendments, see note 20 and accompanying text above.

24. 543 U.S. 157 (2004).

25. 551 U.S. 128 (2007).

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

27. *Atl. Research*, 551 U.S. at 141.

28. See, e.g., *Ashland Inc. v. GAR Electroforming*, 729 F. Supp. 2d 526, 529 (D.R.I. 2010) (detailing the two-decade-long litigation over liability and response costs "associated with remediating a ten acre waste disposal site in Smithfield, Rhode Island"), *vacated*, No. 08-227-M (D.R.I. Jan. 18, 2013); Howard F. Chang & Hilary Sigman, *Incentives to Settle Under Joint and Several Liability: An Empirical Analysis of Superfund Litigation*, 29 J. LEGAL STUD. 205, 231 (2000) ("Recent studies by RAND indicate that transaction costs may account for 23 to 31 percent of total private Superfund expenditures. In addition, legal costs currently account for about 10 percent of the public spending on Superfund." (footnote omitted)).

29. 42 U.S.C. § 9607(a)(4)(B) (2016).

destabilize settlement incentives.³⁰ Courts have long recognized that common law liability principles govern the nature of cost recovery claims.³¹ When government entities bring such claims on behalf of taxpayers, the common law requires imposition of joint and several liability.³² Those same common law principles treat claims brought by PRPs differently; because PRPs are joint tortfeasors, the common law of contribution governs their claims.³³

Surprisingly, few courts have considered how common law principles apply to cost recovery actions brought by PRPs. Some courts have simply assumed that such claims would involve joint and several liability, believing that the common law would treat all cost recovery suits the same.³⁴ Others have concluded that the *Atlantic Research* decision forecloses treating PRP cost recovery actions as contribution actions.³⁵ These analyses, while superficially appealing, overlook important distinctions drawn by common law liability rules and fail to recognize the limited nature of the holding in *Atlantic Research*.

-
30. While this Article does not thoroughly examine the issue, common law principles could support application of joint and several liability to the claims of an innocent private party—that is, one that is not a PRP. *See infra* notes 298-99 and accompanying text. Because of the breadth of the CERCLA liability regime, which includes most current owners of contaminated property, non-PRP private parties are scarce. *See infra* notes 47-52 and accompanying text. Where a current owner has a successful defense to liability, *see infra* notes 53-54 and accompanying text, it will be rarer still for that owner to incur cleanup costs because engaging in cleanup can itself render a party liable under CERCLA, although such parties may be able to obtain a “Good Samaritan” agreement with the EPA. *See infra* note 88. Because the confluence of factors required for a non-PRP private party to incur costs at a site at which the EPA has settled with one or more PRPs will virtually never occur—the Authors are aware of no such instances—the theoretical potential for such claims should have little effect on settlement incentives.
31. *See, e.g.*, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (“[T]he legislative history evinces the intent that the scope of liability under CERCLA, 42 U.S.C. § 9607, be determined from traditional and evolving principles of common law”); *see also* *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-14 (2009) (stating that “[t]he *Chem-Dyne* approach has been fully embraced by the Courts of Appeals” and collecting cases).
32. *See Chem-Dyne*, 572 F. Supp. at 810 (citing 4 RESTATEMENT (SECOND) OF TORTS § 875 (AM. LAW INST. 1979)) (holding that the nature of liability in actions brought by the government under CERCLA section 107(a)(4)(A) is joint and several).
33. *See infra* Part IV.C.
34. *See, e.g.*, *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 121 (2d Cir. 2010) (noting, without distinguishing between PRP and government claims, that CERCLA “[s]ection 107 allows for complete cost recovery under a joint and several liability scheme”).
35. *See, e.g.*, *Ford Motor Co. v. Mich. Consol. Gas Co.*, 993 F. Supp. 2d 693, 703 (E.D. Mich. 2014) (“[T]he United States’ argument that MichCon’s cost recovery claim must be recast as one for contribution is based on an argument that did not and cannot survive the analysis in *Atlantic Research*.” (citing *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007))).

This Article takes up the task of thoroughly analyzing common law liability rules and applying them to PRP cost recovery lawsuits. This analysis lays bare that such claims are claims for contribution, not claims for joint and several liability. To establish the basis for that conclusion, this Article proceeds in five Parts. Part I provides an overview of CERCLA and the problems caused by the contaminated sites it was designed to address. Part II describes the evolution of judicial interpretations of CERCLA, a story necessary to understanding the gap in the case law this Article fills. Part III examines contemporary issues that provide context for thoroughly exploring the nature of PRP cost recovery suits and the importance of doing so. Part IV examines the flexible, yet underanalyzed, nature of CERCLA's cost recovery provision and the common law principles that govern joint and several liability and contribution. As it demonstrates, PRP cost recovery claims, unlike government suits, should involve contribution, not joint and several liability. Part V explains the benefits of recognizing the true nature of PRP cost recovery claims and that existing precedent does not foreclose that result. It also explains that properly construing PRP cost recovery actions as *common law* contribution claims will not undermine the vitality of *statutory* contribution claims.

Others have offered incisive critiques of *Atlantic Research* and *Cooper Industries* on both theoretical and practical grounds, generally concluding that Congress should act to fix the mess the Supreme Court has created.³⁶ A legislative fix, however, is unnecessary. This Article charts a course by which courts, and advocates before courts, can hew closely to Congress's purpose of penalizing intransigence and rewarding cooperation through CERCLA's interlocking liability and settlement provisions. All courts must do is more fully apply established common law principles of liability to define the nature of the cost recovery claim brought by a liable private party.

36. See, e.g., Joanna M. Fuller, Note, *The Sanctity of Settlement: Stopping CERCLA's Volunteer Remediators from Sidestepping the Settlement Bar*, 34 COLUM. J. ENVTL. L. 219, 266 (2009) ("For consistency and clarity, . . . Congress should act to amend CERCLA and extend the settlement bar."); Luis Inaraja Vera, Note, *Compelled Costs Under CERCLA: Incompatible Remedies, Joint and Several Liability, and Tort Law*, 17 VT. J. ENVTL. L. 394, 410 (2016) (suggesting a legislative amendment to address problems created by *Atlantic Research* and *Cooper Industries*). Kenneth Kilbert suggests an alternative approach in which courts would simply adopt equitable allocation for all private party claims, although as he acknowledges, this would not protect settling parties. See Kenneth K. Kilbert, *Neither Joint nor Several: Orphan Shares and Private CERCLA Actions*, 41 ENVTL. L. 1045, 1048, 1089 (2011).

I. Environmental Remediation of Contaminated Sites

Removing contaminants from the environment is a costly and complicated affair.³⁷ Numerous entities, from mom-and-pop dry cleaning businesses to multinational corporations, may be PRPs at a single site.³⁸ That site may be contaminated by a multitude of hazardous substances—some affecting ground water, some affecting soils, some threatening acute health risks, and some threatening long-term chronic health risks.³⁹ Different technologies may best address some hazardous substances, but not others. The cost of cleaning up can reach into the tens or hundreds of millions of dollars.⁴⁰ And sometimes the final bill is higher. Cleanup costs for the Lower Fox River in Wisconsin and the Passaic River in New Jersey could each exceed \$1 billion.⁴¹

-
37. See Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern Is Not the Sword of Damocles for Joint and Several Liability*, 44 NEW ENG. L. REV. 249, 256 (2010) (“Federal government appropriations total[ed] \$33.4 billion; recovered government costs for past and future cleanup total[ed] \$7.3 billion; and cost estimates for private party work at federally listed sites exceed[ed] \$22.5 billion through FY 2007.” (footnotes omitted)).
38. Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 8 (2006) (“Contaminated sites usually involve more than one PRP. A landfill may have been contaminated by waste disposal from hundreds of businesses or individuals. An industrial site may have been contaminated by a series of successive property owners or operators. Contamination from one parcel of property (e.g., a gas station) may have migrated and become co-mingled with contamination emanating from a nearby property (e.g., another gas station on the opposite street corner).” (footnote omitted)); see also LAZARUS, *supra* note 1, at 109 (noting that PRPs can “rang[e] from the most powerful Fortune 500 company to the family-owned neighborhood dry cleaner”).
39. See Broderick Wood Products, *Denver, CO; Contaminant List*, <https://perma.cc/F5AK-SNLK> (archived Nov. 16, 2017) (detailing significant soil and groundwater contamination from benzene, lead, arsenic, dioxins, and tetrachloroethylene, among other contaminants); see also TODD AAGAARD ET AL., *PRACTICING ENVIRONMENTAL LAW* 549-54 (2017) (identifying common contaminants, pathways, and health consequences of exposure).
40. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-10-380, SUPERFUND: EPA’S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST* 18 fig.6 (2010) (identifying the EPA’s annual average expenditure in millions of dollars per site from 1990 through 2009); Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 SW. L. REV. 679, 680 (2012) (“[M]any CERCLA cases, including most CERCLA cases highlighted in legal textbooks, involve multiple parties, hundreds of millions of dollars in cleanup costs, years of discovery and negotiations, and few jury trials.”); see also Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENVTL. L. 191, 199 (2009) (“We know now that addressing the risk at Superfund sites is a lengthy, expensive, and complicated endeavor. Many, if not most, sites will require some kind of monitoring and maintenance for decades.”).
41. See Don Behm, *Judge Upholds Costly Fox River PCB Cleanup Plan*, MILWAUKEE J. SENTINEL (Nov. 22, 2012), <https://perma.cc/MAW6-BW3U>; Fallon, *supra* note 19.

With so much money on the line, PRPs invest heavily in litigation. In CERCLA's early years, a substantial percentage of all money spent went to lawyering rather than addressing contaminants.⁴² Critics argued that cleanups were delayed by protracted litigation against and among PRPs and that high litigation costs were "exhausting finances that could be better directed toward cleanup efforts."⁴³ In 1986, Congress responded by enacting the Superfund Amendments and Reauthorization Act (SARA) of 1986 to reduce litigation and to create incentives for PRPs to settle with the government and thereby to ensure that more money went to cleaning up sites rather than paying for legal services.⁴⁴

To assess how one of CERCLA's original provisions, the cost recovery provision in section 107(a)(4)(B),⁴⁵ threatens to undermine SARA's settlement incentives more than thirty years later, it is important to understand the basic contours of the law governing contaminated sites. This Part pursues that task by identifying the broad range of parties CERCLA defines as PRPs; describing how governmental entities involve themselves in cleanups; and detailing basic principles of the liability regime, including the tools PRPs have to spread costs among themselves.

A. Liable Parties

CERCLA imposes liability on parties bearing virtually any responsibility for hazardous substances that have been released into the environment.⁴⁶ Liability extends to response costs, damage to natural resources, and certain health assessments,⁴⁷ although it does not include other damage to property, personal health, or economic interests.⁴⁸

42. See *United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 520 & n.14 (1st Cir. 1996) (collecting sources); see also, e.g., JAN PAUL ACTON & LLOYD S. DIXON, RAND, R-4132-ICJ, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS 32 (1992), <https://perma.cc/HDU2-4PJ8> (summarizing findings that an average of 88% of insurers' spending on hazardous waste sites went to transaction costs).

43. See Karen L. DeMeo, Note, *Is CERCLA Working?: An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493, 497 (1994).

44. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of the U.S. Code); see also *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 887 (9th Cir. 2001) (en banc) ("In 1986 Congress enacted [SARA], aimed at speeding cleanup and forcing quicker action by the EPA."); DeMeo, *supra* note 43, at 495 & n.3, 496-97 (discussing the legislative history and passage of SARA).

45. 42 U.S.C. § 9607(a)(4)(B) (2016).

46. See Judy & Probst, *supra* note 40, at 195 (describing CERCLA as an "expansive liability scheme" in which "a responsible party is liable even if it was not negligent").

47. 42 U.S.C. § 9607(a)(4)(A)-(D).

48. See Klass, *supra* note 40, at 685 & n.23.

Common Law of CERCLA Claims
70 STAN. L. REV. 191 (2018)

Section 107(a) of the Act defines four categories of PRPs: (1) parties that own or operate a facility;⁴⁹ (2) certain parties that once owned or operated a facility;⁵⁰ (3) parties that arrange for disposal or treatment of hazardous substances;⁵¹ and (4) certain parties that transport hazardous substances for treatment or disposal.⁵²

CERCLA exempts some parties who would otherwise fall within these categories—for example, households sending trash to municipal waste dumps.⁵³ Congress has further amended CERCLA to blunt the perverse incentives created by the broad definitions of PRPs—by, for example, allowing property purchasers to avoid liability if they take certain steps to identify contaminants and fully cooperate with any cleanup activities.⁵⁴ Nonetheless, by sweeping in broad classes of former owners and operators and those arranging for the disposal of hazardous substances, the statute was transforma-

49. 42 U.S.C. § 9607(a)(1). The term “facility” includes structures of any kind as well as any locations where hazardous substances have been deposited in the environment. *Id.* § 9601(9).

50. *Id.* § 9607(a)(2). A prior owner or operator is liable only if a disposal of hazardous substances occurred during ownership or operation. *Id.* The operative facts necessary to trigger this form of liability have been the subject of litigation. *See* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 874-77 (9th Cir. 2001) (en banc) (collecting cases discussing the meaning of the term “disposal” in establishing prior owner liability). If a prior owner can prove that no disposal occurred during its period of ownership, it would not be a PRP and thus not a proper defendant in a cost recovery action. *See id.* at 874-75.

51. 42 U.S.C. § 9607(a)(3) (providing for liability for “any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances”). And while this section can extend liability to manufacturers and distributors of hazardous substances, to qualify as an arranger an entity must actually intend that the substance be disposed of as a result of the transaction. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 612 (2009) (“While it is true that in some instances an entity’s knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.”).

52. 42 U.S.C. § 9607(a)(4). Transporters are liable only if they played a role in selecting the facility to which the hazardous substances are transported. *See id.* (extending liability for transport to “sites selected by such person”); *see also* Tippins Inc. v. USX Corp., 37 F.3d 87, 94 (3d Cir. 1994) (“[A] person is liable as a transporter not only if it ultimately selects the disposal facility, but also when it actively participates in the disposal decision to the extent of having had substantial input into which facility was ultimately chosen.”).

53. *See* 42 U.S.C. § 9607(p)(1).

54. *See id.* §§ 9601(40), 9607(q)(1)(C).

tive, making “liability for environmental contamination . . . everyone’s problem.”⁵⁵

B. Cleanups

Contaminated sites exist in large numbers across the United States.⁵⁶ They range in size, scale, and threat level. In July 2017, the EPA included more than 13,000 sites on its active site inventory.⁵⁷

Some of those sites will require only a short-term, relatively simple response, called a “removal action.”⁵⁸ At others the EPA determines are sufficiently contaminated to be listed on the National Priorities List (NPL), the

55. LAZARUS, *supra* note 1, at 109.

56. *See* Remarks on Signing the Small Business Liability Relief and Brownfields Revitalization Act in Conshohocken, Pennsylvania, 38 WEEKLY COMP. PRES. DOC. 52, 53 (Jan. 11, 2002) (“[A]nywhere from 500,000 to a million brownfields are across our Nation.”).

57. *See* U.S. EPA, U.S. EPA Superfund Program: Superfund Public User Database; List-008R Archived Site Status Report (2017) (on file with authors) [hereinafter July 2017 EPA Site Inventory] (listing 13,049 entries as of July 2017). This spreadsheet is pulled from the EPA’s Superfund Enterprise Management System, which contains valuable data updated quarterly. *See Superfund Data and Reports*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/63MM-L6WR> (archived Oct. 9, 2017) (to locate, select “View the live page,” then select “List 8R—Archive Site Inventory with Pre-remedial Actions (with .XLS Attached)” (capitalization altered)). The list only roughly estimates the number of contaminated sites. It overestimates that number because it includes sites at all stages of evaluation and cleanup, including over 2000 sites the EPA has determined do not qualify for listing on the NPL based on existing information. July 2017 EPA Site Inventory, *supra* (sorting first by “NPL” and second by “Non-NPL Status,” which results in rows 2739 to 4855 being listed as “Not on the NPL” because the “[s]ite does not qualify for the NPL based on existing information”). It also undercounts the number because states do not always report the contaminated sites at which they are active to the EPA. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 17 n.22 (“States are not obligated to report all potentially eligible sites to the Superfund program, and environmental officials in several states confirmed that they have conducted or overseen cleanups at sites . . . that may have been eligible for the NPL.”).

58. *See* 42 U.S.C. § 9601(23) (defining “remove” and “removal”). Removal actions may also be used to take more rapid action in preparation for a longer-term response. *See id.* § 9604(a)(2). The EPA’s July 2017 inventory identifies 4002 sites as needing a removal only and another 690 as being referred for removal. *See* July 2017 EPA Site Inventory, *supra* note 57 (sorting first by “NPL” and second by “Non-NPL Status,” which results in rows 7711 to 11,712 being listed as non-NPL status “Removal Only Site (No Site Assessment Work Needed)” and rows 6924 to 7613 being listed as non-NPL statuses “Referred to Removal” and “Referred to Removal—Further Assessment Needed”). Some states use different nomenclature to denote short-term responses undertaken by state agencies. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 6, § 375-1.2(ab) (2017) (using the term “interim remedial measure” to describe “activities to address both emergency and non-emergency site conditions, which can be undertaken without extensive investigation and evaluation”). Others rely on the vocabulary of CERCLA. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25323 (West 2017) (referring specifically to 42 U.S.C. § 9601(23)).

EPA will lead long-term cleanup activities called “remedial action[s].”⁵⁹ For many other NPL-eligible sites—approximately half according to a 2013 GAO study—state government agencies will undertake, coordinate, and monitor cleanup efforts.⁶⁰ And at some sites, private parties will clean up contaminants themselves, sometimes in consultation with government agencies and sometimes without alerting any government agency at all.⁶¹

Cleanups fall into five categories relevant to inter-PRP lawsuits: First, there are cleanups carried out by government agencies—typically either the EPA or state environmental agencies, although tribal governments can engage in cleanups as well.⁶² CERCLA section 104 provides the EPA with authority to directly engage in “response action[s]”⁶³—a phrase used to include both removal actions and remedial actions.⁶⁴ In the early days, the EPA often directly carried out cleanups, but today the agency has far fewer funds available for this purpose.⁶⁵ State agencies may carry out cleanups using state funds, but in doing

59. 42 U.S.C. § 9601(24). There are 1336 sites listed on the NPL according to the EPA’s July 2017 inventory, *see* July 2017 EPA Site Inventory, *supra* note 57 (sorting first by “NPL” and second by “Non-NPL Status,” which results in rows 2-1337 being listed as NPL status “Currently on the Final NPL”), and over 100 more at which remedial activity is occurring subject to EPA enforcement, *see id.* (including 103 entries as “Remedial Activities Under EPA Enforcement”).

60. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 17. The GAO found that of 3402 sites eligible for inclusion on the NPL, the EPA used informal mechanisms to defer to state agencies at 1585 sites and formally deferred to state agencies at 21 sites. *Id.* at 17 fig.4.

61. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 164 (2004) (explaining that the respondent “cleaned up the properties under the State’s supervision” but without the state or the EPA taking “judicial or administrative measures to compel cleanup”).

62. *See* 42 U.S.C. § 9607(a)(4)(A) (stating that PRPs shall be liable for “all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan”).

63. *Id.* § 9604(a).

64. *See id.* § 9601(25).

65. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 40, at 5-6; *see also* Ian G. John, Note, *Too Much Waste: A Proposal for Change in the Government’s Effort to Clean Up the Nation*, 70 IND. L.J. 951, 965 (1995) (noting that in “the early years of CERCLA remedial actions, the EPA preferred ‘fund-led’ response actions” in which “EPA used CERCLA trust fund dollars to perform (or hire contractors to perform) and pay for each stage of a remedial action before seeking PRP input, either by settlement or § 106 court order” (quoting Eugene P. Brantly, Note, *Superfund Cost Recovery: May the Government Recover “All Costs” Incurred Under Response Contracts?*, 59 GEO. WASH. L. REV. 968, 973 (1991))). When Congress amended CERCLA in 1986, it created the federal Hazardous Substance Superfund funded in large part by an excise tax on petroleum and chemical feedstocks. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 517, 100 Stat. 1613, 1772-74 (codified as amended at 26 U.S.C. § 9507 (2016)). The tax expired in 1995 and has never been reauthorized, although the EPA does receive annual appropriations to fund its remediation efforts. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 40, at 3.

so they operate under the authority vested in them by state law, although many state laws addressing environmental contamination mirror or even expressly incorporate aspects of CERCLA and its implementing regulations.⁶⁶

Second, a PRP may agree to perform some or all of a cleanup in a consent decree or administrative settlement with the EPA or a state agency.⁶⁷ CERCLA section 122 governs such agreements when entered into by the federal government.⁶⁸ It allows the EPA to “enter into an agreement with any person . . . to perform any response action . . . if the [EPA] determines that such action will be done properly by such person.”⁶⁹ It further provides that whenever the EPA “determines that a period of negotiation . . . would facilitate an agreement with [PRPs] for taking response action . . . , the [EPA] shall so notify all such parties” and initiate settlement negotiations.⁷⁰ The EPA may approve settlements administratively unless the settlements oblige a PRP to undertake remedial action, in which case the settlement must take the form of a consent decree approved by a court.⁷¹ CERCLA authorizes the EPA to provide a PRP with a covenant not to sue in exchange for entering into a settlement,⁷² and the statute also creates other settlement incentives that will be discussed below.⁷³ Because settlements cost far fewer taxpayer dollars than EPA-led cleanups, reduce litigation risks, and promote cooperation between the EPA and PRPs, they are often the agency’s preferred approach.⁷⁴

66. See, e.g., CAL. HEALTH & SAFETY CODE § 25350 (West 2017) (authorizing the use of state funds to clean up hazardous substances only if “consistent with the priorities, guidelines, criteria, and regulations contained in the national contingency plan” (NCP)); MASS. GEN. LAWS ch. 21E, § 2 (2017) (including a definition of removal similar to CERCLA’s). Some state hazardous waste laws do depart from CERCLA insofar as they may allow lawsuits to recover damages, not just response costs. See Klass, *supra* note 40, at 686-91 (identifying states that “allow recovery for personal injury, lost profits, diminution in value to property, attorneys’ fees, expenses, or other losses”). State common law also enables damages claims. See *id.* at 691-97.

