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I. INTRODUCTION

Considered by some to be a less-than-perfect exercise in legislative drafting, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) has been the subject of much litigation since its creation. Because a determination of liability could result in bankruptcy for a responsible party, attorneys desperately sought mechanisms for avoiding, or at least limiting, costs of cleanup incurred by their clients. With one such mechanism, responsible parties that had voluntarily cleaned up a contaminated site tried to secure at least a partial recovery for the costs incurred because of the cleanup. Some courts, though varied in their reasoning, found an implied right of contribution within the statute that would allow such recovery. Later, Congress codified an express right of contribution that allowed responsible parties to seek an equitable allocation of cleanup costs between themselves and other responsible parties. However, some question remained as to the prerequisites for bringing such a suit. When Cooper Industries, Inc. v. Aviall Services, Inc. came before the United States Supreme Court, there was no uniform understanding among the courts as to whether, in the absence of a civil action, a party partially responsible for a contaminated site could obtain contribution from other parties that contributed to the subject contamination.

This note first provides a brief description of the facts in Cooper Industries, Inc. v. Aviall Services, Inc., followed by a description of the backdrop leading to the Supreme Court’s consideration of the question presented. It then explores the holding and rationale of the Court in deciding the case,
and lastly, includes a commentary on the decision’s potential effect on voluntary cleanup.11 The discussion that follows revolves mainly around two sections of CERCLA—§ 113(f)(1), which allows contribution between parties held liable under CERCLA, and § 107(a), which defines classes of “covered persons” and allows cost recovery for necessary cleanup under certain circumstances.12 The significance section includes a short discussion of § 113(f)(3)(B), which provides a contribution cause of action among parties following an administrative or judicially approved settlement.13

II. FACTS

In 1981, Aviall Services, Inc. ("Aviall") purchased four aircraft engine maintenance properties in Texas from Cooper Industries, Inc. ("Cooper").14 The maintenance facilities were located throughout the Dallas metro area and included Love Field, Carter Field, and Forest Park.15 Prior to and during Cooper’s ownership, the property had been contaminated by spills of hazardous substances and leaking underground storage tanks containing petroleum and hazardous substances.16 The contamination continued after Aviall’s purchase.17 Several years later, Aviall discovered contamination from petroleum and other hazardous substances on the property, which were attributable to both it and Cooper.18 Aviall disclosed this information to the Texas Natural Resource Conservation Commission (TNRCC), now the Texas Commission on Environmental Quality.19 The TNRCC told Aviall that the site had to be cleaned up; otherwise, the TNRCC would bring an enforcement action against Aviall.20 However, the Environmental Protection Agency (EPA)—the primary CERCLA enforcement authority—never contacted Aviall.21 Aviall subsequently began cleaning up the site in 1984 under the supervision of the TNRCC, without the issuance of an enforcement action.22 Aviall contacted Cooper in 1995 and requested reimbursement for the cleanup.23 Cooper refused to take responsibility for the costs incurred by

11. See infra Parts IV–V.
12. See infra Part III.
13. See infra Part V.
16. Id.
17. Id.
18. Cooper Indus., Inc., 543 U.S. at 163–64.
19. Id. at 164.
20. Id.
22. Cooper Indus., Inc., 543 U.S. at 164.
Aviall. In 1997, after allegedly spending five million dollars on cleanup, Aviall filed an action in the United States District Court for the Northern District of Texas against Cooper for the cost recovery associated with the cleanup. The court granted summary judgment in favor of Cooper, holding that Aviall could not sustain an action under § 113(f)(1) of CERCLA in the absence of an enforcement action pursuant to § 106 or § 107(a). The court also declined to exercise supplemental jurisdiction over Aviall’s state law claims, holding that those claims could be better handled in state court.

Aviall had no better luck when arguing before the Fifth Circuit Court of Appeals. The court, sitting in a three-member panel, affirmed the district court’s decision, holding that § 113(f)(1) was unavailable to a potentially responsible party (PRP) in the absence of an action in progress or completed against it under § 107 or § 106 of CERCLA.

Subsequently, the Fifth Circuit Court of Appeals granted Aviall a hearing en banc. The en banc court, with three dissenting judges, reversed and remanded the district court’s decision. The court interpreted the statutory language of CERCLA that determines when a party may sue under § 113(f)(1) to be permissive, which the court said would further the purposes of CERCLA, and it rejected the previous panel’s holding that only a PRP that has been the subject of litigation or an administrative order can obtain relief under § 113(f)(1).