67. For a discussion of the differences between settlements and consent decrees, see Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191, 199-201 (2015).

68. See 42 U.S.C. § 9622.

69. *Id.* § 9622(a). While section 122(a) refers to the President’s authority to enter into settlement agreements under CERCLA, the President has delegated most of his authority to the EPA. See Exec. Order No. 12,580, § 4(d)(1), 3 C.F.R. 193, 197 (1988), reprinted as amended in, 42 U.S.C. § 9615 app. at 7127, 7129.

70. 42 U.S.C. § 9622(e)(1).

71. *Id.* § 9622(d)(1)(A).

72. See *id.* §§ 9613(f)(2), 9622(c)(1), (g)(5). The importance of section 113(f)(2)’s settlement bar to the entire statutory scheme is explored in greater detail in Part V below.

73. See *infra* Part V.A.

74. The EPA refers to this approach as “enforcement first.” See, e.g., Memorandum from John Peter Suarez, Assistant Adm’r, Office of Enf’t & Compliance Assurance, and Marianne Lamont Horinko, Assistant Adm’r, Office of Solid Waste & Emergency
footnote continued on next page

Settlements also create less controversy and require less political will than more coercive approaches.⁷⁵ State agencies will again operate under state law, which will define their authority to enter settlements or consent decrees.⁷⁶

Third, a PRP may perform cleanup activities to comply with a judicial decree. CERCLA section 106 authorizes the EPA, in cooperation with the Attorney General of the United States, to file an abatement action seeking an injunction if the agency “determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance.”⁷⁷ This provision expands courts’ equitable power beyond that afforded by the common law, empowering courts to issue injunctions where necessary to

Response, U.S. EPA, to Reg’l Adm’rs, U.S. EPA 1 (Sept. 20, 2002), <https://perma.cc/Z6KK-F3L4>; *see also* Memorandum from Barry Breen, Dir., Office of Site Remediation Enft, U.S. EPA, to Dir., Office of Site Remediation & Restoration, U.S. EPA, et al. 2 (June 17, 1999) (on file with authors) (“EPA prefers to achieve . . . response actions under the Model [Remedial Design/Remedial Action] Consent Decree rather than through a [Unilateral Administrative Order (UAO)] because settlements reduce the possibility of litigation and the attendant transaction costs.”).

75. *See, e.g.*, McVean & Pidot, *supra* note 67, at 195 (“Avoiding litigation reduces costs borne by the government—both by administrative agencies and the judiciary—and by private party litigants.”); *see also* Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1123 (2006) (“In both public and private sectors, leaders in many countries proffer conciliation as the exemplary model of judgment.”).
76. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25358.3(a) (West 2017) (authorizing the state agency to initiate a response action either directly, by issuing an administrative order to a responsible party, or indirectly, by recommending that the state attorney general file a civil action); *see also* AAGAARD ET AL., *supra* note 39, at 563-64 (“CERCLA doesn’t specifically authorize any particular type of activity by state agencies.”).
77. 42 U.S.C. § 9606(a); *see* Agere Sys., Inc. v. Advanced Env’tl. Tech. Corp., 602 F.3d 204, 217 n.25 (3d Cir. 2010) (“Section 106 authorizes the United States to bring a suit seeking injunctive relief to abate ‘imminent and substantial endangerment’ resulting from the release of a hazardous substance.” (quoting 42 U.S.C. § 9606(a))). The United States has not initiated many lawsuits under section 106(a) seeking an injunction prior to the EPA issuing a unilateral order. *See* Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 32-33 (D.D.C. 2009) (discussing the EPA’s process in issuing UAOs—orders issued unilaterally by the EPA under section 106(a) that direct PRPs to undertake cleanup efforts—and its reliance on UAOs as the preferred method of initiating cleanup in the event that settlement negotiations are unsuccessful), *aff’d*, 610 F.3d 110 (D.C. Cir. 2010); *see also* Memorandum from Don R. Clay, Assistant Adm’r, Office of Solid Waste & Emergency Response, and James M. Strock, Assistant Adm’r, Office of Enft & Compliance Monitoring, U.S. EPA, to Reg’l Adm’rs, U.S. EPA, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions 3 (Mar. 7, 1999) (on file with authors) [hereinafter EPA UAO Guidance Memorandum] (describing that the EPA prefers to first seek settlement, then issue a UAO, and finally, if necessary, “refer the case for judicial action to compel performance and recover penalties”).

eliminate reasonably foreseeable threats posed by hazardous substances.⁷⁸ Here too, states must rely on state law to seek injunctive relief; CERCLA does not create a cause of action for states (or any other nonfederal parties) to file abatement actions against PRPs.⁷⁹

Fourth, a PRP may perform cleanup activities to comply with an administrative order. The EPA has authority to issue such orders, referred to as unilateral administrative orders (UAOs), pursuant to section 106(a).⁸⁰ Arising from the same statutory section as that authorizing abatement actions, the requirements for seeking a UAO are the same as for a civil injunction—potential “imminent and substantial endangerment.”⁸¹ A party receiving a UAO may not challenge it in court before it complies with the terms of the order.⁸² A recipient may, however, refuse to comply and raise any defenses it has in an action to enforce the order brought by the EPA or a private party under CERCLA’s citizen-suit provision.⁸³ In practice this rarely happens because refusing to comply with a lawful UAO can trigger a hefty financial penalty and even punitive damages.⁸⁴ UAOs have also proven popular with the agency; in 2009, a federal district court found that the EPA “issued approximately six UAOs to nineteen PRPs every month.”⁸⁵ The EPA makes no secret

78. *See* *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 192-93 (W.D. Mo. 1985) (interpreting the “expansive scope” of section 106 to authorize “injunctive relief when there *may* be a risk of harm, not just when there is a risk of harm”), *abrogated in other part* by *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *cf.* *Me. People’s All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006) (interpreting similar “imminent and substantial endangerment” language in the Resource Conservation and Recovery Act (citing 42 U.S.C. § 6972(a)(1)(B))).

79. *See* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049 (2d Cir. 1985) (holding that “injunctive relief under CERCLA is not available” to states).

80. *See* 42 U.S.C. § 9606(a); *Gen. Elec. Co.*, 595 F. Supp. 2d at 11 (noting that the EPA, to facilitate cleanup when negotiations fail, may “issue a ‘unilateral administrative order’ (‘UAO’) under section 106, ordering PRPs to clean up a site”).

81. *See* 42 U.S.C. § 9606(a).

82. *See id.* §§ 9606(b)(2)(A)-(B), 9613(h)(3). PRPs have unsuccessfully argued that this scheme requiring compliance first, and reimbursement later, violates constitutional due process. *See, e.g.*, *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113-14 (D.C. Cir. 2010).

83. *See* 42 U.S.C. §§ 9606(b)(1), 9659(a)(1), (h); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073 (9th Cir. 2006) (involving a citizen suit brought to enforce a UAO). In relevant part, CERCLA’s citizen-suit provision authorizes suits “against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter.” 42 U.S.C. § 9659(a)(1). Thus, a citizen suit cannot be brought to compel a PRP in the absence of a government order such as a settlement or UAO.

84. *See* 42 U.S.C. § 9606(b)(1) (imposing fines up to \$25,000 for each day a recipient “willfully violates, or fails or refuses to comply with,” a UAO issued under section 106(a)); *id.* § 9607(c)(3) (providing for treble damages if a party refuses to comply with a UAO “without sufficient cause”).

85. *Gen. Elec. Co.*, 595 F. Supp. 2d at 33 (emphasis omitted).

of the reasons it relies on UAOs. As it has explained, “Because many PRPs promptly comply with unilateral orders,” UAOs “help to conserve the limited funds available for government-financed cleanup.”⁸⁶ As in the first three categories of cleanups, state agencies may issue administrative orders of their own, but only to the extent authorized by state law.⁸⁷ CERCLA neither empowers states to issue administrative orders nor empowers courts to enforce those orders.

Fifth, some contaminated sites are remediated by PRPs without the EPA or state agencies formally compelling them to do so through lawsuits, settlements, or administrative orders. A PRP may decide to act voluntarily to avoid litigation costs, to better control a cleanup, or to complete a cleanup in order to enhance property value more quickly than if the government were involved.⁸⁸ Even when PRPs act in the absence of a formal government action to compel response, those PRPs’ actions are often substantially motivated by the knowledge that CERCLA liability is a virtual certainty should a government agency turn its attention to the site.⁸⁹ Nonetheless, courts and commentators sometimes refer to PRPs in this position as engaging in voluntary cleanups.⁹⁰ The descriptor is not entirely apt because such actions resolve a liability

86. EPA UAO Guidance Memorandum, *supra* note 77, at 3.

87. *See, e.g.*, MASS. GEN. LAWS ch. 21E, § 9 (2017) (authorizing the state to issue orders to conduct assessment, containment, or removal of oil or hazardous materials).

88. A current landowner, for instance, may be motivated to undertake a “voluntary” remediation in order to quickly restore the value of the property for future sale or development. *See* Aronovsky, *supra* note 38, at 8-9; *see also* Luis Nido & Jason Hutt, *Voluntary Cleanups—Alive After Aviall?*, NAT. RESOURCES & ENV’T, Fall 2005, at 57, 57 (“From the regulated community’s perspective, voluntary cleanups provide flexibility as to cleanup methods, standards and timing.”). In rare circumstances, a party may acquire contaminated property because that party would like to remediate contamination and protect the environment. Such a party may enter into a “Good Samaritan” agreement with the EPA, under which the party agrees to engage in specific cleanup actions in return for a covenant not to sue. *See, e.g.*, Press Release, Trout Unlimited, EPA Agrees to Give Trout Unlimited Liability Protection for Colorado Abandoned Mine Cleanup (Aug. 24, 2010), <https://perma.cc/NS6N-XAWZ>.

89. *See* Solutia, Inc. v. McWane, Inc., 726 F. Supp. 2d 1316, 1341 (N.D. Ala. 2010) (“[V]irtually all cleanups are performed by a party who is at least facing the specter of potential liability under CERCLA.”), *aff’d on other grounds per curiam*, 672 F.3d 1230 (11th Cir. 2012); *see also* Brief for Amici Curiae Natural Resources Defense Council et al. in Support of Respondent at 29, *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (No. 06-562), 2007 WL 1046712 (“While responsibility for the vast majority of these cleanups may be resolved without resort to litigation, CERCLA still drives them; the underlying threat of a CERCLA action is what typically convinces those responsible to come to the table.”).

90. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (referring to “purely voluntary cleanup[s]” as those in which “a judgment or settlement never occurs”).

imposed by law, as will be discussed below.⁹¹ This class of PRPs is an important analytic category, however, because unlike other PRPs, these PRPs are not implicated in a proceeding (whether judicial or administrative) to formally compel them to resolve their liability.⁹²

C. Recoverable Costs

CERCLA's dramatic scope lies in its creation of a broad set of PRPs, multiple pathways for remediation, and expansive liability rules.⁹³ Section 107(a)(4) identifies four types of costs for which PRPs are responsible. Three of the types relate to government agencies acting on behalf of the public: PRPs must reimburse federal, state, and tribal governments for "all costs of removal or remedial action[s] . . . not inconsistent with the national contingency plan" (NCP).⁹⁴ PRPs must similarly reimburse the federal Agency for Toxic Substances and Disease Registry for public health studies and assessments caused by releases of hazardous substances and authorized by CERCLA.⁹⁵ These two provisions ameliorate the burden on taxpayers caused by hazardous substance releases.⁹⁶ PRPs must also pay natural resource damages to an appropriate federal, state, or tribal agency serving as a trustee

91. See *infra* notes 270-72 and accompanying text.

92. A famous example of such a "voluntary" cleanup undertaken by a liable party is *Cooper Industries*, 543 U.S. 157. Aviall Services was the operator of four aircraft engine maintenance sites it had purchased from Cooper Industries. *Id.* at 163. By the time Aviall discovered the contamination, it had been operating the sites for a few years and had contributed to the contamination during that time. See *id.* at 163-64. Aviall notified the Texas Natural Resource Conservation Commission of the contamination and cleaned up the site under the Commission's supervision after the Commission had "threatened to pursue an enforcement action if Aviall failed to undertake remediation." *Id.* at 164. While Aviall could be viewed as a "voluntary" remediator, it would defy logic to suggest that Aviall was not a liable party.

93. See, e.g., *LAZARUS*, *supra* note 1, at 108-09 (describing CERCLA's liability rules and definition of PRPs as "transformative").

94. 42 U.S.C. § 9607(a)(4)(A) (2016).

95. See *id.* §§ 9604(i), 9607(a)(4)(D); see also *Pritikin v. Dep't of Energy*, 254 F.3d 791, 798-99 (9th Cir. 2001) (rejecting a citizen suit brought against the U.S. Department of Energy based on a theory that the Agency for Toxic Substances and Disease Registry failed to implement a medical monitoring program).

96. See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("Congress envisioned the EPA's costs would be recouped, the Superfund preserved, and the taxpayers not required to shoulder the financial burden of a nationwide cleanup."); *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 120 (D.D.C. 2014) ("By requiring responsible parties to pay for cleanup efforts, CERCLA also ensures that 'the taxpayers [are] not required to shoulder the financial burden of a nationwide cleanup.'" (quoting *B.F. Goodrich*, 958 F.2d at 1198)), *aff'd on other grounds*, 833 F.3d 225 (D.C. Cir. 2016).

for the public.⁹⁷ Such natural resource damage payments may only be used to restore or compensate for damage caused to the environment.⁹⁸ This provision also seeks to ameliorate public harm.⁹⁹

The final type of cost CERCLA imposes contrasts with the other three because it protects private parties. Section 107(a)(4)(B) requires PRPs to reimburse “any other necessary costs of response incurred by any other person consistent with the [NCP].”¹⁰⁰ Thus, at least some private parties—Part III below discusses precisely which—may file cost recovery actions.¹⁰¹

The unusual nature of CERCLA liability extends beyond the capacious categories of PRPs it identifies and the broad types of damages for which the statute holds those PRPs responsible. CERCLA imposes liability that is (1) strict, meaning that a PRP remains liable even if it acted with due care,¹⁰² and (2) retroactive, meaning that a PRP remains liable even if its responsibility for hazardous substances in the environment predated CERCLA.¹⁰³ Moreover,

97. See 42 U.S.C. § 9607(a)(4)(C), (f)(1).

98. See *id.* § 9607(f)(1). For some natural resources, different governments may serve as co-trustees, and each co-trustee may seek “the full amount of the damage, less any amount that has already been paid” to another co-trustee. See *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063, 1068 (D. Idaho 2005).

99. See *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006) (noting that the “obvious objective of Congress in enacting 42 U.S.C. § 9607(f)(1)” was to “restore or replace contaminated natural resources” and “protect the public interest in a healthy functioning environment” (quoting *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980))).

100. 42 U.S.C. § 9607(a)(4)(B).

101. Specifically, Part III explains that PRPs receiving UAOs may file cost recovery actions under section 107(a), see *infra* Part III.A, but that PRPs who incur cleanup costs to comply with an injunction or settlement may not; instead, they may seek only statutory contribution under section 113(f), see *infra* Part III.B.

102. Liability is strict because CERCLA cross-references a provision of the Clean Water Act that courts had previously interpreted as involving strict liability. See 42 U.S.C. § 9601(32) (defining “liability” as the same as that imposed under section 311 of the Clean Water Act (citing 33 U.S.C. § 1321 (2016))); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (“Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that ‘liability’ under CERCLA ‘shall be construed to be the standard of liability’ under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability, and which Congress understood to impose such liability.”).

103. No statutory provision specifically provides for retroactive liability, but courts have found clear congressional intent for the statute to operate in that manner. See, e.g., *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) (“Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect. . . . In order to be effective, CERCLA must reach past conduct.”); see also Kilbert, *supra* note 36, at 1052 (“CERCLA liability also is retroactive . . .”); Jerome M. Organ, *Superfund and the Settlement Decision*:

footnote continued on next page

courts have generally held that liability extends no matter how minimal a PRP's responsibility for contamination.¹⁰⁴ In tandem, these rules render CERCLA a "status-based" liability regime; liability applies to anyone "meeting the definition of 'covered persons.'"¹⁰⁵

In many circumstances, liability under CERCLA is also joint and several: Any one PRP is obliged to fund or directly perform the entire remediation of a site irrespective of the liability of other parties.¹⁰⁶ A PRP can, however, avoid joint and several liability by proving the affirmative defense of divisibility—that is, by proving that a "reasonable basis for apportionment exists."¹⁰⁷ A PRP who successfully proves divisibility will be "subject to liability only for the portion of the total harm that he has himself caused."¹⁰⁸ Such apportioned liability is distinct from contribution, discussed below, which involves an apportionment based on equitable factors rather than on an assessment of which harms can be traced to a particular defendant.¹⁰⁹

D. Statutory Contribution

CERCLA is not wholly insensitive to the considerable financial obligations it imposes on PRPs. Drawing upon the common law, in 1986 Congress created two statutory rights to contribution when it enacted section 113(f) as part of

Reflections on the Relationship Between Equity and Efficiency, 62 GEO. WASH. L. REV. 1043, 1046 n.19 (1994) (analyzing *Ne. Pharm.*, 810 F.2d 726).

104. See, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992) (rejecting the argument that the defendant's actions must have themselves caused response costs and holding that "the Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs"). But see *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670 (5th Cir. 1989) (requiring proof that a PRP's release or threatened release of hazardous substances caused response costs).

105. Aronovsky, *supra* note 38, at 13 (quoting 42 U.S.C. § 9607(a)).

106. See *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

107. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (citing *Chem-Dyne*, 572 F. Supp. at 810). This task is a difficult one that PRPs rarely accomplish. See William C. Tucker, *All Is Number: Mathematics, Divisibility and Apportionment Under Burlington Northern*, 22 *FORDHAM ENVTL. L. REV.* 311, 340-41 (2010) (discussing the "intensely factual nature of the divisibility issue" and noting that even after *Burlington Northern*, divisibility "remains a heavy burden for responsible parties under Section 107 of CERCLA").

108. *Burlington N.*, 556 U.S. at 614 (quoting *Chem-Dyne*, 572 F. Supp. at 810).

109. For the concept of equitable apportionment for statutory contribution claims, see Part I.D below. For the potentially divergent manner of equitable apportionment for common law contribution claims, see Part V.B.2 below.

SARA.¹¹⁰ Contribution, at common law, is “[o]ne tortfeasor’s right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined as percentages of causal fault.”¹¹¹

Even prior to the creation of those statutory rights to contribution, many courts found that PRPs possessed a common law right to contribution either as a direct result of the private cost recovery provision of section 107(a)(4)(B) or by implication.¹¹² Congress created section 113(f) to “clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.”¹¹³

The statutory contribution rights provided by section 113(f) attach in two procedural circumstances. Section 113(f)(1) provides: “Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)], during or following any civil action under section [106] or under section [107(a)].”¹¹⁴ In other words, a PRP may seek contribution where the EPA has filed a lawsuit seeking to compel a PRP to perform response actions or where a public or private cost recovery lawsuit has been filed.¹¹⁵

Section 113(f)(3)(B) provides a right to contribution to any “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

110. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113, 100 Stat. 1613, 1647-52 (codified as amended at 42 U.S.C. § 9613).

111. *Contribution*, BLACK’S LAW DICTIONARY (10th ed. 2014).

112. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (noting that “[i]n numerous cases, . . . District Courts interpreted the statute—particularly the § 107 provisions outlining the liabilities and defenses of persons against whom the Government may assert claims—to impliedly authorize . . . a cause of action” for contribution); *id.* at 816 n.7 (collecting cases); see also *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004) (“As originally enacted in 1980, CERCLA contained no provision expressly providing for a right of action for contribution. A number of District Courts nonetheless held that, although CERCLA did not mention the word ‘contribution,’ such a right arose either impliedly from provisions of the statute, or as a matter of federal common law.”); *id.* (collecting cases). For a case finding the right of action for contribution because of the private cost recovery provision, see *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984). For a case implying the right of action, see *United States v. New Castle County*, 642 F. Supp. 1258, 1265 (D. Del. 1986), *superseded by statute*, Superfund Amendments and Reauthorization Act of 1986, § 113, 100 Stat. at 1647-52, *as recognized in* *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515 (3rd Cir. 2006). The Supreme Court vacated *E.I. DuPont* in light of *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007). See *E.I. du Pont de Nemours & Co. v. United States*, 551 U.S. 1129 (2007) (mem.).

113. H.R. REP. NO. 99-253, pt. 1, at 79 (1985); see also *E.I. DuPont*, 460 F.3d at 536 (discussing the legislative history of SARA).

114. 42 U.S.C. § 9613(f)(1).

115. See *id.* §§ 9606(a), 9607(a).

judicially approved settlement.”¹¹⁶ In other words, a PRP may seek contribution if it enters a settlement or consent decree agreeing to reimburse the EPA or a state agency for response costs or agreeing to carry out specified response actions. Importantly, settlements between state agencies and PRPs create a right to contribution under this section even if they only expressly resolve an obligation to engage in environmental remediation created by state law.¹¹⁷ Section 113 also provides definition and limitation to the statutory rights to contribution it creates. Section 113(f)(1) provides: “In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”¹¹⁸ Section 113(f) provides that federal law governs statutory contribution claims.¹¹⁹ Section 113(f)(2) provides: “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.”¹²⁰ It further provides that where a contribution right arises because of a settlement, a PRP’s right to contribution “shall be subordinate to the rights of the United States or the State.”¹²¹ And finally, section 113(g) creates a three-year statute of limitations for statutory contribution claims.¹²²

Of these provisions, the protection afforded to settling parties by section 113(f)(2) is particularly important. It provides a powerful incentive for PRPs to enter settlements with the EPA (or other federal or state government agencies) that will define their obligations to fund cleanup and avoid

116. *Id.* § 9613(f)(3)(B).

117. *See, e.g.,* *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (holding that “§ 113(f)(3)(B) does not require resolution of CERCLA liability in particular”); *ASARCO LLC v. Atl. Richfield Co.*, 73 F. Supp. 3d 1285, 1291 (D. Mont. 2014) (joining the Third Circuit in construing section 113(f)(3)(B) to provide for contribution following a settlement that resolved “response action” and not CERCLA liability), *vacated on other grounds and remanded*, 866 F.3d 1108 (9th Cir. 2017). The Second Circuit briefly adopted a different rule—requiring a settlement with a state agency to expressly resolve CERCLA liability—in *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*: “We read section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved.” 423 F.3d 90, 95 (2d Cir. 2005). It subsequently called that rule into question, *see* *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010) (“The EPA brief understandably takes issue with our holding in *Consolidated Edison*. . . . [T]here is a great deal of force to [its] argument given the language of the statute”), but declined to revisit the issue, *see id.*

118. 42 U.S.C. § 9613(f)(1).

119. *Id.* § 9613(f)(1), (3)(C).

120. *Id.* § 9613(f)(2).

121. *Id.* § 9613(f)(3)(C).

122. *Id.* § 9613(g)(3).

potentially prolonged and costly litigation.¹²³ Courts have held that this protection extends even to circumstances in which a PRP enters a settlement after a claim for contribution has been filed against it.¹²⁴ In exchange for the PRP's agreement to reimburse government costs or fund a cleanup, in many circumstances, the EPA will broadly define the "matters addressed" in a settlement to provide capacious protection from contribution claims,¹²⁵ and courts typically defer to that definition.¹²⁶ As will be discussed, recent Supreme Court decisions threaten to undermine this vital component of CERCLA's liability regime by raising the specter of PRP cost recovery actions sounding in joint and several liability and thus falling outside the "contribution" protection afforded by section 113(f)(2).¹²⁷ The analysis offered in this Article, however,

123. See *supra* notes 20-21 and accompanying text; see also Chang & Sigman, *supra* note 28, at 205-07, 209 (concluding that joint and several liability promotes settlement in multidefendant lawsuits on the assumption that a settling party will be immune from future litigation). The EPA lists "contribution protection" as one of several "reasons why a . . . [PRP] would prefer to enter into a settlement agreement with EPA instead of being ordered to do the work." See *Incentives for Negotiating Superfund Settlements*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/TM57-W6RW> (archived Oct. 11, 2017).

124. See, e.g., *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 420 (4th Cir. 1999) (holding that a claim for contribution under CERCLA section 113 was "rendered moot by the entry of a consent decree" signed by the defendant); see also *ASARCO, LLC v. Union Pac. R.R. Co.*, 762 F.3d 744, 749 (8th Cir. 2014) ("The Act's protections apply even in cases where the settling party is involved in pending contribution litigation." (citing *Axel Johnson*, 191 F.3d at 420)).

125. See, e.g., *United States v. Davis*, 261 F.3d 1, 27-28 (1st Cir. 2001) (upholding the district court's entry of a consent decree under which a PRP agreed to perform a portion of the remediation in exchange for broad, site-wide contribution protection). A 1997 policy issued jointly by the EPA and the U.S. Department of Justice provides that "a definition of 'matters addressed' should typically be included in the contribution protection section of future CERCLA settlements." Memorandum from Bruce S. Gelber, Deputy Chief, Env'tl. & Nat. Res. Div., U.S. Dep't of Justice, and Sandra L. Connors, Dir., Office of Site Remediation Enft, U.S. EPA, to Env'tl. Enft Section Attorneys & Paralegals, U.S. Dep't of Justice, and Reg'l Counsel Branch Chiefs, U.S. EPA 3-4 (Mar. 14, 1997), <https://perma.cc/5EEX-67HD>. The memorandum indicates that the entire cost of site cleanup should generally constitute the "matters addressed" in de minimis settlements, see *id.* at 6-8, settlements related to final remedial designs and assessments, see *id.* at 8, and ability-to-pay settlements, see *id.* at 11. Identifying all site costs as the "matters addressed" may also be appropriate in "cash-out" settlements, a device in which a PRP secures a covenant not to sue for all past and future costs at a site. See *id.* at 10. See generally John M. Hyson, *CERCLA Settlements, Contribution Protection and Fairness to Non-settling Responsible Parties*, 10 VILL. ENVTL. L.J. 277, 354-56 (1999) (explaining the memorandum's approach to broad settlement).

126. See, e.g., *ASARCO*, 762 F.3d at 749 (defining the relevant "matters addressed" by the broad terms of the consent decree); *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 303-04 (5th Cir. 2010) (same); *United States v. Se. Pa. Transp. Auth.*, 235 F.3d 817, 823 (3d Cir. 2000) ("The definition of matters addressed in this decree clarifies the extent of the contribution protection . . .").

127. See *infra* Part II.C.

demonstrates that such claims are themselves governed by the common law of contribution and therefore should also be barred.¹²⁸

II. Evolution of CERCLA Lawsuits

During its more than thirty-five-year life, CERCLA has been the subject of constant litigation. Why, then, would important questions about the nature of liability in private party cost recovery lawsuits remain unanswered? And why in CERCLA's fourth decade would the statutory settlement incentives, which have enabled the EPA and state agencies to fund cleanups without the need for litigation, be in jeopardy?

The answer lies in evolving judicial interpretations of the statute, which have only placed such lawsuits at the fore in the last decade. This Part describes three stages of that evolution: first, the early adoption of joint and several liability for government-initiated lawsuits; second, the decades-long agreement among federal courts that CERCLA only authorized PRPs to seek contribution under the terms set forth in section 113(f); and third, the Supreme Court's dramatic shakeup of that consensus in decisions in 2004 and 2007 that placed in doubt the advantages for PRPs of entering settlements. Part III will then discuss the current state of the law as lower courts have attempted to make sense of the 2004 and 2007 Supreme Court decisions.

A. 1980-1986: Establishing Joint and Several Liability in Government Suits

Federal courts uniformly apply principles of joint and several liability where government agencies sue PRPs under section 107(a)(4)(A) to recover costs;¹²⁹ section 107(a)(4)(C) to recover natural resource damages,¹³⁰ or section 107(a)(4)(D) to recover the cost of health assessments.¹³¹ Despite this

128. *See infra* Part IV.C.

129. 42 U.S.C. § 9607(a)(4)(A) (2016).

130. *Id.* § 9607(a)(4)(C).

131. *Id.* § 9607(a)(4)(D). *See, e.g.,* *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1234 (10th Cir. 2006) (noting that CERCLA makes PRPs jointly and severally liable “for all costs of removal and/or remedial action” as well as for natural resource damages); *see also* *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613, 618-19 (2009) (determining that the court of appeals had improperly reversed the district court's ruling that a PRP had proven the divisibility defense to joint and several liability); *supra* notes 107-09 and accompanying text (discussing the divisibility defense to joint and several liability). No court has passed on whether a claim brought by the Agency for Toxic Substances and Disease Registry for reimbursement of health assessment costs, *see* 42 U.S.C. §§ 9604(i), 9607(a)(4)(D), also imposes joint and several liability. But no logical basis exists for differentiating such claims. They arise out of the same cause of action as other government cost recovery claims, and the common law principles

footnote continued on next page

uniformity of view, the statute does not expressly refer to joint and several liability in any of its provisions.

Courts and commentators frequently poke fun at the poor drafting of CERCLA, commenting, for example, that “[a]ny inquiry into CERCLA’s legislative history is somewhat of a snark hunt”¹³² and that “in an attempt to glean legislative intent, courts seem to resort to a sort of ‘Purkinje phenomenon’, hoping that if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain.”¹³³ The legislative history relevant to joint and several liability is itself tangled, but somewhat less so than for other provisions of the statute. The House and Senate each considered versions of the bill specifying that PRPs were jointly and severally liable.¹³⁴ The imposition of joint and several liability proved controversial, however, and at least one amendment was introduced, but defeated, to specify instead that PRPs were liable only for their several shares.¹³⁵ Shortly before it approved the final bill, the Senate struck any reference to the nature of liability altogether.¹³⁶ Shortly thereafter, Senators Robert Stafford and Jennings Randolph, two of the architects of the legislation, sent a letter to Representative James Florio, a sponsor of the legislation in the House. The letter explained: “Only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matter of hours that fragile coalition began to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged.”¹³⁷ The House then voted to approve the Senate’s version.¹³⁸

that impose joint and several liability on joint tortfeasors in lawsuits brought by innocent plaintiffs like taxpayers, *see infra* Part IV.C.1, would apply with equal force to these costs as to response costs and natural resource damages.

132. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 885 (9th Cir. 2001) (en banc).
133. *CP Holdings v. Goldberg-Zoino & Assocs.*, 769 F. Supp. 432, 435 (D.N.H. 1991) (footnote omitted); *see also* *Artesian Water Co. v. Gov’t of New Castle Cty.*, 851 F.2d 643, 648 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision.”); John Copeland Nagle, *CERCLA’s Mistakes*, 38 WM. & MARY L. REV. 1405, 1405-07 (1997) (quoting cases that have criticized CERCLA’s text and construction).
134. *See* H.R. 7020, 96th Cong. § 4(a) (1980); S. 1480, 96th Cong. § 4(a) (1979); *see also* *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806 (S.D. Ohio 1983) (discussing CERCLA’s legislative history).
135. *See* 126 CONG. REC. 25,078-79 (1980) (statement of Sen. Helms).
136. *See id.* at 30,932 (1980) (statement of Sen. Randolph) (“We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act, but we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.”).
137. Letter from Sen. Robert T. Stafford and Sen. Jennings Randolph to Rep. James J. Florio 1 (Dec. 2, 1980), in 1 ENV’T & NAT. RES. POLICY DIV., CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, at 774 (1983).
138. *See Chem-Dyne*, 572 F. Supp. at 806.

Congress thus rejected explicitly endorsing a specific form of liability for CERCLA. Instead, as Senator Randolph explained, “It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability.”¹³⁹ Representative Florio made similar comments.¹⁴⁰ The comments of a bill’s sponsors are not, of course, ordinarily conclusive as to its meaning.¹⁴¹ Here, however, the comments made by Senator Randolph and Representative Florio—indicating that courts should fill gaps left in the statute based on common law principles—accord with the traditional role assigned to courts interpreting statutes.¹⁴² That is particularly so where a statutory gap relates to a common law principle like liability. As the Supreme Court has explained, “[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’”¹⁴³

Then-Chief Judge Carl Rubin of the Southern District of Ohio wrote the “seminal opinion” discussing this issue¹⁴⁴ in 1983 in *United States v. Chem-Dyne Corp.*¹⁴⁵ After a detailed review of the legislative history, the court concluded that it should—as Senator Randolph and Representative Florio suggested—apply evolving common law principles to determine the nature of cost recovery liability.¹⁴⁶ The court relied on the rule that “where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm” to determine that PRPs are jointly and severally liable for response costs paid by the United States.¹⁴⁷ The court further found that imposing joint and several liability in government lawsuits was “most likely to advance the legislative policies and objectives of the Act.”¹⁴⁸

139. 126 CONG. REC. 30,392 (1980) (statement of Sen. Randolph).

140. *See id.* at 31,964-65 (1980) (statement of Rep. Florio) (“Issues of joint and several liability not resolved . . . shall be governed by traditional and evolving principles of common law.”).

141. *See, e.g.,* *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (“[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history.”).

142. *See, e.g.,* *United States v. Texas*, 507 U.S. 529, 534 (1993) (discussing the longstanding presumption that Congress legislates against a backdrop of common law principles).

143. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)); *see infra* Part IV.C (discussing the common law roots and evolution of joint and several liability and contribution).

144. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613 (2009).

145. 572 F. Supp. 802 (S.D. Ohio 1983).

146. *See id.* at 808-10.

147. *Id.* at 810 (citing 4 RESTATEMENT (SECOND) OF TORTS § 875 (AM. LAW INST. 1979); and WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 52, at 315-16 (4th ed. 1971)).

148. *Id.*

The reasoning in *Chem-Dyne* was widely adopted, resulting in a settled rule that the government could seek joint and several liability in actions to recover cleanup costs under CERCLA.¹⁴⁹ Not as clear after *Chem-Dyne* was whether a PRP who had paid all the costs of response could then seek to recover some of those costs from other PRPs. Relying, however, on the same “traditional and evolving principles of common law” that shaped the holding in *Chem-Dyne*,¹⁵⁰ federal courts quickly read into section 107 an implied right of contribution among PRPs as “an integral component of joint and several liability.”¹⁵¹

B. 1986-2004: Limiting PRPs to Statutory Contribution Claims

In 1986, Congress enacted SARA to streamline litigation and encourage settlement.¹⁵² Among other things, SARA created section 113(f), which provided PRPs with express statutory rights to contribution.¹⁵³ As discussed above, section 113(f) includes two operative provisions: section 113(f)(1), creating a right to contribution “during or following” a civil suit brought under other provisions of CERCLA; and section 113(f)(3)(B), creating a right to contribution allowing settlements with the government obliging PRPs to pay for or carry out cleanup activities.¹⁵⁴

Following SARA, PRPs—at least in certain circumstances—plainly had a statutory right to contribution. Questions remained, however, as to whether all PRPs could always seek contribution under section 113, even if they had not been sued and had not entered a settlement; whether PRPs could sometimes seek to recover money they expended in a cost recovery action under

149. See *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486 (D. Colo. 1985) (noting that “[o]ther courts have similarly held that joint and several liability may be imposed on § 107 responsible parties” and collecting post-*Chem-Dyne* cases).

150. See 572 F. Supp. at 808.

151. See *ASARCO*, 608 F. Supp. at 1489-92; see also *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 828 (7th Cir. 2007) (“Courts filled this vacuum by recognizing an implied right of contribution for PRPs who had been sued under Section 107(a) and, because of that provision’s joint-liability scheme, had been ordered to pay more than their pro rata share of the cleanup costs.”).

152. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of the U.S. Code); see *Organ*, *supra* note 103, at 1052 n.31 (“The legislative history of SARA demonstrates Congress’s recognition of shortcomings in the implementation of CERCLA, including inadequate resources, political pressure to treat every site as a high priority site, and mismanagement and wasteful expenditures on litigation.” (citing H.R. REP. NO. 99-253, pt. 1, at 55-59 (1985))).

153. See 42 U.S.C. § 9613(f) (2016).

154. *Id.* § 9613(f)(1), (3)(B); see *supra* Part I.D.

section 107; and assuming PRPs could sue for cost recovery, in what circumstances could they do so and what rules would govern such claims.¹⁵⁵

The lower courts quickly answered those questions. The Second Circuit's decision in *Bedford Affiliates v. Sill* provides an example:

Section 107(a) holds a potentially responsible person liable for costs incurred by "any other person" during an environmental cleanup. . . . [W]here multiple parties are responsible, joint and several liability attaches. Consequently, one potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor—and not an innocent party—that ultimately must bear its *pro rata* share of cleanup costs under § 107(a).

To bring a derivative action to recoup the portion of costs exceeding a potentially responsible person's equitable share of the overall liability, however, is a quintessential claim for contribution, where a party seeks to apportion liability for an injury for which it is also directly liable.¹⁵⁶

All of the courts of appeals presented with these questions reached a similar conclusion—that PRPs could seek statutory contribution under section 113 but not cost recovery under section 107.¹⁵⁷ They reached this conclusion for one or more of the following reasons: First, they viewed the claim of one liable party against another as fitting squarely within the contours of common law contribution claims, and because section 113 used the word contribution, they believed that section 113 claims extended to all PRPs.¹⁵⁸ Second, they believed that allowing PRPs to seek cost recovery, instead of contribution, "would render § 113(f) meaningless, as a PRP 'would readily abandon a § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a).'"¹⁵⁹ Third, they believed that SARA's legislative history indicated

155. See *Metro. Water Reclamation Dist.*, 473 F.3d at 828-31 (collecting cases and discussing the "set of new questions" produced by SARA's enactment).

156. *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (quoting 42 U.S.C. § 9607(a)), *abrogated by* *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007), *as recognized in* *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85 (2d Cir. 2009).

157. See *Metro. Water Reclamation Dist.*, 473 F.3d at 828 ("Every circuit to decide the issue held that, after SARA, PRPs were precluded generally from seeking joint and several cost recovery under § 107(a), and that any claim seeking to shift costs from one responsible party to another must be brought as a § 113(f) claim for contribution."); Aronovsky, *supra* note 38, at 82.

158. See, e.g., *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100-01 (1st Cir. 1994) ("Congress, in enacting SARA, . . . employed the legal term 'contribution' in its traditional sense to cover an action by one liable party against another liable party. . . . Congress . . . fully intended courts to give the word its customary meaning."), *abrogated by Atl. Research*, 551 U.S. 128 (2007).

159. See, e.g., *Metro. Water Reclamation Dist.*, 473 F.3d at 828 (quoting *Bedford Affiliates*, 156 F.3d at 424). For the reasons courts view cost recovery suits under section 107(a) as more generous than statutory contribution suits under section 113(f), see notes 199-202 and accompanying text below. However, the analysis provided by this Article
footnote continued on next page

that Congress intended for all PRPs to seek contribution, and only contribution, under section 113.¹⁶⁰ Fourth, they assumed that any claim for cost recovery would be a claim for joint and several liability¹⁶¹ and that it would be “unfair” to allow a PRP to recover “100 percent of the response costs from others similarly situated.”¹⁶²

While courts limited PRPs to seeking contribution under section 113, they also extended that right to all PRPs—regardless whether they had been sued or entered a settlement. Courts relied on two distinct rationales for concluding that section 113 contribution claims extend to PRPs outside the procedural circumstances identified in sections 113(f)(1) and 113(f)(3)(B). First, some courts held simply that the word “contribution” as used in section 113(f)(1) encompassed any “action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs” and therefore that all PRPs could pursue claims under that section.¹⁶³ Other courts viewed sections 107 and 113 as operating in tandem, with section 107 providing the sole cause of action for any party—PRP or otherwise—and section 113 defining the nature of claims brought by one PRP against another.¹⁶⁴

demonstrates that cost recovery suits more closely resemble, but remain different from, claims for statutory contribution. *See infra* Parts IV.C.3, V.B.2.

160. *See, e.g., Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) (“CERCLA simply does not provide PRPs who incur cleanup costs with a claim for the joint and several recovery of those costs from other PRPs. . . . [O]ur holding today is mandated by the text, structure, and legislative history of §§ 107 and 113 . . .”), *abrogated by Atl. Research*, 551 U.S. 128, *as recognized in Kotrous v. Goss-Jewett Co.*, 523 F.3d 924 (9th Cir. 2008).
161. *See, e.g., id.* at 1301-03 (rejecting the plaintiff’s section 107 claim partly on the assumption that CERCLA section 107(a) only provides for joint and several liability); Aronovsky, *supra* note 38, at 82 (discussing the history of CERCLA case law before the Supreme Court’s recent intervention).
162. *Metro. Water Reclamation Dist.*, 473 F.3d at 828 (quoting *Bedford Affiliates*, 156 F.3d at 424); *see also Pinal Creek*, 118 F.3d at 1301-03.
163. *See, e.g., United Techs.*, 33 F.3d at 103; *see also Aronovsky, supra* note 38, at 26-29 (noting that every circuit court to address the issue “held that a PRP seeking to recover cleanup costs from another PRP under CERCLA was limited to a contribution action for several liability under section 113(f)” and explaining the distinction between the two primary approaches courts took to resolving the issue).
164. *See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) (“[P]arties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of the defendants, as well as any defenses to that liability. . . . [I]t is § 107(a) that establishes the cause of action for contribution.”), *abrogated by Atl. Research*, 551 U.S. 128 (2007), *as recognized in Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014); *Pinal Creek*, 118 F.3d at 1302 (“[W]hile § 107 created the right of contribution, the ‘machinery’ of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107.”).

An important assumption—one that on closer analysis turns out to be flawed—underlay these analyses. Courts believed that cost recovery claims were, and could only be, claims for joint and several liability, regardless of the plaintiff.¹⁶⁵ Therefore, to allow a PRP to pursue cost recovery would provide that PRP with a means of shirking its own responsibility for cleanup costs by foisting them on others.

This system that treated all PRPs equally—providing all with a contribution claim under section 113(f) and none with a cost recovery claim under section 107(a)—handed the EPA a powerful tool to secure settlements with PRPs. As discussed, section 113(f)(2) bars any contribution claim against a party that has settled with the EPA or a state agency.¹⁶⁶ Because all PRPs had only contribution claims under section 113, a PRP could secure certainty when it entered a settlement: No other PRP could bring suit against it.

C. 2004-2007: Reestablishing PRP Cost Recovery Rights

The consensus reached by the courts of appeals on the nature of PRP claims was upended by a pair of Supreme Court decisions, *Cooper Industries v. Aviall Services, Inc.*¹⁶⁷ and *United States v. Atlantic Research Corp.*¹⁶⁸

In *Cooper Industries*, the Court held that some, although not all, PRPs could bring claims under section 113(f)(1). The Court recited the language of the section, noting that the right of contribution was limited by the phrase “during or following any civil action under section 9606 of this title or under section 9607(a) of this title.”¹⁶⁹ The Court concluded as a matter of unambiguous text that only PRPs falling into the identified circumstances could seek

165. See, e.g., *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997) (explaining that if the plaintiff PRP could bring a cost recovery claim, “a potentially responsible person . . . could recoup all of its expenditures regardless of fault,” and opining that “[t]his strains logic”); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) (identifying the “presumed existence of joint and several liability” for cost recovery actions and the fact that “most courts ultimately ruled that section 9607 conferred an implied right of action for contribution in favor of a PRP” prior to section 113’s enactment), *abrogated in other part by Atl. Research*, 551 U.S. 128 (2007).