III. BACKGROUND

Once described as a “black hole that indiscriminately devours all who come near it,” CERCLA has been interpreted by the courts to include some of the most frightening concepts of liability available under the United States legal system. Creatures such as strict liability, joint and several liability, successor liability, and (most frightening) retroactive liability lurk around every corner searching for the deepest pocket available. With all that is at stake, it is no wonder that so much time has been spent litigating

26. Id.
27. Id.
28. See Aviall Servs., Inc., 263 F.3d 134.
29. Id. at 145.
31. Id. at 681.
32. Id. at 679.
33. See Anderson, supra note 2, at 6–7.
34. See id.
the finer points of CERCLA. 35 The following section first discusses the necessity that led up to the enactment of CERCLA. 36 Next, CERCLA concepts relevant to this particular case are explained. 37 This section ends with an analysis of the district court and court of appeals' decisions leading up to Cooper Industries, Inc. v. Aviall Services, Inc. 38

A. The Development of Hazardous Waste Cleanup Law in the United States

1. The Need for Quick, Responsive Cleanup of Hazardous Substances

In response to increasing problems with improper disposal of hazardous waste, Congress passed the Resource Conservation and Recovery Act of 1976 (RCRA) 39 to ensure proper management of hazardous wastes in the United States. 40 RCRA, however, dealt only with current generation and disposal of hazardous wastes. 41 It did nothing to assist in the cleanup of abandoned hazardous waste sites. 42

In 1978, public concern over hazardous waste sites came to a head with the Love Canal incident. 43 Buried chemicals seeping into the ground at Love Canal, which was at that time a residential neighborhood, were thought to be the cause of a variety of health problems, including birth defects. 44 Existing law provided no remedy for the residents of Love Canal. 45

It was evident that something had to be done to protect people from the dangers of abandoned hazardous waste sites. 46 In 1979, the EPA estimated that there were 32,000 to 50,000 hazardous waste sites in the United States. 47 In response, Congress hastily passed CERCLA 48 during the last

35. See generally Cooper Indus., Inc., 543 U.S. 157.
36. See infra Part III.A.1.
37. See infra Part III.A.2.
38. See infra Part III.B.
41. Id. at 381–82.
42. Id. at 382–83.
43. Id. at 381.
44. Id.
45. Id. at 381–83.
46. Glass, supra note 40, at 381.
47. Id. at 383.
days of the Ninety-Sixth Congress. CERCLA’s two main purposes were to “promote the prompt investigation and remediation of sites” and to “shift the cost of investigating and remediating” to the parties responsible for the contamination.

CERCLA was Congress’s answer to the problem of inactive hazardous waste sites. It provided the EPA with a means by which to clean up hazardous waste sites and/or force other “potentially responsible parties” (PRP) to pay for the cleanup. CERCLA gave the EPA a funding mechanism and the necessary authority to begin cleanup of contaminated sites prior to determining the liability of various PRPs. PRPs constitute a defined class of parties, or “covered persons,” that have some connection with the contaminated site. The different types of covered persons included under § 107(a) of CERCLA are current and past owners and operators of a facility in which hazardous substances were disposed or treated, transporters of hazardous substances, and any person who arranged for hazardous substances to be transported, treated, or disposed. These covered persons are responsible jointly and severally for all costs associated with the removal of hazardous substances or remedial action taken by federal or state government under CERCLA, as well as “any other necessary costs of response” paid by “any other person.” Therefore, the EPA could hold a single PRP liable for the entire cost of cleanup, thereby relieving the EPA of the burdensome task of locating and bringing actions against all PRPs. This shifted the burden of locating other PRPs to the PRP held liable, providing that PRP with a significant motive to find other parties to share the cost.

2. Resolving Cost Recovery and Contribution Under CERCLA

Two separate issues soon arose concerning § 107. One issue regarded whether a private party who is not subject to suit and who incurs cost due to

51. See Glass, supra note 40, at 382–83.
53. See Glass, supra note 40, at 383.
56. Id.
57. Id. § 9607(a)(4)(B).
59. Id.
response action can seek cost recovery under § 107. The other issue concerned whether § 107 allows for one PRP to seek contribution from other PRPs for costs it incurred due to voluntary cleanup or cleanup mandated by the government. Taking a closer look at how the courts have interpreted the "any other person" provision of § 107 helps to properly understand the potential impact of the provision.

After the enactment of CERCLA, many courts found that private parties who had not contributed to the contamination on a site should recover those costs necessary for cleanup under § 107(a)(4)(B). Deciding the "seminal decision" for recognizing a federal common law right to contribution, the United States District Court for the Eastern District of Pennsylvania found in City of Philadelphia v. Stepan Chemical Co. that a PRP who had voluntarily cleaned up a site could sue other PRPs for cost recovery. In City of Philadelphia, the court used both the language of the statute and policy reasons to justify its conclusion that potentially liable parties were not precluded from obtaining response costs. The court reasoned that since one of CERCLA's main objectives was to provide for "prompt cleanup" of contaminated sites and to provide a means of "financing ... private responses," it would frustrate that objective by not allowing parties who could be liable under CERCLA to obtain cost recovery for their voluntary response costs. Furthermore, the court found no reason in the statutory language of the "any other person" provision that would preclude a PRP from fitting into that category.