166. 42 U.S.C. § 9613(f)(2) (2016) (“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.”).

167. 543 U.S. 157 (2004).

168. 551 U.S. 128 (2007); see Aronovsky, *supra* note 38, at 34 n.148 (“Before *Aviall*, there had been virtually no suggestion by the courts that the first sentence of § 113(f)(1) limited the availability of CERCLA contribution rights.”); see also Jeffrey M. Gaba, *The Private Causes of Action Under CERCLA: Navigating the Intersection of Sections 107(a) and 113(f)*, 5 MICH. J. ENVTL. & ADMIN. L. 117, 133 (2015) (noting that the Supreme Court granted certiorari in *Cooper Industries* “[d]espite the absence of a split among the circuits”).

169. *Cooper Indus.*, 543 U.S. at 166 (emphasis omitted) (quoting 42 U.S.C. § 9613(f)(1)).

contribution under that section.¹⁷⁰ The Court similarly suggested that section 113(f)(3)(B) applied only in particular procedural circumstances, specifically to PRPs that enter settlements with the government.¹⁷¹ In other words, the Court squarely rejected the view adopted by many courts that all PRPs could bring claims under section 113(f)(1).¹⁷² Because the Court described section 113 as authorizing statutory contribution claims only in some circumstances, it also implicitly rejected the alternative view of some courts interpreting section 107 as providing all PRPs with a cause of action the nature of which was defined by section 113.¹⁷³

In the wake of *Cooper Industries*, it remained unclear whether CERCLA provided any rights to PRPs who had not yet been sued or entered a settlement. Such PRPs could no longer seek contribution under section 113, but could they sue for cost recovery under section 107? The Supreme Court returned to that issue in *Atlantic Research*. Relying again on the language of the statute, the Court held that PRPs could qualify as “any other person” under section 107(a)(4)(B).¹⁷⁴ The Court explained that based on that language, “a private party that has itself incurred cleanup costs” could file a cost recovery claim.¹⁷⁵ A suit for contribution under section 113, on the other hand, was available only to reimburse response costs paid by other parties.¹⁷⁶

Notwithstanding the Court’s explanation, the bright line it described separating contribution and cost recovery failed to account for statutory contribution claims expressly authorized by section 113 in circumstances where a PRP funds cleanup efforts pursuant to an injunction or settlement.¹⁷⁷ For example, a PRP may have “itself incurred cleanup costs,” but done so involuntarily to comply with a settlement or court order.¹⁷⁸ While the Court in a footnote did acknowledge the potential overlap between cost recovery suits under section 107 and statutory contribution suits under section 113 in a footnote, it declined to address the manner in which the statutory provisions operate within that zone.¹⁷⁹

170. *Id.*

171. *Id.* at 163 (“In short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B).”).

172. *Cf. supra* note 163 and accompanying text.

173. *Cf. supra* note 164 and accompanying text.

174. *United States v. Atl. Research Corp.*, 551 U.S. 128, 131, 134-35, 141 (2007).

175. *Id.* at 139.

176. *Id.*

177. *See* 42 U.S.C. § 9613(f)(3)(B) (2016).

178. *See Atl. Research*, 551 U.S. at 139.

179. *See id.* at 139 n.6 (“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
footnote continued on next page”)

In reaching its decision, the Court addressed—and rejected—an argument raised by the United States that permitting a PRP to seek cost recovery would be inequitable because it could allow that PRP to avoid all liability itself by securing a judgment for joint and several liability against another PRP. The Court explained:

[A] PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a). . . . [A] defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.¹⁸⁰

The Court also included in its decision a caveat crucial to this Article's argument about the nature of PRP cost recovery actions: The Court assumed, without deciding, that a PRP's cost recovery lawsuit would be for joint and several liability.¹⁸¹

Cooper Industries and *Atlantic Research* threaten to substantially undermine the settlement incentive created by section 113(f)(2)'s contribution bar. Because PRPs are no longer relegated to contribution claims under section 113, a settlement now leaves a settling PRP open to the possibility of future litigation if cost recovery claims by other PRPs are viewed as something other than contribution claims. In Part IV below, this Article will explain that correct application of common law principles related to joint tortfeasor claims reveals that this threat is more apparent than actual.¹⁸²

III. Settlement Incentives at Risk

The Supreme Court's decisions in *Cooper Industries* and *Atlantic Research* effectively reset the playing field with respect to the rights CERCLA provides to PRPs. This new landscape for litigation threatens to undermine the protection afforded by section 113(f)(2) to parties that settle with the EPA or state agencies. This is because parties that can seek cost recovery under section 107, rather than statutory contribution under section 113, may be able to sue PRPs that have previously settled with the United States or a state. The larger the number of PRPs that can arguably bring such claims against settling parties, the more settlement incentives are diminished. This Part discusses two primary legal issues that define the universe of PRPs that can bring cost recovery actions under section 107(a).

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." (citations omitted).

180. *Id.* at 140.

181. *See id.* at 140 n.7.

182. *See infra* Part IV.C.

A. The Nature of Unilateral Administrative Orders

The largest category of PRPs that can seek cost recovery under section 107 is undoubtedly PRPs that incur costs to comply with UAOs. The EPA relies heavily on UAOs, issuing multiple orders every month, sometimes to many PRPs at a time.¹⁸³ Such UAOs can require massive expenditures on the part of the recipient PRPs.¹⁸⁴

UAOs do not, however, cleanly fit into the procedural circumstances covered by section 113(f). They surely are not settlements—indeed, the name itself indicates that they are issued unilaterally and without the consent of the recipient. The only question, then, is whether a UAO could be viewed as a “civil action,” thereby giving rise to a claim for statutory contribution under section 113(f)(1).¹⁸⁵

Virtually every court has answered that question in the negative. As Jeffrey Gaba explains, “Nothing beyond the most straightforward textual reading is necessary to conclude that UAOs are not civil actions and thus not within the scope of 113(f)(1).”¹⁸⁶ Judges tend to agree.¹⁸⁷ As one judge explained, “[T]he natural meaning of ‘civil action’ is clearly a non-criminal judicial proceeding. . . . Turning to an administrative order, its natural meaning is far from that of being synonymous with civil action.”¹⁸⁸

183. See *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 33 (D.D.C. 2009) (“Between August 16, 1982 and May 25, 2006—a period of 285 months—EPA issued 1,705 UAOs to more than 5,400 PRPs.”).

184. See, e.g., U.S. EPA, LOWER PASSAIC RIVER ROD, *supra* note 10, at 88 (estimating the cost of remedial action for a portion of a site at over \$1 billion); *Case Summary: EPA Orders \$25+ Million Cleanup Along the Kalamazoo River*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/H5DK-6B6Q> (archived Oct. 11, 2017) (discussing the EPA’s issuance of a UAO to three companies requiring work valued at \$25-30 million to clean up a 1.7-mile stretch of the Kalamazoo River).

185. See 42 U.S.C. § 9613(f)(1) (2016).

186. Gaba, *supra* note 168, at 154. The Supreme Court has reached this exact conclusion in other circumstances as well; for example, it held that an administrative order did not qualify as an “action” under the Mineral Leasing Act. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-92 (2006) (“The key terms in this provision—‘action’ and ‘complaint’—are ordinarily used in connection with judicial, not administrative, proceedings.” (quoting 28 U.S.C. § 2145(a))).

187. See *Emhart Indus., Inc. v. New Eng. Container Co.*, 478 F. Supp. 2d 199, 203 (D.R.I. 2007); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1142-43 (D. Kan. 2006); *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at *3-4 (W.D. Mo. June 27, 2005); *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1087 (S.D. Ill. 2005); *United States v. Taylor*, 909 F. Supp. 355, 365 (M.D.N.C. 1995); see also Gaba, *supra* note 168, at 153 (“Most, but not all, of the courts to address this issue have concluded that UAOs are not ‘civil actions.’”).

188. *Pharmacia*, 382 F. Supp. 2d at 1087.

Only three district court decisions have reached the opposite conclusion.¹⁸⁹ The decision of the Western District of Tennessee in *Carrier Corp. v. Piper* is representative.¹⁹⁰ There, the court explained that a UAO compels a PRP to take action and incur costs and that “[i]n terms of the burden it places on a party, a UAO is similar to a judgment issued pursuant to a court proceeding.”¹⁹¹ The court therefore concluded that a UAO was a civil action and that it triggered a statutory contribution right under section 113(f)(1).¹⁹²

This analysis, as will be discussed below, correctly identifies compulsion as relevant to determining whether a claim sounds in the common law of contribution.¹⁹³ That a UAO compels a PRP to incur costs does not, however, seem sufficient to bring it within the meaning of the statutory words “civil action” and thereby satisfy the procedural prerequisites for a statutory contribution claim under section 113(f)(1).

B. The Exclusivity of the Contribution Remedy

While UAO recipients can bring cost recovery actions under section 107(a), courts have generally disallowed such actions brought by a second category of PRPs that arguably could have brought such claims. In the wake of *Atlantic Research*, PRPs that fund or carry out environmental remediation to comply with settlements or injunctions could be viewed as having both a cost recovery action under section 107¹⁹⁴—because they incurred costs—and a statutory contribution action under section 113¹⁹⁵—because they settled or have been the subject of a section 106 abatement action.¹⁹⁶ Were that

189. See *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 742 (D.S.C. 2015); *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2009 WL 3931036, at *3 (E.D. Wis. Nov. 18, 2009); *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 840-41 (W.D. Tenn. 2006). One other court also noted in dicta that a UAO may satisfy the civil action requirement. See *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1336 (N.D. Ala. 2010) (“But such contingency is not satisfied, the [*Atlantic Research*] Court held, where a plaintiff seeks to recover or apportion costs of a cleanup it performed voluntarily, without ever having been sued under § 106 or § 107, settling its liability, or in response to an administrative order.” (emphasis added)), *aff’d on other grounds per curiam*, 672 F.3d 1230 (11th Cir. 2012).

190. See 460 F. Supp. 2d at 840-41.

191. *Id.* at 841.

192. *Id.*

193. See *infra* note 281 and accompanying text.

194. See 42 U.S.C. § 9607(a) (2016).

195. See *id.* § 9613(f).

196. See *id.* § 9606(b).

the case, a large number of PRPs—including many PRPs that enter settlements with the EPA or a state agency—would have a choice of remedies.¹⁹⁷

In a series of amicus briefs, the United States strenuously argued against that result and in favor of the view that costs incurred pursuant to a settlement or injunction could only be recovered in statutory contribution actions.¹⁹⁸ These cases arose because PRPs seized on the possibility of having a choice of remedies to argue that despite having entered settlements, they could take advantage of the arguably more generous cost recovery provisions of section 107, including, in their view, the ability to recover jointly and severally from other PRPs.¹⁹⁹ In at least one case, which settled shortly before oral argument, a PRP argued for a cost recovery claim and for joint and several liability, and it further argued that because it had settled, the defendant could not file a contribution counterclaim.²⁰⁰ Had that argument prevailed, it would have raised the specter of a settling party having the ability to shift all response costs to any other PRP and evade entirely any financial obligation for a cleanup itself.

Courts have rejected the choice-of-remedies approach and adopted the views of the United States. Since *Atlantic Research*, every federal court to address the issue has held that section 107's cost recovery provision and section 113's statutory contribution provisions provide distinct and mutually exclusive causes of action, and that "PRPs *must* proceed under § 113(f) if they meet one of

197. Under this theory, PRPs who enter settlements under which they solely agree to reimburse costs incurred by the government would not have cost recovery actions. See *Negotiating Superfund Settlements*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/XKK3-SP7W> (archived Oct. 11, 2017) ("When an agreement only addresses reimbursing EPA costs, it is referred to as a Cost Recovery Agreement and takes the form of an Administrative Agreement.").

198. See, e.g., Brief for the United States as Amicus Curiae Supporting the Appellee at 11-12, *Morrison Enters. v. Dravo Corp.*, 638 F.3d 594 (8th Cir. 2011) (Nos. 10-1468 & 10-1469), 2010 U.S. 8th Cir. Briefs LEXIS 635, at *14-15; Brief of the United States as Amicus Curiae Supporting Appellant at 9, *Niagara Mohawk Power Corp. v. Chevron U.S.A. Inc.*, 596 F.3d 112 (2d Cir. 2010) (No. 08-3843-cv(L)), 2008 WL 10610074; Brief for the United States as Amicus Curiae Supporting Appellees at 10-12, *Phelps Dodge Miami, Inc. v. CanadianOxy Offshore Prod. Co.*, No. 08-17614 (9th Cir. June 10, 2009), 2009 WL 3639583 [hereinafter *United States Phelps Dodge Miami Brief*].

199. See, e.g., *Niagara Mohawk Power*, 596 F.3d at 127-28 (dismissing the plaintiff's section 107(a) claim brought in addition to its claim for contribution under section 113(f)).

200. See Brief of Appellants at 29, *Phelps Dodge Miami* (9th Cir. Apr. 3, 2009), 2009 WL 3639580 ("It is, of course, possible that a PRP held jointly and severally liable under section 107(a) may be forced to reimburse cleanup costs that it believes should be apportioned equitably to a PRP that has settled and cannot be compelled to contribute more. That possibility is an inherent and, indeed, intentional feature of the statutory contribution bar under CERCLA's scheme . . ."). But see *United States Phelps Dodge Miami Brief*, *supra* note 198, at 13-29 (responding to the appellants' arguments).

that section's statutory triggers."²⁰¹ Alternatively, if a party's procedural circumstances fall outside the parameters of section 113, that party's exclusive cost-shifting remedy under CERCLA lies in section 107.²⁰² The Second Circuit's decision in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*,²⁰³ provides a concise illustration of the analysis courts have used to reach this result. The court, referring to the plaintiff as NiMo, explained:

NiMo's claim fits squarely within the more specific requirements of § 113(f)(3)(B). NiMo acknowledged responsibility and paid for response costs under the statute. NiMo settled its CERCLA liability with [the state environmental agency] by agreeing to identify and to remediate some of the hazardous substances present at the Water Street Site. . . . The EPA in its amicus brief strongly argues that § 113(f)(3)(B) is the proper vessel for NiMo's contribution claims in light of its more specific requirements, the nature of NiMo's claims, and the amendment of the statute to provide the right of contribution. We agree. Congress recognized the need to add a contribution remedy for PRPs similarly situated to NiMo. To allow NiMo to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113. "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect."²⁰⁴

Most cases have addressed the choice-of-remedies issue in the context of a settling party seeking to bring a cost recovery claim rather than a statutory contribution claim under section 113(f)(3)(B).²⁰⁵ At least one case, however, reached the same result in the context of section 113(f)(1), ruling that a PRP subjected to a "civil action" under CERCLA cannot instead choose to seek cost

201. See *Ford Motor Co. v. Mich. Consol. Gas Co.*, No. 08-13503, 2015 WL 540253, at *10, *15 (E.D. Mich. Feb. 10, 2015) (quoting *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014)) (collecting cases); see also Gaba, *supra* note 168, at 142 & n.132 ("[S]ince *Atlantic Research*, the seven courts of appeals that have explicitly addressed this issue have concluded that the causes of action under 107 and 113(f) are mutually exclusive."); Christopher D. Thomas, *Tomorrow's News Today: The Future of Superfund Litigation*, 46 ARIZ. ST. L.J. (SPECIAL ISSUE) 537, 548 & n.64 (2014) ("The majority of the circuits have now ruled that parties working under a consent order or consent decree—and hence eligible to seek contribution under § 113—may not choose instead to seek cost recovery under § 107.").

202. See, e.g., *Bernstein v. Bankert*, 733 F.3d 190, 202 (7th Cir. 2013). PRPs may have alternative claims under state law, including contribution claims arising under state common law. See 42 U.S.C. § 9613(f)(1) (2016) (preserving claims for contribution other than the statutory contribution claims created by § 113(f)).

203. 596 F.3d 112.

204. *Id.* at 127-28 (last alteration in original) (footnote omitted) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)).

205. See, e.g., *Bernstein*, 733 F.3d at 202 (holding that a settling party may only sue under section 113(f)(3)(B), not under section 107(a)); *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010) (same); *Niagara Mohawk Power*, 596 F.3d at 127-28 (same).

recovery under section 107(a).²⁰⁶ In any case, the analytic approach that the courts of appeals have taken to this issue applies equally to either section 113(f)(1) or section 113(f)(3)(B).²⁰⁷

Limiting PRPs to statutory contribution claims if they fall within the procedural circumstances covered by section 113(f) represents a significant victory for the EPA. This result protects settling PRPs from lawsuits brought by other PRPs incurring costs to comply with their own settlements or injunctions, eliminating at least one threat to the settlement incentives created by the statutory protections CERCLA provides settlement parties.²⁰⁸

206. See *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 740-41 (D.S.C. 2015). The *PCS Nitrogen* court's manner of reconciling section 113(f)(1) and section 107(a) is consistent with the decisions construing section 113(f)(3)(B) because the court agreed with the Sixth Circuit that "CERCLA's text and structure lead us to conclude that PRPs must proceed under § 113(f) if they meet one of that section's statutory triggers." See *id.* at 741 (quoting *Hobart*, 758 F.3d at 767). The court's further ruling that a UAO constitutes a "civil action" that triggers section 113(f)(1), however, directly contradicts the view of the majority of courts to have considered the issue. Compare *id.* at 742 (ruling that a UAO is a "civil action"), with *Diamond X Ranch LLC v. Atl. Richfield Co.*, No. 3:13-cv-00570-MMD-WGC, 2016 WL 4498211, at *5 (D. Nev. Aug. 26, 2016) ("In contrast [to *PCS Nitrogen*], the majority of courts have held that UAOs under § 106(a) do not constitute a 'civil action' for the purposes of § 113(f)(1)."), and *Emhart Indus., Inc. v. New Eng. Container Co.*, 478 F. Supp. 2d 199, 203 (D.R.I. 2007) ("[T]his court will follow the majority of courts in concluding that 113(f)(1) is unavailable for parties who are merely subject to administrative orders, as opposed to final consent decrees, judgments, or apportionments of liability.").

207. See *Hobart*, 758 F.3d at 767 ("If § 113(f)'s enabling language is to have bite, though, it must also mean that a PRP, eligible to bring a contribution action, can bring only a contribution action."); *Bernstein*, 733 F.3d at 202 (referring to both sections 113(f)(1) and (3)(B) and holding that "each CERCLA right of action carries with it its own statutory trigger, and each is a distinct remedy available to persons in different procedural circumstances"); *Niagara Mohawk Power*, 596 F.3d at 127-28 (grounding its decision in basic canons of statutory construction and concluding that (1) section 113 contains more specific requirements than section 107 and therefore should govern when applicable; and (2) section 113 was enacted later than section 107, and Congress typically intends for "its amendment[s] to have real and substantial effect" (quoting *Stone*, 514 U.S. at 397)).

208. The EPA has less successfully advanced the argument that "once one of the procedural triggers for a party's contribution claim has occurred, the party's right to contribution extends to all of the party's expenses at the site, regardless of whether those expenses were at issue in the triggering litigation or settlement." See *Whittaker Corp. v. United States*, 825 F.3d 1002, 1008 (9th Cir. 2016). The Ninth Circuit rejected this trigger theory in *Whittaker*, holding that "a party's right to contribution for some of its expenses at a site does not necessarily mean that the party loses its right to bring a cost recovery action for other expenses." *Id.* at 1010-11; see also *DMJ Assocs. v. Capasso*, 181 F. Supp. 3d 162, 169 (E.D.N.Y. 2016) ("[S]ome of the [third-party plaintiffs'] costs are recoverable only under § 107, while some are separately recoverable only under § 113."). Should the courts reverse course and adopt the EPA's trigger theory, it would further reduce the number of PRPs eligible to seek cost recovery under section 107(a). It would also enable the EPA to foreclose a cost recovery lawsuit by filing a claim under sections 106 or 107,

footnote continued on next page

IV. The Nature of PRP Cost Recovery Actions

The cost recovery claims of PRPs are of a relatively new vintage, and courts have not examined them thoroughly. Because government cost recovery claims have long been understood to impose joint and several liability, some courts and commentators assume that the same rules should apply to PRP cost recovery claims. This Part demonstrates the error in that approach, revealing that common law liability rules do not support applying joint and several liability to govern the claim of one PRP against another.

A. Scant Judicial Attention to the Nature of PRP Cost Recovery Claims

Courts have paid little attention to whether common law principles of joint and several liability apply to suits between PRPs. Legal scholars have generally followed suit, assuming that PRP suits, like government suits, should be governed by principles of joint and several liability.²⁰⁹

The Supreme Court has not itself addressed the issue. In *Atlantic Research*, the Court expressly declined to address the nature of a PRP's cost recovery claim, explaining that the Court would “assume without deciding that § 107(a) provides for joint and several liability.”²¹⁰ Other courts have also merely assumed or provided only conclusory support for the notion that cost recovery claims under section 107(a)(4)(B)—by private parties—must be treated like cost recovery claims under section 107(a)(4)(A)—by government agencies—and must, therefore, provide for joint and several liability.²¹¹ For example, in

thereby placing the defendant into the procedural circumstances covered by the statutory contribution right created by section 113(f)(1).

209. See, e.g., Steven Ferrey, *Toxic “Plain Meaning” and “Moonshadow”: Supreme Court Unanimity and Unexpected Consequences*, 24 VILL. ENVTL. L.J. 1, 8 (2013) (contrasting joint and several liability under section 107 with contribution liability under section 113); Gaba, *supra* note 168, at 120 (“The standard for recovery under 107(a)(4)(B) is ‘joint and several’; under 113(f) the standard is one of ‘equitable allocation.’”); cf. Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 104-05 (1997) (explaining that allowing PRPs to sue under section 107 “would lead to a seemingly anomalous result: a potentially liable party would be entitled to sue as a *plaintiff* and recover full judgment against other potentially liable parties”).

210. See *United States v. Atl. Research Corp.*, 551 U.S. 128, 140 n.7 (2007). The surrounding text makes clear that the Court's general reference to section 107(a) was meant to refer more specifically to section 107(a)(4)(B). See *id.* at 139-40. As will be discussed in further detail, see *infra* notes 211-13 and accompanying text, lumping section 107(a)(4)(A) and section 107(a)(4)(B) together, when they provide distinct causes of action to different parties, is one of the primary factors leading to confusion on the issue.

211. See, e.g., *Bernstein*, 733 F.3d at 201; *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236-37 (11th Cir. 2012) (per curiam); *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 228 (3d Cir. 2010); *Niagara Mohawk Power*, 596 F.3d at 121; *Kotrous v. Goss-Jewett Co.*, 523 F.3d 924, 933 n.9 (9th Cir. 2008); *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*,
footnote continued on next page

Niagara Mohawk Power, the Second Circuit stated simply: “Section 107 allows for complete cost recovery under a joint and several liability scheme; one PRP can potentially be accountable for the entire amount expended to remove or remediate hazardous materials.”²¹² Similarly, in *Solutia, Inc. v. McWane, Inc.*, the Eleventh Circuit stated that “to allow a § 107(a) claim here would allow [PRPs] . . . to impose joint and several liability on Defendants, and other similarly situated parties.”²¹³ Neither decision considered or applied common law principles to ascertain the nature of a PRP cost recovery action; instead, each merely assumed that such an action must be for joint and several liability because that is the nature of government cost recovery actions. Moreover, in neither case was the court’s assertion that a PRP cost recovery lawsuit sounds in joint and several liability necessary to the holding because both courts held that the plaintiffs could only seek statutory contribution under section 113(f).²¹⁴

While most courts have merely assumed in passing that section 107(a)(4)(B)’s private party cost recovery provision provides for joint and several liability, three district courts have directly engaged the issue.²¹⁵ In an unpublished order issued by the Central District of California in *City of Colton v. American Promotional Events, Inc.*, the court rejected application of joint and several liability to a PRP’s cost recovery action, finding instead that the PRP’s claims were “in the nature of contribution claims arising out of a common liability.”²¹⁶

Two other courts have reached the opposite conclusion based either on a misapprehension of common law liability rules or reliance upon unrelated policy considerations. In an unpublished opinion in *Reichhold, Inc. v. U.S. Metals*

423 F.3d 90, 100 n.9 (2d Cir. 2005); *Whittaker Corp. v. United States*, No. CV 13-1741 FMO (JCx), 2014 WL 631113, at *4 (C.D. Cal. Feb. 10, 2014), *rev’d on other grounds*, 825 F.3d 1002 (9th Cir. 2016); *Tennessee v. Roane Holdings*, 835 F. Supp. 2d 527, 542 (E.D. Tenn. 2011).

212. 596 F.3d at 121.

213. 672 F.3d at 1236-37 (per curiam).

214. *See id.*; *Niagara Mohawk Power*, 596 F.3d at 127-28.

215. *See City of Colton v. Am. Promotional Events, Inc.*, No. ED CV 09-1864 PSG (SSx), slip op. at 3 (C.D. Cal. June 10, 2011); *Reichhold, Inc. v. U.S. Metals Ref. Co.*, No. 03-453 (DRD), 2008 WL 5046780, at *6-7 (D.N.J. Nov. 20, 2008); *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306, 1310-11 (D. Kan. 2007). Two other district courts have ruled that a PRP’s cost recovery action is not a claim for contribution without deciding whether that claim may impose joint and several liability. *See Ford Motor Co. v. Mich. Consol. Gas Co.*, 993 F. Supp. 2d 693, 703-04 (E.D. Mich. 2014); *Ashland Inc. v. GAR Electroforming*, 729 F. Supp. 2d 526, 548 (D.R.I. 2010) (rejecting an argument presented in the United States’s amicus brief that Ashland’s claim for cost recovery under section 107 was “in the nature of contribution” due to Ashland’s status as a PRP (quoting the amicus brief)), *vacated*, No. 08-227-M (D.R.I. Jan. 18, 2013).

216. Slip op. at 3.

Refining Co., the District of New Jersey took the first approach in ruling that a PRP could assert a cost recovery claim sounding in joint and several liability.²¹⁷ The court relied on the Restatement (Second) of Torts as providing the relevant common law principles.²¹⁸ The court did not, however, recognize that—as will be discussed below²¹⁹—joint tortfeasors may not generally avail themselves of joint and several liability under the Second Restatement. Thus, the court incorrectly viewed the claim of a PRP as being similarly situated to that brought by an innocent party.

In *Raytheon Aircraft Co. v. United States*, the District Court of Kansas relied on its view of the policies underlying CERCLA to find joint and several liability applicable to a PRP's cost recovery action.²²⁰ Referring to the seminal decision ruling that joint and several liability principles apply to government cost recovery claims,²²¹ the court framed the question before it as “whether the *Chem-Dyne* approach applies to a section 107(a) claim when the party asserting that claim is itself a liable party.”²²² While the court correctly identified *Chem-Dyne* as establishing the accepted approach for interpreting CERCLA's liability provision, it departed from that approach by failing to consider common law principles to ascertain the nature of the lawsuit before it. Instead, the *Raytheon* court justified applying joint and several liability based on its view that such expansive liability would impel more rapid site cleanup.²²³ That policy

217. 2008 WL 5046780, at *7.

218. *See id.*

219. *See infra* Part IV.C.1.

220. *See* 532 F. Supp. 2d at 1310.

221. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). For a discussion of *Chem-Dyne's* approach to construing section 107(a)(4)(B), see text accompanying notes 145-48.

222. *Raytheon*, 532 F. Supp. 2d at 1310.

223. *See id.* (“By providing a PRP with an opportunity to pursue joint and several liability against other PRPs, section 107(a) further encourages a PRP to quickly and voluntarily cleanup [sic] a site in the hopes that it might recover its response costs from other PRPs who . . . made the decision to sit by and let other PRPs bear the initial burden of cleanup despite its own status as a potentially responsible party.”). The court in *Raytheon* also based its decision on its perception that the United States had taken an inconsistent position in prior litigation. *See id.* at 1312-13 (citing *In re Dana Corp.*, 379 B.R. 449, 450-61 (S.D.N.Y. 2007)). The plaintiff in *Raytheon* asserted a section 107(a) claim against the United States “based on the Army Corps of Engineers status as an alleged co-PRP,” *see id.* at 1307, and the United States argued that the plaintiff, as a PRP, was “not entitled to pursue its cost recovery claim on a theory of joint and several liability,” *see id.* at 1309. The district court viewed the United States's position in *In re Dana Corp.* as conflicting because there the government had asserted a claim for joint and several liability under section 107(a)(4)(A) to recover costs incurred by the EPA, even though the U.S. Department of Defense was a co-PRP at the site. *See id.* at 1312-13; *see also In re Dana Corp.*, 379 B.R. at 452-53, 461. But that argument differs from the one before the *Raytheon* court because the lawsuit in *In re Dana Corp.* sought to recover government

footnote continued on next page

analysis, whatever its merits,²²⁴ diverges sharply from common law principles that impose joint and several liability on joint tortfeasors to ensure that innocent parties are made whole.

Little jurisprudence, then, construes the nature of a PRP's cost recovery action in light of common law principles. This question, which has substantial implications for the protection CERCLA provides to settling parties, remains open.

B. Inherent Flexibility of Cost Recovery Liability

What of the considerable ink courts have spilled analyzing the nature of government cost recovery actions under section 107(a)(4)(A)? Shouldn't the same rules apply to all cost recovery actions, even those of private parties under section 107(a)(4)(B)? This Subpart explains that CERCLA includes textual indications that differentiate between claims under those two sections. Moreover, Congress did not intend courts to adopt a one-size-fits-all approach to CERCLA liability, but rather intended courts to apply common law principles on a "case by case" basis to ascertain the nature of any particular cost recovery claim.²²⁵

Application of joint and several liability to government cost recovery claims under section 107(a)(4)(A) traces its judicial origins to the detailed and well-reasoned decision in *Chem-Dyne*. As then-Chief Judge Rubin explained, Congress crafted the liability provisions of CERCLA to ensure that joint and several liability would be applied in some, but not all, situations because such liability "might produce inequitable results in some cases."²²⁶ The divisibility defense is the most prominent way in which common law principles determine whether joint and several liability is appropriate in a particular

response costs incurred by the EPA as a regulator, *see id.* at 452, not by the Department of Defense as a liable party.

224. It is a dubious proposition that CERCLA's goals are advanced by incentivizing purely voluntary cleanups. As the government argued in *Atlantic Research*, "CERCLA was never intended to promote 'wholly voluntary, unsupervised, *sua sponte*' cleanups. The goal . . . is to promote 'government-supervised cleanups and [to encourage] PRPs promptly to settle their liability with the government.'" *See* Aaron Gershonowitz, *United States v. Atlantic Research Corp.: Who Should Pay to Clean Up Inactive Hazardous Waste Sites?*, 19 DUKE ENVTL. L. & POL'Y F. 119, 145 (2008) (second alteration in original) (quoting Brief for the United States at 36, 41, *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (No. 06-562), 2007 WL 669263).

225. *See Chem-Dyne*, 572 F. Supp. at 808; *see also* *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988) ("In each case, the court must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially." (footnote omitted)).

226. *Chem-Dyne*, 572 F. Supp. at 808.

case,²²⁷ but it is not the only relevant principle. In *Cooper Industries*, the Court inferred another potential limit, noting the possibility that a PRP could “pursue a § 107 cost recovery action for some form of liability other than joint and several.”²²⁸

Distinguishing between cost recovery suits brought by governments and those brought by private parties is supported by the statutory structure. Those claims arise out of different subparagraphs of section 107—section 107(a)(4)(A) creates government cost recovery claims,²²⁹ and section 107(a)(4)(B) creates private party cost recovery claims,²³⁰ including the claims of PRPs.

Congress treated the claims of governments and private parties differently. The first difference is apparent in the text of those provisions. Federal, state, and tribal governments may recover costs “not inconsistent with the national contingency plan” while private parties may recover costs “consistent with the national contingency plan.”²³¹ Courts have held that this slight shift in language affects burdens of proof, requiring private parties, but not governments, to introduce proof of consistency as an element of a cost recovery action.²³²

Section 107(e)(1) also differentiates between private party and government cost recovery actions, providing: “No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer . . . the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.”²³³ As courts have recognized, the first sentence of the section prevents indemnification agreements from defeating public cost recovery claims.²³⁴ A PRP remains liable to the government regardless of its contractual arrangements.²³⁵ The second sentence, however, makes “clear that private parties may agree by contract to apportion CERCLA liability as

227. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614-15 (2009).

228. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169-70 (2004).

229. See 42 U.S.C. § 9607(a)(4)(A) (2016).

230. See *id.* § 9607(a)(4)(B).

231. See *id.* § 9607(a)(4)(A)-(B).

232. See, e.g., *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 91 (1st Cir. 2008) (“Actions undertaken by the federal or a state government are presumed not to be inconsistent with the NCP; private plaintiffs have the burden of proving that their response actions are consistent with the NCP.”).

233. 42 U.S.C. § 9607(e)(1).

234. See, e.g., *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10, 14 (2d Cir. 1993) (noting the district court’s ruling, not challenged on appeal, that “under CERCLA private parties may contract with respect to indemnification and contribution but that, notwithstanding such contracts, all responsible parties remain fully liable to the government.”).

235. See *id.*

between themselves.”²³⁶ Thus, an indemnification may be raised as a defense to liability in at least some private cost recovery claims under section 107(a)(4)(B).²³⁷

The Supreme Court has also drawn distinctions between cost recovery claims under section 107(a)(4)(A) and those under section 107(a)(4)(B), suggesting that attorneys’ fees may be recoverable by governments proceeding under the former but holding that private parties are not entitled to attorneys’ fees when proceeding under the latter.²³⁸ Each provision makes PRPs liable for response costs, which are defined to include “enforcement activities.”²³⁹ Notwithstanding the parallel provisions, the Court explained that only government cost recovery actions could potentially encompass attorneys’ fees because the government’s fees could be viewed as an element of enforcement activities.²⁴⁰

Construing CERCLA’s cost recovery provisions in a nuanced and fact-sensitive fashion according to common law principles also accords with traditional canons of statutory construction. “[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’”²⁴¹ As the next Subpart shall

236. *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 503 (N.D.N.Y. 2011) (citing *Olin*, 5 F.3d at 14), *aff’d in part, vacated in part, and remanded on other grounds*, 766 F.3d 212 (2d Cir. 2014); *see also* *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 692 (9th Cir. 1992) (explaining the Ninth Circuit’s case law holding that “indemnification clauses do[] not frustrate public policy as expressed in CERCLA” because “all responsible parties would remain fully liable to the government”). A district court can properly consider an indemnity agreement in a contribution action where the government is a PRP. *See, e.g.,* *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1027-28, 1030 (9th Cir. 2002) (holding that an indemnity contract entered into by the government barred the government’s cost recovery action against Dow Chemical).

237. *See, e.g., N.Y. State Elec. & Gas*, 808 F. Supp. 2d at 487, 503 (interpreting an indemnification agreement to determine whether it barred a private cost recovery suit under section 107(a)(4)(B)).

238. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994).

239. Section 107(a)(4)(A) ties liability to the costs of “removal or remedial action[s],” and section 107(a)(4)(B) ties liability to “costs of response.” 42 U.S.C. § 9607(a)(4)(A)-(B) (2016). CERCLA defines “response” costs, however, to include remedial and removal actions, *see id.* § 9601(25), so functionally the provisions are identical.

240. *Key Tronic*, 511 U.S. at 818-19; *see also* *United States v. Dico, Inc.*, 266 F.3d 864, 878 (8th Cir. 2001) (“[A]ttorney fees are recoverable as response costs under CERCLA.”); *United States v. Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998) (“[S]tatutory authority permits the government . . . to recover attorney fees attributable to the litigation as part of its response costs.”).

241. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)); *see also* *Consol. Rail Corp. v. Gottshall*, 512 U.S. *footnote continued on next page*

explain, well-established common law principles indicate that joint and several liability cannot apply to a PRP's cost recovery claim.

C. Contribution, Not Joint and Several Liability, Is the Appropriate
Common Law Rule for PRP Cost Recovery Actions

Federal courts have uniformly recognized that common law principles govern the nature of cost recovery actions, but they have yet to provide a thorough examination of how those principles apply to claims among PRPs. This Subpart illuminates the common law both of joint and several liability and of contribution and explains that contribution governs the cost recovery claims of PRPs.

1. The common law of joint and several liability

The common law, as articulated in section 875 of the Restatement (Second) of Torts,²⁴² identifies joint and several liability as the default liability rule where the conduct of two or more persons combines to cause a single, indivisible harm.²⁴³ Section 433A provides a caveat to that general rule, explaining that joint and several liability is inappropriate where there “are distinct harms” or “there is a reasonable basis for determining the contribution of each cause to a single harm.”²⁴⁴ Under section 433B, each joint tortfeasor bears the burden of proving such a divisibility defense.²⁴⁵

These provisions of the Second Restatement do not explicitly address the action of one tortfeasor against another. That omission must be understood in light of the traditional tort principle of contributory negligence, which

532, 544 (1994) (explaining that common law principles are, “unless . . . expressly rejected in the text of the statute,” “entitled to great weight”).

242. Courts have primarily relied on the Second Restatement, rather than its successor, in interpreting CERCLA's liability provisions. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009); *see also United States v. NCR Corp.*, 688 F.3d 833, 838 n.1 (7th Cir. 2012) (“The Supreme Court has told us in *Burlington Northern* to adopt the apportionment principles of the Restatement (Second) of Torts, and that is the end of it for a lower court.”). This may be because the Third Restatement was published after CERCLA's enactment. *Compare* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (enacted in 1980), *with* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (AM. LAW. INST. 2000) (published twenty years later).

243. 4 RESTATEMENT (SECOND) OF TORTS § 875 (AM. LAW INST. 1979).

244. 2 *id.* § 433A(1) (AM. LAW INST. 1965); *see also* 4 *id.* § 881 (providing that several liability applies where divisibility can be proven).

245. *See* 2 *id.* § 433B(2).

generally barred claims by joint tortfeasors.²⁴⁶ So long as a “plaintiff’s negligence . . . is a substantial factor in bringing about his harm,” absent special circumstances, that plaintiff could not succeed in a tort suit, and therefore no rule to govern the nature of such a suit was necessary.²⁴⁷

The unavailability of claims for joint tortfeasors, and the implications that principle has for joint and several liability, is addressed in two of the comments to the Second Restatement. Comment c to section 465 explains that even where special circumstances exist such that contributory negligence does not bar suit, a joint tortfeasor could only recover if the harm that served as the basis for the lawsuit was subject to apportionment—in other words, only if that joint tortfeasor would not have been subject to joint and several liability because it could prove the divisibility defense:

[T]he rules stated in § 433A as to the apportionment of harm to different causes are applicable in cases of contributory negligence. Where the harm is single and indivisible, it is not apportioned between the plaintiff and the defendant, in the absence of a statute providing for such division of the damages upon an arbitrary basis. Where, however, there are distinct harms, or a reasonable basis is found for the division of a single harm, the damages may be apportioned, and the plaintiff may be barred only from recovery for so much of the harm as is attributed to his own negligence.²⁴⁸

246. *See id.* § 467 (“Except where the defendant has the last clear chance, the plaintiff’s contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.”).

247. *See id.* § 465(1); *see also* *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 163 (2003) (“Nothing is more clear than the right of a plaintiff, having suffered . . . a loss . . . , to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for *the full amount of his loss.*” (first alteration in original) (quoting *The Atlas*, 93 U.S. 302, 315 (1876))); Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1188 (1988) (“In sum, when the plaintiff is innocent, the expense and risk of apportioning the cost of compensation among tortfeasors should be borne entirely by the tortfeasors.”).

248. 2 RESTATEMENT (SECOND) OF TORTS § 465 cmt. c, at 510-11. In *Carney v. McAfee*, the Court of Appeals of Ohio explained this principle in holding that a jury verdict finding contributory negligence would defeat a claim for joint and several liability. No. E-85-58, 1986 WL 15057, at *9-10 (Ohio Ct. App. Dec. 31, 1986), *rev’d on other grounds*, 517 N.E.2d 1374 (Ohio 1988). The court explained that once “contributory negligence was asserted,” the state’s comparative negligence statute came into play, and “when the jury determines the percentage of negligence, each party is only liable for his or her portion of the total damages The parties would not be jointly and severally liable.” *Id.* at *9. If the jury finds that the plaintiff was “zero percent negligent,” joint and several liability applies based on the rationale that “it is more just that a person who caused plaintiff harm be made to pay, rather than force an innocent plaintiff to continue to suffer due to a tortfeasor being uncollectible.” *Id.*

Comment d to section 433B is also in accordance. That comment explains the rationale for imposing joint and several liability unless a defendant can prove divisibility: “As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.”²⁴⁹ That rationale—of favoring the interests of the entirely innocent over those with some responsibility—simply has no application to a claim brought by a joint tortfeasor. And the Second Restatement is not alone in justifying joint and several liability as a means of protecting innocent parties. Both courts and commentators explain that the predicate for holding a defendant jointly and severally liable is a “social policy choice of making a plaintiff whole over any concerns that excessive liability could be imposed on an individual defendant.”²⁵⁰

State court decisions—which serve as the expositors of the common law from which the Second Restatement draws—also clearly indicate that joint and several liability protects innocent plaintiffs, not joint tortfeasors. For example, the Supreme Court of Florida explained that where “acts of negligence are concurrent in producing injury to a third person, the liability of the negligent persons is both joint and several and the injured innocent party may sue one or all.”²⁵¹ Similarly, the Supreme Court of California explained that joint and several liability exists because “the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.”²⁵²

Federal courts typically rely on the Second Restatement to provide common law principles applicable to interpreting CERCLA.²⁵³ In any event,

249. 2 RESTATEMENT (SECOND) OF TORTS § 433B(2) cmt. d, at 444.

250. See 74 AM. JUR. 2D *Torts* § 66 (West 2017) (quoting *Sowinski v. Walker*, 198 P.3d 1134, 1151 (Alaska 2008)); see also *Wright*, *supra* note 247, at 1162 (explaining that the decision to allow joint and several liability turns on “whether the plaintiff-victim, the defendant-tortfeasors, or both should bear the expense of apportionment and the risk of collecting from insolvent or otherwise unavailable tortfeasors”).

251. *Nichols v. Rothkopf*, 185 So. 725, 725 (Fla. 1939), *superseded by statute*, Tort Reform and Insurance Act of 1986, ch. 86-160, § 60, 1986 Fla. Laws 695, 755-56 (codified as amended at FLA. STAT § 768.81 (2017)).

252. *Finnegan v. Royal Realty Co.*, 218 P.2d 17, 32 (Cal. 1950) (explaining that joint and several liability is premised on the rationale that it is preferable to impose complete liability on each of several defendants, thereby leaving the wrongdoers “to work out between themselves an apportionment,” than to force an “innocent wronged party” to suffer loss as a result of actions for which they have no fault (quoting *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948))), *superseded in other part by statute*, Act of July 5, 1957, ch. 1700, 1957 Cal. Stat. 3076 (codified as amended at CAL. CIV. PROC. CODE § 875 (West 2017)), *as recognized in* *Witt v. Jackson*, 366 P.2d 641 (Cal. 1961).

253. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (“Following *Chem-Dyne*, the Courts of Appeals have acknowledged that [t]he universal starting point for divisibility of harms analyses in CERCLA cases’ is § 433A of the
footnote continued on next page”).

the evolution of tort principles since the publication of the Second Restatement in 1979²⁵⁴ also provides no support for applying joint and several liability to the claims of joint tortfeasors. Some states, primarily through legislative enactment, have adopted comparative liability regimes that impose only proportionate several liability on defendants as a substitute for joint and several liability.²⁵⁵ The contraction or elimination of joint and several liability in some states does not, however, support an argument to broaden the doctrine to encompass the claims of joint tortfeasors like PRPs.²⁵⁶

There is, however, one legal setting in which federal courts allow one joint tortfeasor to sue another and secure joint and several liability, but that exception is context specific and does not support applying a similar rule to CERCLA. Federal maritime law permits an injured seaman who bears some responsibility for his injuries to collect jointly and severally from any negligent defendant, with the amount of recovery reduced only by the share of responsibility attributable to the plaintiff.²⁵⁷ In *Coats v. Penrod Drilling Corp.*,

Restatement (Second) of Torts.” (alteration in original) (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001))).

254. See 4 RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1979).

255. See *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 164-65 (2003) (explaining that most state comparative liability regimes “have come through legislative enactments rather than judicial development of common-law principles”); see also 74 AM. JUR. 2D *Torts* § 66 (“[C]ourts may be reluctant to disturb the elemental doctrine of joint and several liability in the absence of express direction from the legislature.” (citing *Carrozza v. Greenbaum*, 916 A.2d 553, 565-66 (Pa. 2007))). “Under proportionate several liability, each defendant who tortiously contributed to an injury is only held liable for a fraction of the damages that she tortiously caused, corresponding to her percentage of comparative responsibility for the injury.” Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 46 (1992).

256. Federal courts have generally not viewed legislative limitations on joint and several liability as modifying the traditional common law rule. See, e.g., *Norfolk & W. Ry.*, 538 U.S. at 164-65 (discrediting “legislative enactments rather than judicial development” in analyzing common law rules); see also *id.* at 163 (“The conclusion that the [Federal Employers Liability Act] does not mandate apportionment is also in harmony with this Court’s repeated statements that joint and several liability is the traditional rule.”); Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 879 (1996) (“The notion of joint and several liability is as old as tort law. It has always been the case that if one defendant is ten percent negligent, and another defendant is ninety percent negligent, and together they combine to injure Marshall, they are both liable to him. Marshall can recover a hundred percent of his damages from either one.”).

257. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259-60 (1979) (“[A] longshoreman’s award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman’s own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder . . .”); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1126-30 (5th Cir. 1995) (explaining that the Supreme Court has held that a carpenter injured while working on a ship “was responsible for his own share of comparative fault, but

footnote continued on next page

the Fifth Circuit explained that this joint and several liability rule arises out of a “concern that the innocent plaintiff receive full recovery of his damages In fact, . . . this consideration has apparently taken on an elevated significance in maritime law because of special concerns unique to the admiralty, especially its role as ‘protector’ of seamen.”²⁵⁸ Because “[s]eamen from the start were wards of admiralty,”²⁵⁹ they receive “special solicitude.”²⁶⁰ Moreover, “their relationship with their employers is similar to the relationship between a beneficiary and a fiduciary.”²⁶¹ The unique rule applied under federal maritime law, because of a quasi-fiduciary relationship and the special protection afforded seamen, only reinforces the conclusion that in ordinary circumstances joint tortfeasors may not avail themselves of joint and several liability.

2. The common law of contribution

Contribution arose as an equitable rule to ameliorate the perceived unfairness of holding one joint tortfeasor jointly and severally liable for all of an indivisible harm caused by multiple parties.²⁶² The common law of contribution provides such a joint tortfeasor with a cause of action “to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share.”²⁶³ A common law contribution plaintiff

the risk of noncollection fell on defendants, rather than on an injured victim” (citing *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 407-08 (1953)).

258. 61 F.3d at 1125; *accord* *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1548 (11th Cir. 1987) (“Historically maritime law has treated seamen as in need of special protection”); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987) (explaining that allowing seamen to recover jointly and severally “is consonant with the policy behind the Jones Act, to provide protection to seamen who are victims of negligence”).

259. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971); *see also* *Bass v. Phx. Seadrill/78, Ltd.*, 749 F.2d 1154, 1160-61 (5th Cir. 1985) (“Seamen, of course, are wards of admiralty whose rights federal courts are duty-bound to jealously protect.”).

260. *Coats*, 61 F.3d at 1136.

261. *Richards v. Relentless, Inc.*, 341 F.3d 35, 41 (1st Cir. 2003).

262. *See* 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. c, at 338 (AM. LAW INST. 1979) (“Contribution is a remedy that developed in equity”); 18 AM. JUR. 2D *Contribution* § 4 (West 2017) (“Contribution claims are derivative and not new causes of action.”); *Hernandez*, *supra* note 209, at 100 (“The doctrine of contribution originated in equity, based on notions of natural justice.”); Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 841 n.48 (1989) (“Originally, no right to contribution existed under the common law. Beginning in the late nineteenth century, however, common law courts began to recognize such a right.” (citations omitted)); Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 134-35 (1932) (explaining the origins of contribution).

263. *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007) (quoting *Contribution*, BLACK’S LAW DICTIONARY (8th ed. 2004)); *see also* *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 87-88 (1981) (“Typically, a right to contribution is recognized when

footnote continued on next page

can recover if she proves a common liability with defendants and a payment to resolve that liability in excess of her equitable share.²⁶⁴

As comment e to section 886 of the Second Restatement explains, “[B]efore there can be contribution between joint tortfeasors there must first of all be joint tortfeasors.”²⁶⁵ Accordingly, under a “common liability rule,” “a tortfeasor seeking contribution must prove both his own liability and that of the other alleged tortfeasor.”²⁶⁶ The liability of a contribution defendant is, then, limited to the amount the plaintiff paid in excess of the plaintiff’s “equitable share of the liability.”²⁶⁷

Common law courts construed the common liability rule liberally, requiring only proof of a concurrent liability of the plaintiff and defendant, regardless whether that liability had been adjudicated by a court.²⁶⁸ That a formal adjudication of liability is an unnecessary predicate for a contribution suit is the result of an understanding that the right to contribution arises at the

two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.”).

264. Common law courts often described three “essential elements for a right of contribution”: “(1) two or more parties jointly at fault; (2) common liability between or among those parties because of that fault; and (3) one party paying an unequal portion of the common liability.” See 1 COMPARATIVE NEGLIGENCE MANUAL § 9:2 (3d ed. 1995); see also 4 RESTATEMENT (SECOND) OF TORTS § 886A; John H. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1021 (1991) (“In the jurisdictions permitting contribution, the elements generally required in such a suit include: (a) two or more persons are liable in tort to the same person for the same harm, (b) one tortfeasor has discharged the entire claim by paying more than his equitable share of the common liability, and (c) the tortfeasor seeking contribution was not an intentional wrongdoer.”). The first two elements combine to define the common liability rule discussed here.
265. 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. e, at 339; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 339 n.31 (5th ed. 1984) (“[B]efore there can be contribution among tortfeasors, there must be tortfeasors.” (quoting *Allied Mut. Cas. Co. v. Long*, 107 N.W.2d 682, 687 (Iowa 1961))); William L. Crowe, Sr., *The Anatomy of a Tort—Part V Apportionment, Contribution, and Indemnity Among Multiple Parties in the Area of Damages*, 44 LOY. L. REV. 671, 682 (1999) (“[Contribution] can only occur when the tortfeasor or tortfeasors seeking contribution have been, or may be, liable to the plaintiff for more than that tortfeasor’s ‘fair share’ of the plaintiff’s or plaintiffs’ recovery or potential recovery relative to the other tortfeasor or tortfeasors.”).
266. 3 DAN B. DOBBS ET AL., THE LAW OF TORTS § 489, at 77 (2d ed. 2011); see also KEETON ET AL., *supra* note 265, § 50, at 339 (“The contribution defendant must be a tortfeasor, and originally liable to the plaintiff.”).
267. 4 RESTATEMENT (SECOND) OF TORTS § 886A(2).
268. See, e.g., *Allied Mut. Cas.*, 107 N.W.2d at 687 (explaining that a contribution claim can follow a settlement resolving joint liability without a judicial determination of liability).

moment an indivisible harm occurs. As the Wisconsin Supreme Court explained:

Some confusion seems to exist as to when joint tort-feasors are subject to a common liability. Logically, it would appear that the right comes into being when the combination of negligent acts gives force and direction to events necessarily resulting in an occasion for paying damages. This does not depend upon an action being begun. A lawsuit may be necessary to settle the differences arising between the parties, but it is not within the province of a court as an original matter to give this right or to take it away. It has its inception at the time the negligence of the alleged joint tort-feasors concurs to bring the injuries to the third person. . . . One confronted with an obligation that he cannot legally resist is not obliged to wait to be sued and to lose a reasonable opportunity to make a favorable compromise in order to avoid assuming the character of an interloper or volunteer in the matter of paying a liability common to him and another.²⁶⁹

Thus, “[c]ommon liability exists when an injured party has a legal remedy against both a party that is seeking contribution and the party from whom contribution is sought.”²⁷⁰ No court need confirm the common liability prior to the suit for contribution, although the plaintiff seeking contribution will need to prove the existence of common liability in that proceeding.

In this manner, the common law right to contribution exists in inchoate form from the moment harm occurs, and a claim for contribution accrues when a joint tortfeasor makes a payment to resolve, or partially resolve, the common liability.²⁷¹ The right to contribution is not, however, without limits. The common law provides that “a ‘volunteer’ may not recover any form of

269. *W. Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co.*, 251 N.W. 491, 492 (Wis. 1933); see also *Allied Mut. Cas.*, 107 N.W.2d at 687 (“The concurring negligence which gives rise to a right of contribution must have existed at the time of the accident. . . . [N]o authority makes any distinction between cases where negligence has been adjudicated and those in which a settlement was made by one party.”).

270. 18 AM. JUR. 2D *Contribution* § 9 (West 2017); see *Welter v. Curry*, 539 S.W.2d 264, 271 (Ark. 1976) (noting that a prerequisite to contribution under Arkansas’s Uniform Contribution Among Tortfeasors Act of 1939 is common liability in that “the injured party must have a possible remedy against both the party seeking contribution and the party from whom it is sought”); see also 18 AM. JUR. 2D *Contribution* § 45 (“[T]he right to contribution between joint tortfeasors becomes fixed at the time of injury or the event upon which liability depends. Contribution is available [even if] . . . the liability of joint tortfeasors has yet to be determined.” (footnote omitted)).

271. See 18 AM. JUR. 2D *Contribution* § 45 (“While the basis for a claim for contribution is created the moment when the joint tortfeasors harm an injured party, the specific right to bring a contribution claim does not exist, for limitations purposes, unless and until one of the joint tortfeasors pays more than his or her proportionate share of the settlement of the underlying claim.”); see also *W. Cas. & Sur.*, 251 N.W. at 492 (“This inchoate right [to contribution] ripens into a cause of action when one of the joint tortfeasors pays more than his proportionate share of the claim for which all are liable.”).

restitution, including contribution.”²⁷² Where a court has adjudicated the liability of the contribution plaintiff, there is no reason to think the plaintiff is a volunteer; any payment would be made to satisfy the court’s judgment. Settlements, on the other hand, pose the risk that a party voluntarily assumed a liability or agreed to a payment in excess of the value of that liability. To enforce the rule that volunteers cannot seek contribution, courts therefore allow contribution defendants to challenge the reasonableness of any settlement.²⁷³ Any unreasonable amount paid cannot be recovered.²⁷⁴

Accordingly, at common law, only parties that make voluntary payments, either because they are not liable or because they pay in excess of the reasonably calculated damages suffered by an injured party, lack a right to contribution.²⁷⁵ In the former circumstance, where a nonliable party makes a payment, that party lacks both a right to contribution and a right to otherwise sue the party that actually caused the injury, including to bring a suit for joint and several liability.²⁷⁶ In the latter circumstance, the liable party can recover

272. Hernandez, *supra* note 209, at 104; *see, e.g.*, RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRS. §§ 2, 112 (AM. LAW INST. 1937).

273. *See* 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. d, at 339 (AM. LAW INST. 1979) (“The reasonableness of the settlement is always open to inquiry in the suit for contribution, and the tortfeasor making it has the burden of establishing the reasonableness of the payment he has made.”).

274. *See id.*

275. *See id.* § 886A cmt. e, at 339 (“[I]f the one seeking contribution was not in fact liable to the injured person but has made a payment in the mistaken belief that he was or might be or for other reasons, he may be barred from contribution by the equity rule that it will not be allowed in favor of a volunteer.”); *see also* GAF Corp. v. Tolar Constr. Co., 271 S.E.2d 811, 812 (Ga. 1980) (“Clearly, in the absence of allegations showing a legal necessity for payment by the [third-party] plaintiff to the injured party, we must assume that such payment was made voluntarily and not under the compulsion of law; and such being true, the [third-party] plaintiff had no standing to seek indemnity from the [third-party] defendant.” (alterations in original) (quoting S. Nitrogen Co. v. Steven Shipping Co., 151 S.E.2d 916, 921 (Ga. Ct. App. 1966), *superseded in other part by statute*, 1966 Ga. Laws 433 (codified as amended at GA. CODE ANN. § 51-12-32 (2017)), *as recognized in* Nguyen v. Lumbermens Mut. Cas. Co., 583 S.E.2d 220, 224 n.16 (Ga. Ct. App. 2003))). Some jurisdictions have even added a safe harbor under which a payment “is not voluntary so as to deprive the payor of the right to contribution, where facts exist which would permit avoidance of the principal obligation, and the claimant, ignorant of those facts and guilty of no neglect in his or her lack of knowledge, makes payment in good faith.” 18 AM. JUR. 2D *Contribution* § 15.

276. *See, e.g.*, City of Albany v. Pippin, 602 S.E.2d 911, 912, 914 (Ga. Ct. App. 2004) (holding that a city that had settled with a group of plaintiffs and later failed to establish its own liability could not then seek contribution from the original codefendants who had all denied liability); Allied Mut. Cas. Co. v. Long, 107 N.W.2d 682, 686 (Iowa 1961) (rejecting a contribution claim where the plaintiff did not “plead[] its own negligence as one of the concurring causes of the injury”).

contribution, but only up to the contribution defendant's proportionate share of the reasonable value of the injury.²⁷⁷

3. PRP cost recovery actions as common law contribution claims

The examination of the common law provided above surfaces two general principles. First, joint tortfeasors cannot sue each other for joint and several liability. Second, a joint tortfeasor compelled to resolve a common liability can sue another for contribution. This Subpart more closely examines the nature of CERCLA liability and the manner in which it operates on PRPs, and it explains that common law contribution principles, not joint and several liability principles, govern PRP cost recovery claims.

Under CERCLA, every PRP at a contaminated site is presumptively liable for all response costs.²⁷⁸ This framework imposes liability based on a party's status as current or former owner or operator, arranger, or transporter, rather than on any consideration of fault.²⁷⁹ Liability among PRPs is collective; each is jointly and severally liable in the absence of proving the affirmative defense of divisibility.²⁸⁰

PRPs, then, share common liability for response costs. That is a necessary, but insufficient, basis for establishing a contribution claim at common law. A

277. 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. d, at 339 (“[W]hen a tortfeasor without suffering a judgment against him has voluntarily made a settlement with the plaintiff and a payment that exceeds any amount that would be reasonable under the circumstances, he should not be permitted to inflict liability for contribution regarding the excess upon another tortfeasor who has not entered into the same settlement.”).

278. The EPA has broad discretion to define the geographic boundaries of sites. See 42 U.S.C. § 9604(d)(4) (2016) (“Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one . . .”). On the President’s delegation of decisionmaking authority to the EPA, see note 69 above.

279. See 42 U.S.C. § 9607(a); see also *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993) (explaining that establishing CERCLA liability does not “require[] . . . that the government show that a specific defendant’s waste caused incurrence of clean-up costs”); *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 240 (D. Conn. 2012) (“[T]he traditional tort concept of causation plays little or no role in the liability scheme.” (quoting *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 131 (2d Cir. 2010))); *Aronovsky*, *supra* note 38, at 13 (“CERCLA liability is status-based; that is, liability is imposed on any party meeting the definition of ‘covered persons’ (i.e., liable parties) under the statute.”).

280. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (noting that “where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm,” but “CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists” (quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983))).

contribution plaintiff must also prove that she has undertaken a financial obligation to resolve common liability as a result of a legal compulsion rather than on a voluntary basis.²⁸¹

A PRP funding a response action to comply with a UAO easily fits within this framework. CERCLA section 106 affirmatively authorizes the federal government to order PRPs to engage in response actions.²⁸² The recipient of such an order is subject to a civil penalty each day it “fails or refuses to comply with” such an order “without sufficient cause.”²⁸³ Liability for such civil penalties begins on the day the UAO is received, not upon any subsequent judicial determination of liability.²⁸⁴ A UAO, therefore, confronts a PRP “with an obligation that he cannot legally resist,”²⁸⁵ which is the common law principle that differentiates between joint tortfeasors who voluntarily assume liabilities (and therefore cannot seek contribution²⁸⁶) and those who face legal compulsion (and therefore can seek contribution). A PRP complying with a UAO would, therefore, have a common law contribution claim, and as a result, its cost recovery action is in the nature of contribution according to common law principles.

A similar, although more subtle, analysis applies to PRPs that fund response actions without formal government action. Such PRPs do not face civil penalties to compel cleanup. But common law courts allowed joint tortfeasors to seek contribution following private settlements resolving common liability so long as the settling party could prove “the compromiser’s own liability to the original plaintiff” as well as “the amount of the damages and the reasonableness of the settlement.”²⁸⁷ That is because the right to contribution arises at the moment harm occurs and accrues when a payment to resolve liability for the harm is made; the right does not depend on a judicial determination of liability.²⁸⁸ Any PRP who undertakes response actions

281. *See* *W. Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co.*, 251 N.W. 491, 492 (Wis. 1933) (explaining the nature of liability that gives rise to a right to contribution).

282. 42 U.S.C. § 9606(a) (authorizing “other action . . . including . . . issuing such orders as may be necessary to protect public health and welfare and the environment”).

283. *Id.* § 9606(b)(1).

284. *See id.*

285. *See W. Cas. & Sur.*, 251 N.W. at 492.

286. *See supra* notes 272-74 and accompanying text.

287. KEETON ET AL., *supra* note 265, § 50, at 339.

288. *See Allied Mut. Cas. Co. v. Long*, 107 N.W.2d 682, 687 (Iowa 1961) (“The concurring negligence which gives rise to a right of contribution must have existed at the time of the accident. . . . [N]o authority makes any distinction between cases where negligence has been adjudicated and those in which a settlement was made by one party.”); *W. Cas. & Sur.*, 251 N.W. at 492 (“[T]he right [to contribution] comes into being when the combination of negligent acts gives force and direction to events necessarily resulting

footnote continued on next page

resolves common liability in a manner akin to joint tortfeasors making payments under private settlements. PRPs are liable to fund response actions until the environmental conditions giving rise to liability have been ameliorated.²⁸⁹ The terms of section 107(a)(4)(B)²⁹⁰ provide the framework—much like the terms of a private settlement—that guides resolution of liability. Liability is limited to “necessary costs of response . . . consistent with the national contingency plan.”²⁹¹ In other words, a PRP can only seek cost recovery if it has actually resolved some or all of the common liability shared with other PRPs to fund response actions needed to achieve the degree of cleanup required by CERCLA. Just like common law contribution plaintiffs acting upon a “mistaken belief” about the amount of liability,²⁹² PRPs who gratuitously engage in cleanup activities beyond what is required by law—and who therefore act voluntarily in a manner that does not resolve common liability—may not seek cost recovery.²⁹³

While courts have not adequately grappled with the common law principles governing PRP cost recovery claims, they have recognized that treating PRPs as per se volunteers simply because no civil enforcement action has yet been brought is at best a legal fiction. As the district court in *Solutia, Inc. v. McWane, Inc.* noted, “[T]he distinction between ‘compelled’ and ‘voluntary’ cleanups is in some measure artificial; virtually all cleanups are performed by a

in an occasion for paying damages. . . . It has its inception at the time the negligence of the alleged joint tort-feasors concurs to bring the injuries to the third person.”)

289. See *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 148-49 (3d Cir. 1999) (agreeing that the government has only “obtained complete relief” in a CERCLA settlement “when ‘the endangerment providing the basis for EPA’s § 106(a) authority has been abated’” (quoting Brief for Appellant at 16, *Occidental Chem.*, 200 F.3d 143 (No. 99-3084))).

290. 42 U.S.C. § 9607(a)(4)(B) (2016).

291. *Id.* The requirement that a cost recovery plaintiff prove the necessity of costs and consistency with the NCP is akin to the requirement that “a tortfeasor claiming contribution against another must prove common liability and the reasonableness of the settlement,” *M. Pierre Equip. Co. v. Griffith Consumers Co.*, 831 A.2d 1036, 1039 (D.C. 2003) (citing 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. g, at 339-40 (AM. LAW INST. 1979)).

292. See 18 AM. JUR. 2D *Contribution* § 15 (West 2017).

293. See *Carson Harbor Vill., Ltd. v. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006) (“Private parties have the burden of proving that cleanup costs associated with remedial actions are consistent with the [NCP] to recover those cleanup costs under CERCLA.”); *Pentair Thermal Mgmt., LLC v. Rowe Indus., Inc.*, Nos. 06-cv-07164 NC & 10-cv-01606 NC, 2013 WL 1320422, at *14-15 (N.D. Cal. Mar. 31, 2013) (awarding cost recovery to a PRP because the costs incurred complied with the NCP and were necessary, cost-effective, and “closely tied to cleanup of the site”); *cf. AmeriPride Servs. Inc. v. Tex. E. Overseas Inc.*, 782 F.3d 474, 490 (9th Cir. 2015) (explaining that the party seeking contribution under section 113(f) must “prove that the settlement reimbursed the recipient for necessary response costs incurred consistent with the NCP”).

party who is at least facing the specter of potential liability under CERCLA.”²⁹⁴ Courts also commonly recognized the congruency between PRPs and joint tortfeasors prior to the decision in *Atlantic Research*, explaining that a PRP is “akin to a joint ‘tortfeasor.’”²⁹⁵ Courts at that time recognized the import of that conclusion, holding that “[b]ecause all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution.”²⁹⁶ While *Atlantic Research* rejected an interpretation of section 113(f) as providing a statutory right to contribution to all PRPs,²⁹⁷ that case did not disturb the recognition that common law contribution principles apply to PRP plaintiffs.