Also, in Colorado v. Asarco, Inc., the United States District Court for the District of Colorado found contribution under § 107. The court held that there was a common-law right to contribution through the legislative

61. Id. at 161.
62. Id. at 162.
64. See, e.g., Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986); Walls v. Waste Res. Corp., 761 F.2d 311, 318 (6th Cir. 1985).
67. Id. at 1142. The defendants in City of Philadelphia argued that the term "any other person" could not include a person who was already a PRP. Id. at 1141. Otherwise, the defendants claimed, the result would be a "merry go round" of litigation. Id. at 1142. The court rejected this claim. Id. It may have been somewhat important to the court's decision that Philadelphia was arguably an innocent party, being a victim of illegal dumping. See id.
69. Id. at 1143-44.
73. Id. at 1489.
history of CERCLA. Notably, the sources referred to by the court seem to support a contribution cause of action by someone who has been held liable under CERCLA. The court’s policy reasoning also points to the right to contribution only for a party that has already been sued. In fact, the court’s holding states that the party “will have a right to contribution in the event that they are held jointly and severally liable.”

Later, however, the United States District Court for the District of Delaware clearly recognized the ability of a PRP to obtain cost recovery under CERCLA. The court in United States v. New Castle County again recognized a right to contribution that existed under federal common law and was fashioned by the judiciary. More importantly, the court recognized the importance of allowing PRPs to obtain recovery for costs associated with voluntary cleanup. Eerily foretelling what was to come, the court explained the situation in which a party who voluntarily cleaned up a site could become liable for the entire cost: “It is not hard to imagine that such a system would discourage voluntariness but would instead invite responsible individuals to adopt a ‘wait and see’ attitude with the hope that some other responsible entity will eventually be the one sued by the Government under § 107(a) of the Act.”

Another problem that arose concurrently was how to distribute costs between PRPs under § 107. In the early days of CERCLA, many courts decided that suits between PRPs should be treated as actions for contribution, using equitable allocation under the federal common-law right to contribution. The court in Asarco found that, although joint and several liability were viable options of providing the means to clean up contaminated sites, the legislative history of CERCLA clearly envisioned apportionment of costs between PRPs, thereby allowing contribution.

74. Id.
75. See id. at 1491.
76. Id. at 1489.
77. Id. at 1492 (emphasis added).
80. Id. at 1269.
81. Id. at 1264–65.
82. Id.
84. Id.
B. Enter the Superfund Amendments and Reauthorization Act

1. Codifying the Right to Contribution Among PRPs

While most courts recognized some form of contribution under § 107, there was no firm agreement on the origin of authorization for this cause of action.\(^86\) Some found it in the language of CERCLA; some found it as an implied right, and others found it existing in federal common law.\(^87\)

In response to differing opinions concerning contribution among PRPs in the federal circuits, Congress amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA).\(^88\) Through SARA, PRPs had an express right of contribution under § 113(f)(1) as follows:

Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title, during or following any civil action under § 9606 of this title or under § 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 § 9606 of this title or § 9607 of this title.\(^89\)

2. Two Routes of Recovery

After SARA, CERCLA included two possible routes for PRPs to obtain recovery from other PRPs for costs resulting from voluntary cleanup: the preexisting recovery action under § 107 and the new express contribution action under § 113(f).\(^90\) This left the courts to decide whether § 107, § 113(f), or both allowed PRPs to sue other PRPs for costs resulting from cleanup.\(^91\)

The Fifth Circuit Court of Appeals looked at the differences between § 107 and § 113(f) claims when called upon to rule on a combined claim in *OHM Remediation Services v. Evans Cooperage Co.*\(^92\) OHM had performed cleanup work for Louisiana Oil Recycle and Reuse at a contaminated site in

\(^86\) *New Castle County*, 642 F. Supp. at 1262.

\(^87\) *Id.*


\(^90\) *See* Faulk & Bishop, *supra* note 83, at 329.

\(^91\) *Id.*

\(^92\) 116 F.3d 1574 (5th Cir. 1997).
Baton Rouge. Subsequently, Louisiana Oil went out of business, leaving OHM unpaid on a three-million-dollar bill. OHM, seeking cost recovery, sued Evans, a party who had contributed to contamination at the site. OHM brought claims against Evans under both § 107 and § 113(f)(1). Evans, in turn, named other third-party defendants who named other third-party defendants (seventy in all), including OHM. OHM, however, denied that it was a PRP under CERCLA. The district court dismissed OHM’s § 107 claim, holding that a party must have a “protectable interest” in the land in question in order to sue. The district court also dismissed OHM’s § 113(f) claim, holding that OHM could not bring a § 113(f) claim unless it admitted it was a PRP.