One category of private parties does, however, resemble the type of volunteer who at common law could not seek contribution. An innocent, nonliable private party who pays for a response action would fail to meet the prerequisite of sharing a common liability with contribution defendants and therefore would not qualify for a common law contribution claim. Such an innocent private party, however, fits comfortably within the principles of joint and several liability, which were designed to favor innocent parties over

294. 726 F. Supp. 2d 1316, 1340-41 (N.D. Ala. 2010) (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 136-37 (2007)), *aff'd on other grounds per curiam*, 672 F.3d 1230 (11th Cir. 2012); *see also* *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1043 n.8 (E.D. Wis. 2008) (“The notion that any of the response costs paid by [the plaintiffs] were voluntary is curious, to say the least. [The plaintiffs] are not philanthropic organizations devoted to cleaning up environmental messes created by other companies. Their contributions to the response effort to the PCB contamination of the Lower Fox River resulted from their recognition that they were at least in part responsible for the contamination.”). In its pre-*Atlantic Research* decision in *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), the Tenth Circuit provided a sound analysis of the compelled nature of a PRP’s costs. The court explained: “The fact that Plaintiffs incurred cleanup costs by complying with a unilateral administrative order, without forcing the government to take them to court, does not change their status as jointly and severally liable parties.” *Id.* at 1190. Instead, the “Plaintiffs’ claim is still by and between jointly and severally liable parties, seeking the equitable apportionment of a payment which Plaintiffs have been compelled to make, and is still a claim for contribution.” *Id.*

295. *See, e.g.*, *Juniper Dev. Grp. v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 931 (1st Cir. 1993).

296. *See, e.g.*, *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *abrogated by Atl. Research*, 551 U.S. 128, *as recognized in* *Kotrous v. Goss-Jewett Co.*, 523 F.3d 924 (9th Cir. 2008); *see also* *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) (“[A] ‘non-innocent’ party (*i.e.*, a party who himself is liable) [may] only . . . seek recoupment of that portion of his expenditures which exceeds his *pro rata* share of the overall liability—in other words, to seek contribution rather than complete indemnity.”), *abrogated by Atl. Research*, 551 U.S. 128; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (“Whatever label [the plaintiff] may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.”), *abrogated by Atl. Research*, 551 U.S. 128.

297. *See infra* notes 326-34 and accompanying text.

responsible parties. Because CERCLA imposes liability broadly, few private parties with a relationship to a contaminated site will actually be nonliable and therefore truly innocent. This may occur on occasion, however, particularly where a party can prove that it falls within one of the affirmative defenses provided by CERCLA²⁹⁸ or that it is shielded from liability by corporate law.²⁹⁹ Rather than proving it is a liable party and thus eligible for contribution, such a party would prove its innocence and therefore its eligibility to have its claim governed by joint and several liability.

Modern tort reform efforts that have limited the availability of joint and several liability, favoring liability rules that impose only several liability on at least some joint tortfeasors,³⁰⁰ do not support treating the claims of PRPs as anything other than contribution claims. This is true for several reasons. First, states that have modified or abandoned common law rules for joint and several liability, and by proxy contribution as a claim derivative of joint and several liability, have primarily done so through legislation and not development of the common law.³⁰¹ Second, states that have adopted comparative fault in lieu of joint and several liability have done so as a general matter, not solely for claims among joint tortfeasors.³⁰² Third, some states that have adopted comparative fault schemes through legislation continue to provide for joint and several liability in some circumstances.³⁰³ Fourth, the equitable

298. See 42 U.S.C. § 9607(b)(1)-(3) (2016).

299. See, e.g., *Marsh v. Rosenbloom*, 499 F.3d 165, 176-84 (2d Cir. 2007) (holding that state corporate law barred a CERCLA claim against the shareholders of a dissolved corporation); see also *United States v. Bestfoods*, 524 U.S. 51, 61-70 (1998) (analyzing a claim against a parent company for CERCLA liability at a plant owned by a subsidiary, which involved several “fundamental principle[s] of corporate law”). See generally Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 ENVTL. LAW. 435 (1998) (analyzing liability of successor corporations under CERCLA); Michael Carter, Comment, *Successor Liability Under CERCLA: It’s Time to Fully Embrace State Law*, 156 U. PA. L. REV. 767 (2008) (discussing the interaction between corporate law and CERCLA liability).

300. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 cmt. a, at 100 (AM. LAW INST. 2000) (“The adoption of comparative responsibility, which permits plaintiffs to recover from defendants even though plaintiffs are partially responsible for their own damages, has had a significant impact on the near-universal rule of joint and several liability.”).

301. See *id.* § 17 reporters’ note cmt. a, at 149 (identifying, as of 2000, the means by which states had modified joint and several liability rules); see also F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 489 (2006) (“[T]raditional joint and several liability, even with a right of contribution, is no longer the majority rule in the United States; only ten states now follow the doctrine.”).

302. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 reporters’ note cmt. a, at 149-59 (describing five categories of liability rules adopted by states).

303. See, e.g., IDAHO CODE § 6-803(5) (2017) (providing for joint and several liability where joint tortfeasors “were acting in concert or when a person was acting as an agent or servant of another party”); S.C. CODE ANN. § 15-38-15(A), (F) (2017) (disallowing joint

footnote continued on next page

justifications for applying several liability do not apply to circumstances in which the common law would allow only a claim for contribution because contribution already enables courts to consider comparative fault as an aspect of determining liability.³⁰⁴

V. Restoring CERCLA Settlement Incentives

Part IV above explained that common law principles require that a PRP's cost recovery claims be considered claims for contribution. This Part explains the salutary effect that result has for reinvigorating settlement incentives. It also addresses two potential obstacles to courts adopting this analysis, explaining that dicta in *Cooper Industries* and *Atlantic Research* distinguishing cost recovery and statutory contribution claims do not foreclose the analysis offered here and that meaningful, albeit less dramatically consequential, differences remain between PRP claims for cost recovery and statutory contribution suits.

A. The Virtue of PRP Cost Recovery Suits as Contribution Claims

Construing the cost recovery claim of a PRP as a contribution claim, rather than as a claim for joint and several liability, not only properly applies common law principles, but it also advances a central purpose of CERCLA: to promote settlements with the government. Congress placed a high value on such settlements because through them PRPs agree to fund response actions to remediate contamination connected with their activities while reducing litigation and taxpayer expenses. This policy is evinced by the text and structure of the statute and by its legislative history, and it is a policy long recognized by courts.³⁰⁵

and several liability except with respect “to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional” or whose conduct “involv[es] the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs”).

304. See, e.g., *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992) (“Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.”), *superseded in other part by statute*, Act of May 19, 1993, ch. 407, 1993 Tenn. Pub. Acts 699 (codified as amended at TENN. CODE ANN. § 20-1-119 (2017)), as recognized in *Brown v. Wal-Mart Disc. Cities*, 12 S.W.3d 785 (Tenn. 2000).

305. See, e.g., *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013) (“Aside from the timely cleanup of polluted sites and imposing liability on responsible parties, [o]ne of the core purposes of CERCLA is to foster settlement through its system of incentives and without unnecessarily further complicating already complicated litigation.” (alteration in original) (quoting *Cal. Dep’t of Toxic Substances Control v. City of Chico*, 297 F. Supp. 2d 1227, 1235 (E.D. Cal. 2004))); *United Techs.*

footnote continued on next page

Common Law of CERCLA Claims
70 STAN. L. REV. 191 (2018)

Section 122, for example, provides: “Whenever practicable . . . , the [EPA] shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.”³⁰⁶ The structure of CERCLA liability also reflects this policy. PRPs are subject to joint and several strict liability. CERCLA affords settling parties, however, certainty and finality. First, section 122(f)(1) authorizes the EPA to issue a covenant not to sue to settling parties.³⁰⁷ Second, section 113(f)(2) protects settlers from future litigation brought by other PRPs.³⁰⁸ That section provides: “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.”³⁰⁹

In introducing section 113(f)(2), Representative Norman F. Lent affirmed the importance of settlement to the CERCLA regime:

I am pleased to report that the idea of encouraging settlements is no longer considered groundbreaking but now a simple and obvious matter of good policy. Costly, protracted litigation threatens the effectiveness of the Superfund Program and consumes resources better spent on cleanup. It is essential that EPA and private parties join together to accomplish cleanup.³¹⁰

Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 102 (1st Cir. 1994) (“CERCLA seeks to provide EPA with the necessary tools to achieve prompt cleanups.”), *abrogated by* United States v. Atl. Research Corp., 551 U.S. 128 (2007); Publicker Indus., Inc. v. United States (*In re Cuyahoga Equip. Corp.*), 980 F.2d 110, 119 (2d Cir. 1992) (“Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation.”); *see also* Organ, *supra* note 103, at 1056-57 (explaining Congress’s intent in enacting CERCLA section 122).

306. 42 U.S.C. § 9622(a) (2016).

307. *See* 42 U.S.C. § 9622(f)(1).

308. *See id.* § 9622(f)(2); Organ, *supra* note 103, at 1066 (noting that CERCLA creates incentives for settlement by “threaten[ing] PRPs with the ‘stick’ of strict, joint and several liability” while also providing “settling PRPs the ‘carrot’ of an RD/RA Consent Decree that would enable PRPs to define their liability to some extent, to receive the benefits of a covenant not to sue from the EPA, and to enjoy protection from contribution actions by recalcitrant PRPs concerning matters covered in the Consent Decree”).

309. 42 U.S.C. § 9613(f)(2).

310. 132 CONG. REC. 29,717 (1986) (statement of Rep. Lent); *see also* H.R. REP. NO. 99-253, pt. 1, at 80 (1985) (“In addition to encouraging settlement, [the settlement bar] will help bring an increased measure of finality to settlements. Responsible parties who have entered into a judicially approved good faith settlement under the Act will be protected from paying any additional response costs to other responsible parties in a contribution action.”).

Thus, by creating sections 113 and 122 through SARA, Congress made clear its intent to promote the conservation of resources through settlement.³¹¹

Recognizing PRP cost recovery actions as contribution actions promotes finality and certainty for settling parties, as Congress intended. Section 113(f)(2) affords protection only against contribution actions. If PRP cost recovery actions are not governed by rules of contribution, then the claims of a large number of PRPs—including all those who refuse to cooperate with the EPA and who await UAOs before undertaking action—may be brought against settling parties. Such a result would be anomalous.³¹² It hardly seems logical for Congress to provide a mechanism to protect settling parties from future claims by the federal government and contribution claims by other liable parties while leaving PRPs vulnerable to the claims of other PRPs that, as a result of their intransigence, have been issued compliance orders by the EPA.³¹³

311. 132 CONG. REC. 29,717 (1986) (statement of Rep. Lent); *see also* H.R. REP. NO. 99-253, pt. 1, at 80 (noting that the effect of simultaneously creating an express right to contribution and an express contribution bar was to encourage settlements, private party cleanups, and finality, as well as to “bring[] all responsible parties to the bargaining table at an early date”).

312. As one commentator explained, allowing PRPs to file cost recovery actions against settling parties would “significantly affect the CERCLA settlement process because it fundamentally changes the framework of CERCLA contribution protection.” 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, 259 (2008).

313. In *Atlantic Research*, the Supreme Court expressed the view that allowing cost recovery PRPs to sue settling PRPs would not substantially reduce settlement incentives because “[a] district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus” and “settlement carries the inherent benefit of finally resolving liability as to the United States or a State.” *See* United States v. Atl. Research Corp., 551 U.S. 128, 140-41 (2007). This explanation overlooks the fact that avoiding litigation, which can take years or decades to complete, may be as valuable as, or more valuable than, avoiding a small additional share of liability. As numerous courts and commentators have noted: “[T]o allow for the imposition of joint and several liability in contribution actions under CERCLA is to invite ‘inefficiency, potential duplication, and prolongation of the litigation process.’” *See, e.g.,* Elementis Chromium L.P. v. Coastal States Petroleum Co., 450 F.3d 607, 613 (5th Cir. 2006) (quoting Pinal Creek Grp. v. Newmont Mining Corp., 118 F.3d 1298, 1303 (9th Cir. 1997), *abrogated by* Atl. Research, 551 U.S. 128, *as recognized in* Kotrous v. Goss-Jewett Co., 523 F.3d 924 (9th Cir. 2008)). And this has borne out in practice as courts have required section 113(f)(1) counterclaimants to engage in redundant procedural processes before proceeding to equitable allocation. *See, e.g.,* United Alloys, Inc. v. Baker, 797 F. Supp. 2d 974, 998-99 (C.D. Cal. 2011) (engaging in a divisibility analysis under section 107 before proceeding to equitable allocation under the section 113(f)(1) counterclaim); Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 484-90 (D.S.C. 2011) (same), *aff’d*, 714 F.3d 161 (4th Cir. 2013); *see also* Yankee Gas Servs. Co. v. UGI Utils., Inc., 852 F. Supp. 2d 229, 240 (D. Conn. 2012) (explaining that a PRP bringing a section 113 counterclaim “bears the burden of showing that its opponent is liable under the terms of § 107(a)”). These cases show that by exalting form over substance, the section 113 counterclaim approach accomplishes little more than an increase in attorneys’ fees.

Properly applying common law principles to PRP cost recovery claims avoids this absurd result.³¹⁴

That result depends, of course, on interpreting section 113(f)(2) as barring contribution claims regardless of their source rather than targeting only the statutory claims for contribution created by sections 113(f)(1) and 113(f)(3)(B). The text of section 113(f)(2) does not, however, qualify the types of contribution claims it prohibits. It protects settlers from “claims for contribution,” not merely claims for contribution brought under section 113(f).³¹⁵ The omission of any language to qualify the contribution claims affected is made more significant by Congress’s decision to include qualifying language in section 113(f)(3), providing that federal and state claims have priority in “any action under this paragraph.”³¹⁶

The consequence of narrowly reading section 113(f)(2) further counsels against implying that it bars only statutory claims for contribution. A PRP subject to joint and several liability through CERCLA litigation or settlement would often have a common law contribution right under applicable state law because it would be a party compelled to resolve a joint liability.³¹⁷ CERCLA recognizes this fact, including an express saving clause to preserve contribution claims arising beyond section 113(f) from the rules of preemption.³¹⁸ But if settling parties face the threat of state law contribution claims from the very PRPs for whom CERCLA creates statutory rights to contribution, then its protections are hollow comfort indeed, and rather than a substantial incentive for settlement, Congress created only a bounty for clever pleading. Such a perversion of Congress’s intentions should hardly be implied from statutory silence.

314. *Cf.* *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”). Courts will not, however, nullify a provision of a statute to avoid absurd results because “[l]aws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.” *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Treating PRP cost recovery claims as contribution claims avoids absurd results and, as explained in Part V.B.2 below, nullifies no provision of CERCLA.

315. *See* 42 U.S.C. § 9613(f)(2) (2016).

316. *Id.* § 9613(f)(3)(C).

317. *See supra* Part IV.C.

318. 42 U.S.C. § 9613(f)(1) (“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 . . . or section 9607 of this title.”); *see* *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166–67 (2004) (explaining that the “sole function” of the saving clause is to “rebut[] any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP”).

B. The Permissibility of Construing PRP Cost Recovery Actions as Contribution Claims

Construing PRP cost recovery actions as contribution claims faces potential obstacles. A superficial reading of *Cooper Industries* could suggest that the Supreme Court has already rejected the view that all PRPs have contribution claims, and a similarly superficial reading of *Atlantic Research* could suggest that cost recovery claims are inherently distinct from contribution claims. These obstacles are, however, more illusory than real. Moreover, distinctions remain between statutory contribution claims under section 113(f) and section 107(a) cost recovery claims in the nature of contribution.

1. The lessons of *Cooper Industries* and *Atlantic Research*

The decisions in *Cooper Industries* and *Atlantic Research* reset the jurisprudence of private party claims under CERCLA. The fundamental lessons of those cases relate to the proper construction of statutory language, not the application of common law principles to fill gaps in that language. As a result, these cases do not prevent courts from properly applying common law principles to define the nature of CERCLA's cost recovery provisions.

In *Cooper Industries*, the Supreme Court rejected a reading of section 113(f) that would have effectively erased specific words in the statute.³¹⁹ Section 113(f) creates a statutory right to contribution for PRPs in specific and identified procedural circumstances—section 113(f)(1) applies “during or following any civil action” under sections 106 or 107,³²⁰ and section 113(f)(3)(B) applies to “[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.”³²¹ Allowing all PRPs to seek contribution under section 113(f)(1) ignored the prerequisites section 113(f) imposes for statutory contribution actions and further made it entirely unnecessary for the statute to include two distinct contribution provisions.³²² As the Court explained, allowing all PRPs to proceed under section 113(f)(1) “would render part of the statute entirely superfluous, something we are loath to do.”³²³

319. See 543 U.S. at 165-66.

320. 42 U.S.C. § 9613(f)(1).

321. *Id.* § 9613(f)(3)(B).

322. See *Cooper Indus.*, 543 U.S. at 166.

323. *Id.*

By giving effect to the “natural meaning” of the statutory contribution rights created by section 113(f),³²⁴ the Court did not identify, analyze, or apply the common law principles governing cost recovery claims. In declining to consider whether the plaintiff, Aviall, could pursue a claim other than a contribution claim under section 113(f)(1), the Court explained:

[T]he parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs for joint and several liability. To hold here that Aviall may pursue a § 107 action, we would have to consider whether these decisions are correct And we might have to consider other issues . . . such as whether Aviall, which seeks to recover the share of its cleanup costs fairly chargeable to Cooper, may pursue a § 107 cost recovery action for some form of liability other than joint and several. We think it more prudent to withhold judgment on these matters.³²⁵

In so doing, the Court made clear that the availability of cost recovery claims for PRPs is a separate and distinct issue from the nature of such a claim.

In *Atlantic Research*, the Court addressed only the ability of PRPs to seek cost recovery. In the opening sentences of the opinion, the Court framed its decision: “In this case, we must decide a question left open in *Cooper Industries* . . . : whether § 107(a) provides so-called [PRPs] with a cause of action to recover costs from other PRPs.”³²⁶ This framing mirrors the questions presented to the Court, which raised no issue about the nature of a PRP’s cost recovery action.³²⁷ Moreover, in discussing the protection section 113(f)(2) provides settling parties, Chief Justice Roberts asked, “[W]hen one responsible party has paid out the cost and is seeking a cost recovery claim from another responsible party, it’s not too much of a stretch to call it a contribution claim, is it?”³²⁸ In so doing, Chief Justice Roberts intimated that the nature and

324. *Id.*

325. *Id.* at 169-70 (citations omitted).

326. *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007) (citation omitted).

327. *See* Petition for a Writ of Certiorari at I, *Atl. Research*, 551 U.S. 128 (No. 06-562), 2006 WL 3024300. The petition phrased the question presented as:

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under [CERCLA], but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, may bring an action against another potentially responsible party under Section 107(a).

Id. (citations omitted). The brief for Atlantic Research Corp. added a second question presented: “[I]f the aforementioned potentially responsible party has no express cause of action under Section 107(a) to recover a portion of the response costs incurred, whether the party has an implied right to contribution afforded by Section 107(a).” *See* Brief for Respondent Atlantic Research Corp. at i, *Atl. Research*, 551 U.S. 128 (No. 06-562), 2007 WL 1046709.

328. Transcript of Oral Argument at 23, *Atl. Research*, 551 U.S. 128 (No. 06-562), 2007 WL 1181894.

availability of cost recovery claims are distinct issues, only one of which the Court addressed.

The analysis in the *Atlantic Research* opinion remains tied to the question of the availability of PRP cost recovery claims. Like in *Cooper Industries*, the Court again turned to rules of language and grammar. That textual analysis led the Court to conclude that the right to cost recovery provided to “any other person” by section 107(a)(4)(B) included persons other than the government entities identified in section 107(a)(4)(A).³²⁹ As a result, “the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs.”³³⁰

To be sure, language in *Atlantic Research* implies that cost recovery actions are different in kind from contribution actions. The Court explained that sections 107(a) and 113(f) “provide two ‘clearly distinct’ remedies.”³³¹ And the Court contrasted those provisions with each other by suggesting that contribution claims under section 113(f) exist where a PRP “reimburses other parties for costs that those parties incurred” while cost recovery claims “permit[] a PRP to recover only the costs it has ‘incurred’ in cleaning up a site.”³³² The Court justified this distinction, in part, based on the common law meaning of the word “contribution.”³³³ In rejecting the argument that allowing PRPs to seek cost recovery would “eviscerate” the protection section 113(f)(2) affords to settling parties, the Court also opined that “[t]he settlement bar does not by its terms protect against cost-recovery liability under § 107(a),” implying that PRP cost recovery actions are not contribution actions.³³⁴

In context, however, this discussion should not be viewed as resolving any questions about the nature of a PRP’s cost recovery claim. The Court contrasted cost recovery and contribution in response to an argument made by the United States that “PRPs will eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a).”³³⁵ In other words,

329. *Atl. Research*, 551 U.S. at 135 (quoting 42 U.S.C. § 9613(f)(1)).

330. *Id.* at 136.

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

332. *Id.* at 139 (quoting 42 U.S.C. § 9607(a)(4)(B)).

333. *Id.* at 138 (citing *Contribution*, BLACK’S LAW DICTIONARY (8th ed. 2004)).

334. *Id.* at 140. The Court’s statement cannot fairly be read to suggest that section 113(f)(2) bars only statutory contribution claims and not contribution claims arising under other bodies of law—including those that arise as a result of common law contribution principles to cost recovery claims—because such arguments were neither raised nor addressed. Moreover, that crabbed reading of the provision is supported by neither the purposes of CERCLA nor the words Congress used to define the protection afforded to settling parties. *See supra* notes 305-11 and accompanying text; *infra* notes 337-40 and accompanying text.

335. *See Atl. Research*, 551 U.S. at 138.

the Court responded to an argument that was itself predicated on an assumption about the nature of cost recovery actions; the Court did not independently examine the nature of those actions. And the Court's statement should be read to mean that section 113(f)(2) does not expressly bar cost recovery claims and, indeed, even the reading of the cost recovery provisions of section 107(a) offered here would not bar the claims of innocent parties or other government entities. Regardless, the Court offered its comments without the benefit of briefing or argument addressing the common law principles that should define the nature of PRP cost recovery actions. The decision should also be understood in light of the questions presented, which did not address the nature of such liability.³³⁶

Furthermore, the facile contrast the Court drew between contribution and cost recovery misunderstands both statutory contribution under section 113(f) and common law contribution.³³⁷ Contrary to the Court's description, section 113(f) expressly allows contribution claims in some circumstances where a PRP has incurred its own costs rather than reimbursing the costs of another. Section 113(f)(3)(B) authorizes contribution following settlements that resolve liability for either "a response action" or the "costs of such action."³³⁸ And section 113(f)(1) authorizes contribution where an injunction is sought to compel a PRP to clean up a site.³³⁹ In both circumstances, statutory contribution is available for PRPs that have directly incurred costs rather than reimbursing another party's costs.

Nor is the common law of contribution limited to circumstances in which a liable party reimburses the costs of an injured plaintiff. For example, no common law rule would defeat the claim of a contribution plaintiff who entered a settlement under which she agreed to directly pay for medical care. So long as such a settlement resolved a common liability and was reasonable, a contribution action could follow.³⁴⁰

336. Cf. SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

337. Others have noted that the Court's discussion of cost recovery and contribution is contradictory. See, e.g., Gershonowitz, *supra* note 224, at 152 ("If PRPs are not necessarily joint tortfeasors, that is, they do not have common liability, then what is the basis for joint and several liability? Certainly, the PRP plaintiff will not be jointly and severally liable on the contribution counterclaim."); Kilbert, *supra* note 36, at 1079 ("[T]he notion of a contribution counterclaim is an oxymoron."); Alfred R. Light, *CERCLA's Wooden Iron: The Contribution Counterclaim*, 23 TOXICS L. REP. 642, 642 (2008) (describing contribution counterclaim as "a *contradictio in adjecto*").

338. 42 U.S.C. § 9613(f)(3)(B) (2016).

339. *Id.* § 9613(f)(1).

340. See generally 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. d, at 339 (AM. LAW INST. 1979).

Atlantic Research and *Cooper Industries* should not forever warp judicial interpretation of a PRP's cost recovery claims based on hints and implications entirely unnecessary to the holdings of those cases. Neither case presented the Court with questions presented, briefing, or argument about the common law of contribution and its applicability to cost recovery claims, and to the extent the Court opined on that matter, it relied on demonstrably false premises. Nonetheless, two district court decisions have read the Court's opinions this way, allowing a PRP to seek cost recovery against a settling party because, in those courts' views, such a claim is not a contribution claim barred by section 113(f)(2). In *Ford Motor Co. v. Michigan Consolidated Gas Co.*, the court reached this conclusion because of the Supreme Court's admonition that sections 107(a) and 113(f) provide "clearly distinct remedies."³⁴¹ The court in *Ashland Inc. v. GAR Electroforming* followed a similar analysis, but the district court subsequently vacated its decision after the parties reached a settlement.³⁴² These courts correctly understood that an interpretation of the cost recovery provisions of section 107(a) and the statutory contribution provisions of section 113(f) must give each section independent meaning and vitality. But as will be discussed, such vitality persists even following recognition that a PRP's cost recovery action is governed by the common law of contribution.

341. 993 F. Supp. 2d 693, 701-02 (E.D. Mich. 2014) (quoting *United States v. Atl. Research Corp.*, 551 U.S. 128, 137-38 (2007)); *see also id.* at 703 (explaining that arguments that cost recovery claims should sound in contribution "did not and cannot survive the analysis in *Atlantic Research*").

342. *See* 729 F. Supp. 2d 526, 537, 541, 548 (D.R.I. 2010) (relying in part on *Atlantic Research* and the Court's description of sections 113(f) and 107(a) as "clearly distinct" remedies in rejecting the government's argument that the plaintiff's section 107 claim was "in the nature of [a] contribution' claim and therefore barred by Section 9613(f)(2)" (alteration in original) (quoting the United States's amicus brief)), *vacated*, No. 08-227-M (D.R.I. Jan. 18, 2013). The argument to vacate was predicated on the grounds that the question whether a section 107(a)(4)(B) claim is in the nature of contribution is a recurring issue that has "potential significance to EPA's administration of its programs under [CERCLA], and [that] there was not a full opportunity to litigate [the] issue[] before [the district court] or to appeal what the United States views as an incorrectly decided opinion on [an] important issue[]." Memorandum of Amicus United States in Support of UTC's Unopposed Motion to Vacate July 2010 Opinion at 2-3, *Ashland*, No. 08-227-M (D.R.I. Jan. 15, 2013), 2013 WL 6079993 (citation omitted). Accordingly, the fact that the court granted the motion and vacated its opinion at least suggests that the court was aware that *Atlantic Research* does not directly control the issue, that it remains an open question, and that there is a valid argument "that since *Ashland* was a potentially liable party, akin to a joint tortfeasor (as opposed to the government or an innocent party performing cleanup work), its claim was in the nature of contribution," *see id.* at 6.

2. The remaining vitality of private party cost recovery claims under section 107(a) and statutory contribution claims under section 113(f)

Applying common law contribution principles to PRP cost recovery suits does not render either section 107(a) or section 113(f) superfluous. These remedies would remain “clearly distinct”³⁴³ for the following reasons:

First, each section would continue to provide contribution rights to PRPs in different circumstances. A PRP may only seek contribution under section 113(f) if it falls within the procedural circumstances identified in that section. Such claims may, however, be brought prospectively—for example, during the pendency of a civil action under sections 106 or 107, or after a settlement has been reached but before the PRP begins paying for its implementation.³⁴⁴ A cost recovery action, on the other hand, may be brought only after a PRP has incurred response costs,³⁴⁵ a result reinforced by the traditional common law contribution principles courts should apply, which only allow claims following actual payment to extinguish a common liability.³⁴⁶

Second, different statutes of limitation apply to cost recovery claims brought under section 107 and statutory contribution claims brought under section 113.³⁴⁷ CERCLA requires plaintiffs to file section 113 contribution claims within three years of either the date of a judgment or settlement.³⁴⁸ The statute provides more flexibility to PRPs seeking cost recovery. For shorter-term removal actions—which still may involve years of work³⁴⁹—a plaintiff may file a lawsuit any time within three years of the action’s completion.³⁵⁰

343. *See Atl. Research*, 551 U.S. at 138 (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 163 n.3 (2004)).

344. *See* 42 U.S.C. § 9613(f)(1) (authorizing contribution “during or following” civil actions).

345. *See* *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 167-68 (4th Cir. 2013) (describing the “prima facie case for cost recovery under CERCLA” as including that “the plaintiff has incurred costs responding to the release or threatened release of hazardous substances”); *Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 933 (6th Cir. 2004) (including within the prima facie case for cost recovery that “the release caused the plaintiff to incur necessary costs of response”).

346. *See, e.g., Shurtleff v. United Effort Plan Tr. (In re United Effort Plan Tr.)*, 289 P.3d 408, 419 (Utah 2012).

347. *Compare* 42 U.S.C. § 9613(g)(2) (statute of limitations for cost recovery actions under section 107), *with id.* § 9613(g)(3) (statute of limitations for contribution actions).

348. *Id.* § 9613(g)(3).

349. *See, e.g., United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1244, 1246-47 (9th Cir. 2005) (upholding the EPA’s characterization of an action that would take several years to complete as a “removal” action).

350. 42 U.S.C. § 9613(g)(2)(A).

For longer-term remedial actions, a claim may be filed within six years after on-site commencement of the remedy.³⁵¹

Third, cost recovery plaintiffs may recover prejudgment interest on the amount expended on a response action.³⁵² Section 113 does not provide for prejudgment interest. While some courts have suggested that prejudgment interest may be awarded in section 113(f) actions as a matter of equity,³⁵³ even if that were the case, “the imposition of prejudgment interest under § 107(a) is mandatory.”³⁵⁴ That means that a PRP suing under section 107(a) may be entitled to a greater recovery than one suing under section 113(f), even if both claims are contribution claims, because only the former plaintiff will always be entitled to prejudgment interest.³⁵⁵ In other words, a section 107(a) plaintiff will be entitled to contribution for the amount it paid plus interest, while a section 113(f) plaintiff may be entitled to contribution only for the amount actually paid.³⁵⁶

Fourth, CERCLA renders the right to statutory contribution created by section 113(f)(3)(B)—for parties entering settlements with the United States or a

351. *Id.* § 9613(g)(2)(B). Where a remedial action commences within three years of completion of a removal action, a claim with respect to both may be brought within six years of the commencement of the remedial action. *See id.*

352. *See id.* § 9607(a).

353. *See, e.g.,* *Litgo N.J. Inc. v. Comm’r N.J. Dep’t of Env’tl. Prot.*, 725 F.3d 369, 391-92 (3d Cir. 2003) (acknowledging, without passing upon, the argument “that prejudgment interest is discretionary under § 113(f)” and ordering an award of mandatory prejudgment interest under section 107(a)(4)(B)). *But see* *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 159-60 (D.D.C. 2014) (“[T]he purposes of prejudgment interest are inapplicable to this equitable allocation case.”), *aff’d on other grounds*, 833 F.3d 225 (D.C. Cir. 2016).

354. *Litgo N.J.*, 725 F.3d at 392.

355. In *Lockheed Martin*, for example, the district court refused to award prejudgment interest to a section 113(f) plaintiff. *See* 35 F. Supp. 3d at 159-60. Moreover, the fact that section 107(a) expressly authorizes prejudgment interest could be read to preclude a court from awarding prejudgment interest as a matter of equity under section 113(f). *Cf. AmeriPride Servs. Inc. v. Tex. E. Overseas Inc.*, 782 F.3d 474, 490-91 (9th Cir. 2015) (explaining that section 107(a)’s provision prevents district courts from considering equitable factors in determining prejudgment interest).

356. Prior to *Cooper Industries* and *Atlantic Research*, courts did find that prejudgment interest should be awarded under section 113(f) in the manner provided for in section 107(a). *See, e.g.,* *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 28 (1st Cir. 2004) (“[B]ecause § 9613(f) incorporates the liability provisions of § 9607, an action for contribution also incorporates the prejudgment interest provision.”); *Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 100 F.3d 792, 799 (10th Cir. 1996) (“We hold prejudgment interest should be granted in § 113(f) actions in the same fashion as it is granted in § 107 actions.”). Those decisions, however, were predicated on an understanding of the interrelationship between sections 107(a) and 113(f) repudiated in *Cooper Industries*. *See supra* notes 319-25 and accompanying text.

State³⁵⁷—subordinate to rights possessed by the United States or states, including their right to cost recovery.³⁵⁸ Plaintiffs pursuing such contribution claims can therefore only recover if a defendant PRP remains solvent after reimbursing costs incurred by the government. The claim of a plaintiff pursuing cost recovery is not so limited, and such a plaintiff could assert a claim concurrent to a claim by the government and potentially recover a portion of costs from a PRP defendant entering bankruptcy.³⁵⁹

Fifth, courts may develop and apply different principles to govern allocation in cost recovery actions and statutory contribution actions. The text of section 113(f)(1) provides open-ended discretion to a district court to allocate costs in contribution actions arising under that section based on any “equitable factors as the court determines are appropriate.”³⁶⁰ Courts have generally grounded such equitable allocation in one of two sets of factors, referred to as the Gore factors and the Torres factors.³⁶¹ The Gore factors are a set of six specific factors enumerated by then-Representative Al Gore in an unsuccessful attempt to amend CERCLA in 1980.³⁶² The Torres factors refer to a judicially crafted set of four factors enumerated by Judge Ernest Torres of the District of Rhode Island.³⁶³ While courts rely on these approaches as a starting place in allocating costs in section 113(f) lawsuits, they often also consider other factors they find relevant to a specific case.³⁶⁴

357. See 42 U.S.C. § 9613(f)(3)(B).

358. *Id.* § 9613(f)(3)(C). The limitation contained in section 113(f)(3)(C) applies only to “any action under this paragraph,” see *id.*; that is, a contribution action arising under section 113(f)(3)(B).

359. See *id.* § 9607(a)(4)(B) (including no provision to render PRP cost recovery claims subordinate to government claims). While CERCLA gives preference to cost recovery claims brought under section 107(a) over statutory contribution claims brought under section 113(f)(3)(B), the law of bankruptcy provides independent limits, generally enabling claimants to prove up contribution or cost recovery claims for past payments but potentially barring claims for future payments as contingent claims. See generally B. David Naidu et al., *Key Environmental Liability Considerations in Bankruptcy Actions*, N.J. LAW., Oct. 2016, at 54, 55-57.

360. 42 U.S.C. § 9613(f)(1). That section applies generally to “contribution claims,” see *id.*, but in context should be read to apply only to contribution claims created by section 113(f). Otherwise, in the guise of creating two statutory claims under CERCLA, Congress broadly revised the common law of contribution across all contexts.

361. See *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 123 (D.D.C. 2014), *aff’d on other grounds*, 833 F.3d 225 (D.C. Cir. 2016).

362. See *id.*; see also *Env’tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992) (outlining the Gore factors).

363. See *Lockheed Martin*, 35 F. Supp. 3d at 123; see also *United States v. Davis*, 31 F. Supp. 2d 45, 63 (D.R.I. 1998), *aff’d*, 261 F.3d 1 (1st Cir. 2001).

364. See *Lockheed Martin*, 35 F. Supp. 3d at 123 (“Given the broad discretion granted in CERCLA § 113(f)(1), courts also look beyond the Gore and Torres factors when equitably allocating response costs.”).

PRP cost recovery claims should be governed by common law contribution principles, not section 113(f)(1).³⁶⁵ While common law contribution is also an equitable remedy, courts have tended to adopt methods of allocation divergent from, and more limited than, the Gore factors and Torres factors.³⁶⁶ Comment h to section 886A of the Second Restatement describes these approaches:

The first method, still followed by a majority of the courts, derives from contribution among sureties and the maxim that “equality is equity,” and provides that the tortfeasors who are liable will end by paying equal shares. . . . The second method, followed by a growing number of states, provides that contribution is based according to the comparative fault of the tortfeasors.³⁶⁷

While both methods “may call for some variation” based on the specific facts of a case,³⁶⁸ they suggest that the starting point for allocation in a cost recovery suit may differ from that in a suit for contribution under section 113(f).³⁶⁹ At the very least, the divergent bases for allocation—

365. The sentence providing that “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate,” 42 U.S.C. § 9613(f)(1), could be read to govern all contribution claims brought against a PRP, regardless of their source. After all, the sentence includes no qualifier and, as previously discussed, the contribution protection afforded by section 113(f)(2) is best read to bar all contribution claims. *See supra* notes 311-16 and accompanying text. That interpretation founders on the shores of logic and context. First, the provision creates a right to statutory contribution only for PRPs faced with a civil action brought under sections 106 or 107. *See* 42 U.S.C. § 9613(f)(1). The next sentence then provides that “[s]uch claims” are governed by federal law and the Federal Rules of Civil Procedure. *Id.* Accordingly, the third sentence—governing the allocation of response costs—should be read in keeping with the prior two, particularly because the fourth and final sentence of the paragraph expressly addresses other claims for contribution, which it saves from preemption. *See id.* (“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 . . . or section 9607 of this title.”); *see also* *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (“The sole function of the [fourth and final] sentence is to clarify that § 113(f)(1) does nothing to ‘diminish’ any cause(s) of action for contribution that may exist independently of § 113(f)(1).”). Moreover, the alternative interpretation would seem to require a federal rule of decision for the contribution claims preserved by the saving clause, creating the unlikely implication that Congress meant to provide a rule of decision for state law contribution claims, potentially even if adjudicated in state court. *Cf.* *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (“It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.” (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952))).

366. *See generally* 4 RESTATEMENT (SECOND) OF TORTS § 886A cmt. h, at 340-41 (AM. LAW INST. 1979).

367. *Id.* at 340.

368. *See id.* at 341.

369. Since the Second Restatement, many states have adopted statutes to govern comparative fault among joint tortfeasors and contribution claims may be governed by
footnote continued on next page

section 107(a) cost recovery claims arising out of the common law of contribution, and section 113(f) statutory contribution claims arising out of statutory language authorizing consideration of any equitable principles—provide courts with the opportunity to develop different allocation methods as they deem appropriate. Thus, courts can develop separate and distinctive approaches to allocating costs based on the attributes of claims under sections 107(a) and 113(f).

Applying common law contribution principles to PRP cost recovery claims, then, does not make section 107(a)(4)(B), section 113(f)(1), or section 113(f)(3)(B) superfluous. Each governs distinct situations and involves different rules. To be sure, applying joint and several liability to PRP cost recovery claims would magnify the differences between those claims and contribution claims under section 113(f). Canons of statutory construction do not, however, favor maximizing divergence between statutory provisions. Ensuring that each provision has some meaning is enough.³⁷⁰ Moreover, the legislative history indicating that Congress created section 113(f) to “clarif[y] and confirm[]” contribution rights³⁷¹ supports reading CERCLA as creating similar, but not identical, claims for PRPs under sections 107(a) and 113(f).

Conclusion

Since its enactment, CERCLA has been responsible for the cleanup of thousands of contaminated sites and has helped spark dramatic improvement

statutory comparative fault principles. *See generally* RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 23 reporters’ note cmt. a, at 290-92 (AM. LAW INST. 2000). If federal courts borrowed from these state statutes, rather than the common law rules articulated in the Second Restatement, to govern private party cost recovery claims in the nature of contribution, this too would differentiate the methods of allocation in those claims from the methods courts have developed to govern statutory contribution claims.

370. *Cf.* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).
371. *See, e.g.*, H.R. REP. NO. 99-253, pt. 1, at 79 (1985). Where Congress has enacted legislation based on an understanding of common law principles, courts should hesitate before rejecting those principles in construing a statute. *See* *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994) (“[A]lthough common-law principles are not necessarily dispositive . . . , unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis.”); *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’” (quoting *Isbrandsten Co. v. Johnson*, 343 U.S. 779, 783 (1952))).

in the handling of hazardous substances for fear of liability.³⁷² But the United States's experience with environmental contamination—and the consequences it has for public health and the environment—has not yet ended.

In an era of shrinking EPA budgets and a leadership that exhibits at best a tepid commitment to enforcing environmental laws,³⁷³ the best hope for environmental cleanup lies in settlements between the EPA (and state agencies) and PRPs. CERCLA creates significant incentives for such settlements, particularly by affording settling parties with certainty and finality about their financial obligations to remedy the harms to which they have contributed. That certainty has been shaken, however, by developments in case law that could be viewed as allowing some PRPs—counterintuitively, the most intransigent PRPs who await UAOs rather than negotiate settlements—to override protections for settling parties.

Some courts and commentators view the erosion of settlement incentives as the inevitable result of allowing PRPs to bring cost recovery actions at all. This need not be so. The cost recovery actions of PRPs are nothing like those brought by governments or other innocent parties. Common law principles make that clear. Under the common law, the claim of a joint tortfeasor, like a PRP, is governed by contribution principles, not by principles of joint and several liability. Faithfully applying those common law principles to PRP cost recovery actions furthers the fundamental purposes of CERCLA and retains vitality in each of the statute's provisions.

372. See Aronovsky, *supra* note 3, at 583.

373. See Coral Davenport, *Counseled by Industry, Not Staff, E.P.A. Chief Is Off to a Blazing Start*, N.Y. TIMES (July 1, 2017), <https://perma.cc/64Z3-YZ2W> (“Scott Pruitt has moved to undo, delay or otherwise block more than 30 environmental rules, a regulatory rollback larger in scope than any other over so short a time in the agency’s 47-year history . . .”); Leif Fredrickson, *Scott Pruitt Is Wrong About the Origins of the EPA*, WASH. POST (July 14, 2017), <https://perma.cc/5VRA-R9EZ> (analyzing Pruitt’s claim that he is an “EPA originalist” as embracing the view that “the early EPA was a low-key regulator with a narrow agenda, that it had a coequal status with the states, and that it was as much about natural resource and industrial development as pollution”). The EPA has, for example, attempted to delay compliance deadlines for environmental regulations already in effect without undertaking any public participation process, a move the D.C. Circuit held violated administrative law principles. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (holding that the EPA’s decision “was ‘arbitrary, capricious,’ and beyond its statutory authority under the Clean Air Act (quoting 42 U.S.C. § 7607(d)(9)(A))”).

Appendix A
Key Statutory Provisions Related to Liable CERCLA Claims

CERCLA Section	Text
§ 107(a)(4)(B) ³⁷⁴	“[PRPs, as defined in section 107(a)(1)-(4), shall be liable for] any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]”
§ 113(f)(1) ³⁷⁵	“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.”
§ 113(f)(2) ³⁷⁶	“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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.”
§ 113(f)(3)(B) ³⁷⁷	“A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).”

374. 42 U.S.C. § 9607(a)(4)(B) (2016).

375. *Id.* § 9613(f)(1).

376. *Id.* § 9613(f)(2).

377. *Id.* § 9613(f)(3)(B).