The court of appeals looked to the language of the “any other person” provision and held that there was no such “protectable interest” element required in a § 107 claim. Since OHM had not yet been held liable itself as a PRP, the court declined to address whether a PRP fits into that “any other person” category. The court also concluded that OHM was eligible to bring an action under § 113(f)(1). The court reasoned that since OHM had been sued as a third-party defendant in this case, it was at least “potentially liable,” because it met the prerequisite of being a PRP, and, therefore, it was able to bring an action for contribution under § 113(f)(1).

Section 107 and § 113(f)(1) have distinct differences that must be addressed in order to fully understand the reasoning adopted by the various federal courts. Because § 107 allows for strict liability, one party suing another party under § 107 need show only that the other party is a PRP under § 107 in order to obtain cost recovery (perhaps even for the complete cost of response), as fault is not a required element. However, under § 113(f)(1) the defending party may receive an “equitable allocation based on care and fault.” Similarly, while § 107 allows for joint and several liability

93. Id. at 1577.
94. Id. at 1578.
95. Id.
96. Id.
97. Id. OHM was a PRP because it had previously sent ten drums of waste to the Louisiana Oil facility. Id.
98. OHM Remediation Servs., 116 F.3d at 1578.
99. Id.
100. Id.
101. Id. at 1579–80.
102. Id. at 1582.
103. Id. at 1583.
104. OHM Remediation Servs., 116 F.3d at 1582–83.
105. See McCrory, supra note 50, at 22–24.
106. Id. at 23.
107. Id.
in which the entire cost of cleanup may be allocated completely to one or more PRPs, § 113(f)(1) makes defendants liable only for the contamination they contributed to the site.\(^\text{108}\) Therefore, when one PRP has covered more than its share of the costs of cleanup, § 113(f)(1) allows it, through contribution, to recover from other PRPs the difference between the cleanup costs for the contamination it actually contributed to the site and what it spent on cleanup.\(^\text{109}\) Because of the possibility of one PRP being able to recover the entire amount of cleanup costs from another PRP under § 107, rather than apportioning costs, federal courts of appeals chose to use § 113(f)(1) in cases in which the plaintiff was a PRP.\(^\text{110}\) Section 113(f)(1), by design, provided an action for contribution among tortfeasors, and it, therefore, provided for equitable allocation of costs.\(^\text{111}\)

C. Enter *Cooper Industries, Inc. v. Aviall Services, Inc.*

With most federal courts agreeing that § 113(f) was the exclusive remedy for PRPs under CERCLA, the question remained as to whether a PRP could recover its costs for voluntary cleanup under § 113(f) in the absence of a civil action or settlement with the federal or state government.\(^\text{112}\) This was the question in *Cooper Industries, Inc. v. Aviall Services, Inc.*\(^\text{113}\) Aviall brought suit against Cooper under § 113(f)(1) in the United States District Court for the Northern District of Texas, seeking contribution for its voluntary cleanup.\(^\text{114}\)

Aviall’s complaint originally asserted two federal law claims—one for contribution under § 113(f)(1) and one for cost recovery under § 107.\(^\text{115}\) Later, however, Aviall amended its complaint to include only the § 113(f)(1) claim, with § 107 being an element of that claim.\(^\text{116}\) The district court

\(^{108}\) Id.

\(^{109}\) See *Restatement (Second) of Torts* § 886A (1979) (explaining the mechanism of contribution).

\(^{110}\) See *Faulk & Bishop*, *supra* note 83, at 330. One author has suggested that § 113 “contribution protection” is not all that great. See generally Brian D. Langa, *Taken to the Cleaners: Potentially Responsible Parties That Sign CERCLA Consent Decrees May Face Unexpected Claims from Non-PRPs*, 28 L.A. Law. 30 (2005). Langa imagines a case in which PRPs that have settled pursuant to an EPA agreement may still be sued under § 107 for cost recovery by non-PRPs. *Id*.

\(^{111}\) See *Faulk & Bishop*, *supra* note 83, at 328.


\(^{113}\) *Id*.

\(^{114}\) *Id* at 164.

\(^{115}\) *Id*.

\(^{116}\) Aviall Servs., Inc. v. Cooper Indus., Inc., 2000 U.S. Dist. LEXIS 520, at *2 (N.D. Tex. Jan. 15, 2000). Aviall maintained that Fifth Circuit precedent holding a “[§] 113 claim is a type of [§] 107 claim” was the reason they amended their complaint to drop the § 107 claim. *Cooper Indus., Inc.*, 543 U.S. at 164. As we can see, this later came back to haunt
granted summary judgment to Cooper, finding that a § 113(f)(1) claim was unavailable to Aviall in the absence of some civil action brought against it. The court further reasoned that the saving clause of § 113(f)(1) did not remove the requirement for there to be some civil action pending or resolved, but, instead, it served only to not undermine claims outside of CERCLA, such as claims under state law.

The parties brought an appeal before a Fifth Circuit panel, which held that the § 113(f)(1) claim was unavailable to Aviall in the absence of a civil action under § 107 or a pending or adjudged administrative order under § 106. The panel also reasoned that this holding was in line with congressional intent to base contribution on common-law standards that require a civil action to be pending or adjudged. Furthermore, the panel did not foresee its decision affecting voluntary cleanup, as many states have similar environmental cleanup laws in place that allow cost recovery. Judge Jacques L. Weiner, Jr., in his dissent, found no reason to preclude a PRP that had not been sued from obtaining contribution under § 113(f)(1). Later, when the Fifth Circuit reversed the panel’s prior decision during a rehearing en banc, Judge Weiner’s dissenting opinion that a PRP could obtain contribution from other PRPs even in the absence of a § 106 administrative order or a § 107 civil action served as the template for the majority opinion.

The Fifth Circuit’s holding was based in part upon Aviall’s argument that the saving clause in § 113(f)(1) made certain that § 113(f)(1) did not take away a person’s right to contribution in the absence of a civil action or...
administrative order—the so-called "federal common-law right to contribution." The court relied on, among others, *City of Philadelphia v. Stepan Chemical Co.* and *Key Tronic Corp. v. United States* as support for finding the implied right to contribution in CERCLA. The court further reasoned that the “federal common law right of contribution” survived the enactment of § 113(f)(1) through the saving clause. Additionally, the court looked at the “may” and “during or following” provisions of § 113(f)(1) not as “shall” or “may only.” Instead, the court read the statutory language as meaning that an action for contribution could—but was not required to—take place at those times.

The decision by the Fifth Circuit Court of Appeals in *Aviall* provided the Supreme Court with the issue discussed in this note: whether a PRP not yet involved in litigation may sue another PRP for contribution.

IV. REASONING

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the United States Supreme Court ruled that Aviall could not sustain a claim under § 113(f)(1) because Aviall had not been subject to a “civil action.” The majority opinion, written by Justice Clarence Thomas, began with a discussion of the history of CERCLA and the facts and procedural posture surrounding the case. Then, the Court moved on with a textual analysis of the statute, finding no uncertainty in the language of § 113(f)(1). The Court declined to rule on what would constitute a “civil action” under § 107(a) or § 106 because Aviall did not contend that it was subject to a civil action. This left only the issue of whether a PRP could obtain contribution in the absence of a civil action. Justice Ruth Bader Ginsburg wrote a dissenting opinion, which Justice John Paul Stevens joined. Justice Ginsburg disagreed with

125. *Aviall Servs., Inc.*, 312 F.3d at 682–83. In *Key Tronic Corp. v. United States*, the United States Supreme Court recognized that § 107 and § 113(f)(1) have “similar and somewhat overlapping remed[ies].” 511 U.S. 809, 816 (1994).
126. *Aviall Servs., Inc.*, 312 F.3d at 687.
127. *Id.* at 686–87.
128. *Id.*
129. *Cooper Indus., Inc.*, 543 U.S. at 160–61.
131. *Id.* at 166.
132. *Id.* at 162–65.
133. *Id.* at 167.
134. *Id.* at 168.
135. *Id.*
136. *Cooper Indus., Inc.*, 543 U.S. at 171 (Ginsberg, J., dissenting).
the majority as to whether the Court should render judgment on Aviall's § 107 claim.\textsuperscript{137}

A. The Majority Opinion: Clarifying the Requirements for Contribution

The Supreme Court disagreed with the Fifth Circuit's holding that the word "may," as used in § 113(f)(1), did not mean "may only."\textsuperscript{138} First, the Court explained that in looking at the language of the sentence itself, the "natural meaning" of "may" would be that a § 113(f)(1) action for contribution could be brought only "during or following" a civil action.\textsuperscript{139} Next, the Court reasoned that if the statutory language that says a party "may" initiate an action "during or following" a civil action was permissive, then it would "render part of the statute entirely superfluous, something [the Court is] loath to do."\textsuperscript{140}

The Court recognized that the legislative intent behind placing an express right of contribution for PRPs in SARA was to confirm prior federal court decisions authorizing contribution between PRPs.\textsuperscript{141} However, the Court also recognized § 113(f)(1) as placing specific limitations upon when, and under what circumstances, this right of contribution would occur.\textsuperscript{142} Specifically, the Court held that the right of contribution provided by § 113(f)(1) "may only" exist "during or following" a civil action.\textsuperscript{143}

The United States Supreme Court also disagreed with the Fifth Circuit's interpretation of the saving clause in § 113(f)(1), reasoning that the sentence acted only to "rebut any presumption that the express right of contribution provided by the enabling clause" is the PRP's only possible cause of action.\textsuperscript{144} The Court explained that the saving clause was not, in and of itself, a cause of action.\textsuperscript{145} The Court further explained that the saving clause did not expand the § 113(f)(1) action for contribution to include actions that were not "during or following" some civil action under § 107(a) or § 106.\textsuperscript{146}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Id. at 171–74.
\item \textsuperscript{138} Id. at 166 (majority opinion).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Cooper Indus., Inc., 543 U.S. at 166.
\item \textsuperscript{143} Id. The United States, as amicus curiae, also weighed in on the case on behalf of Cooper. Transcript of Oral Argument at 26–28, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192). The United States argued that the EPA's position on voluntary cleanup is that it must be done pursuant to a federal or state settlement agreement. Id. When asked if the EPA had the time and resources to enter into settlement agreements with all PRP volunteers, the United States responded that a state settlement agreement would be a more likely route. Id.
\item \textsuperscript{144} Cooper Indus., Inc., 543 U.S. at 166–67.
\item \textsuperscript{145} Id. at 167.
\item \textsuperscript{146} Id.
\end{enumerate}
\end{footnotesize}
Instead, the Court recognized that other causes of action may exist for PRPs outside of § 113(f)(1), and § 113(f)(1) did not act to destroy those particular causes of action.\(^{147}\)

Although the Court held that a PRP could not obtain contribution through § 113(f)(1), the Court declined to address the issue of whether Aviall could sue for cost recovery under § 107(a) or whether § 107(a) created an “implied right of contribution.”\(^{148}\) Consequently, the Court reversed the Fifth Circuit’s judgment and remanded the case to the lower court for a determination of whether Aviall could bring suit under § 107(a).\(^ {149}\)

B. The Dissent: Allowing Recovery Under § 107

In her dissent, Justice Ginsburg noted that the Court had already recognized a PRP’s ability to maintain a cost recovery action against other PRPs.\(^{150}\) Justice Ginsburg noted that “no Justice” in the Key Tronic court “expressed the slightest doubt that § 107[,] indeed[,] did enable a PRP to sue other covered persons for reimbursement . . . of cleanup costs the PRP legitimately incurred.”\(^ {151}\) Justice Ginsburg, however, did not argue whether Aviall actually had a § 113(f)(1) claim. Instead, Justice Ginsburg disagreed with any question as to whether Aviall should be able to bring its § 107 action against Cooper.\(^ {152}\)

V. SIGNIFICANCE

The Supreme Court’s decision in Cooper Industries, Inc. v. Aviall Services, Inc. has sent a chill through PRPs who now will be hesitant to undertake a purely voluntary cleanup.\(^ {153}\) Subsequent lower court decisions will

\(^{147}\) Id.

\(^{148}\) Id. at 168. The Court recognized that its decision in Key Tronic Corp. v. United States contained dictum acknowledging that § 107(a) and § 113(f)(1) were two separate but similar remedies. Id. (citing 511 U.S. 809 (1994)). However, the Court was unwilling to decide on that issue since it had not been pleaded by either party. Id. at 585.

\(^{149}\) Id. at 171. Aviall emphatically pleaded that, in the event its § 113(f)(1) claim failed, the question of whether or not it could pursue a claim under § 107(a) should be preserved and remanded to the Fifth Circuit. Transcript of Oral Argument, supra note 143, at 32.

\(^{150}\) Cooper Indus., Inc., 543 U.S. at 172 (Ginsburg, J., dissenting).

\(^{151}\) Id. (citing Key Tronic Corp. v. United States, 511 U.S. 809 (1994)). In fact, the Key Tronic Court said that “[§] 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs.” Key Tronic Corp., 511 U.S. at 818. The Court also reasoned that the “statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.” Id. at 816. Given that Key Tronic Corp. was a PRP, in deciding the case, the Supreme Court did not take issue with the fact that Key Tronic Corp. was not an innocent party. Id. at 809.

\(^{152}\) Cooper Indus., Inc., 543 U.S. at 171-74 (Ginsburg, J., dissenting).

\(^{153}\) See Faulk & Bishop, supra note 83, at 324-25.
indicate whether § 107(a) or some other alternate route under federal law is available for the PRP who takes the initiative to clean up a contaminated site prior to being the subject of a civil action. However, because of disagreement among the various federal circuits, the time will likely come when the Supreme Court must revisit the issue of voluntary cleanup. Parties may also look to CERCLA-like state laws to provide a mechanism for cost recovery. Whatever route parties take, the Court’s decision in Cooper Industries, Inc. v. Aviall Services, Inc. will likely curb voluntary cleanup actions throughout the United States. The following section explores subsequent decisions by lower federal courts concerning contribution pursuant to § 107(a), § 106, and Arkansas’s voluntary cleanup provisions.

A. Subsequent Decisions

1. Can a PRP Obtain Cost Recovery Through § 107(a)?

Since Cooper Industries, Inc. v. Aviall Services, Inc., there have been several decisions by lower courts regarding contribution under CERCLA. Recently, in Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., the Second Circuit Court of Appeals followed the Cooper Industries, Inc. v. Aviall Services, Inc. decision and denied a claim for contribution under § 113(f)(3)(B) that was based upon a voluntary cleanup agreement between Consolidated Edison (Con Ed) and the New York Department of Environmental Conservation. The court held that an administrative agreement absolving a party of liability under state law did not absolve a party under CERCLA and, therefore, did not amount to an administrative settlement under § 113(f)(3)(B). In the absence of an administrative settlement resolving Con Ed’s CERCLA liability, a § 113 contribution claim was not available. The court did, however, hold that Con Ed could maintain a cause of action under § 107(a) for cost recovery. The court reasoned that because the United States Supreme Court had stated that § 107 and § 113 were similar but not the same, a separate right for cost recovery still existed. The court went on to say that “[e]ach of those sections . . . embodies a mechanism for cost recovery available to persons in different procedural circumstances.”

155. Id. at *1.
156. Id. at *3–5.
157. Id. at *4.
158. Id. at *7.
159. Id. at *6–7.
107(a), the court had to answer only "whether Con Ed is a 'person' and whether it has incurred 'costs of response.'"\(^{161}\)

Importantly, the court found no basis for distinguishing between parties that were "innocent" and PRPs, and it held that, based upon the "quite simple language" of § 107(a), "any person" incurring costs related to cleanup of a contaminated site can bring a § 107 cause of action.\(^{162}\) The court recognized important policy reasons for maintaining this § 107 action, particularly the effect of discouraging voluntary cleanup of contaminated sites.\(^{163}\) In the absence of a viable method of cost recovery, parties would likely wait to be sued rather than risk bearing the whole cost of site cleanup costs.\(^{164}\) In effect, it would undermine "one of CERCLA's main goals, 'encourag[ing] private parties to assume the financial responsibility of cleanup, by allowing them to seek recovery from others.'"\(^{165}\)

As recently as the summer of 2005, at least one author has argued that § 107(a) is not available for PRPs, as they would not fit into the category of "other persons."\(^{166}\) Based on the reasoning of Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., however, it seems that § 107(a) may once again become a viable option for PRPs that have not been subject to litigation.

161. Id. at *7.
162. Id. Interestingly, the Second Circuit indicated that § 107 cost recovery under CERCLA may be unavailable to parties that had already been held liable or could become liable due to pending litigation. Id. at *9. It appears that the court was distinguishing between situations in which a party actually undertakes cleanup activities, making § 107 available to them and situations in which a party may merely be on the hook monetarily for cleanup of a contaminated site already undertaken by someone else. See id. at *9. It is plausible that in the first instance, voluntary cleanup serves one of CERCLA's goals. In the second instance, that of the tortfeasors being held liable for costs, the goal of voluntary cleanup is not furthered in any significant way.
163. Id. at *7.
164. Id.
165. Id. (citing Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994)).
166. Wm. Bradford Reynolds and Lisa K. Hsiao, The Right of Contribution Under CERCLA After Cooper Industries v. Aviall Services, 18 TUL. ENVTL. L.J. 339, 346–47 (2005). Reynolds argued that "whether [§] 107(a) remains available to PRPs to pursue other PRPs for contribution costs seems already to have been answered by the federal circuits with an emphatic 'no.'" Id. at 346. He also argued that a "reasonable interpretation" of § 107(a) would lead one to conclude that PRPs are ineligible under § 107(a). Id. at 346–47. This seems to be in direct conflict with the Second Circuit's holding in Consolidated Edison. While it is true that through § 113(f)(1), § 107(a) recovery may ultimately be unavailable, it appears to be viable for the purpose of PRP cost recovery actions. Reynolds does make an interesting point in stating that "[p]urely voluntary cleanups of Superfund sites, without government involvement or supervision, were never CERCLA's objective." Id. at 347. Again, however, his comment appears to go against one of CERCLA's key goals: allowing parties undertaking voluntary cleanup to recover costs from others (as expressed by the Key Tronic Corp. Court). Key Tronic Corp., 511 U.S. at 818.
There is still reason for plaintiff PRPs to fear, however, based upon a quite different result recently coming out of the Seventh Circuit. In *City of Waukesha v. Viacom International, Inc.*, the United States District Court for the Eastern District of Wisconsin upheld Seventh Circuit precedent that only “innocent” parties have § 107(a) available to them. The court held that because the *Cooper* decision did not disturb Seventh Circuit decisions holding that § 107(a) was unavailable to PRPs and because *Cooper* made § 113(f)(1) unavailable in the absence of civil action, PRPs undertaking voluntary cleanup had no means under CERCLA by which to obtain cost recovery.

The court cited a previous Seventh Circuit opinion in which it had noted that “an innocent landowner could bring a claim for direct response costs” against a PRP, but a “landowner who was a party liable in some measure for the contamination must seek contribution under § 113(f).” In the near future, it appears that PRPs seeking recovery under § 107 absent a civil action will have a different result depending on what federal circuit decides the case.

2. The § 113(f)(3)(B) Alternative

Administrative orders pursuant to § 106 provide an alternative to § 107(a) for PRPs to achieve contribution under § 113. Section 106 provides the government with the power to force parties to clean up contaminated sites through the use of administrative orders. Section 113(f)(3)(B) provides that parties to an administratively approved settlement may obtain contribution from other PRPs that were not parties to the settlement. Many PRPs, as well as the EPA and Department of Justice, believed expenditures made by a PRP to satisfy the requirements of a § 106 administrative order were costs for which contribution claims would be available under § 113(f)(3)(B) as administrative settlements, thereby allowing PRPs a cause of action against other non-settling PRPs. In March of 2005, however, the United States District Court for the Southern District of Illinois found that an EPA administrative order did not satisfy § 113(f)(3)(B), reasoning that an

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168. *Id.*
169. *Id.* at 1028.
170. *Id.* at 1026.
171. *Id.* at 1028.
173. *Id.*
administrative order under § 106 did not pass as a settlement. PRPs were once again dealt a devastating blow in the area of voluntary cleanup, and this time, with the help of the EPA, they searched for a solution that would provide some predictability to judicial decisions.

In August of 2005, the EPA released a modified version of its model administrative order for use by PRPs. In the model administrative order, the EPA changed the name of the agreement to include "settlement." Additionally, the EPA added the term "settlement" throughout the redlined document. The EPA also added the statement "constitutes an administrative settlement . . . for the purposes of CERCLA § 113(f)(3)(B)" to the document. Specifically referencing Cooper Industries, Inc. v. Aviall Services, Inc., the EPA maintained that its position—also the position of the Department of Justice—was that the Administrative Order of Consent resolved a PRPs liability to the United States under a particular CERCLA action and satisfied § 113(f)(3)(B) for the purpose of contribution. However well-intentioned the EPA may have been, it remains to be seen whether this new administrative order will be accepted by all federal circuits.

Equally devastating to the strength of the administrative order, the court in Pharmacia Corp. v. Clayton Chemical Acquisition LLC, also found that an administrative order issued by the EPA did not satisfy the requirements for a civil action under § 113(f)(1).

B. Effects on Voluntary Cleanup in Arkansas

In addition to remedies under federal law, voluntary PRPs may also look to state CERCLA-like laws in order to obtain contribution. PRPs in Arkansas, however, will have no such luck in the absence of state agency intervention. The Remedial Action Trust Fund Act (RATFA) is Arkansas's version of the federal CERCLA. RATFA allows "any person" to

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177. See Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, United States Environmental Protection Agency 2–3 (Aug. 3, 2005) (on file with author).
178. Id. at 1.
179. Id. at 2.
180. Id. at 2–3.
181. Id.
182. See id. at 2.
185. ARK. CODE ANN. § 8-7-520 (LEXIS 2000).
186. Id.
obtain contribution for cleanup costs from other PRPs in "response to an administrative or judicial order initiated" against them or "pursuant to an administrative or judicially approved settlement."187

In Reynolds Metal Co. v. Arkansas Power & Light Co.,188 the United States District Court for the Eastern District of Arkansas strictly construed the language and intent of RATFA to allow contribution only in the wake of a state administrative or judicial order or settlement.189 The fact that Reynolds Metal Company had entered into a settlement agreement with the EPA, and not the Arkansas Department of Pollution Control and Ecology, did not change the result.190

PRPs that are contemplating voluntary cleanup in Arkansas should weigh their options carefully. Whether to rely on the EPA’s new model administrative order or seek some sort of settlement with the state depends largely on what claims the PRP will carry into court. PRPs must be forward-thinking and must carefully plan not only for the technical remediation aspects of the cleanup, but also for the requisite settlement agreement or administrative order. PRPs may also consider trying to persuade the state environmental department to file suit against them, thereby meeting the civil action requirement of § 113(f)(1).

VI. CONCLUSION

Cooper Industries, Inc. v. Aviall Services, Inc., has left many PRPs who have undertaken voluntary cleanup scrambling to determine how they will be able to pursue a contribution claim under CERCLA against other liable parties who have not paid their fair share of the response costs.191 Short of a PRP actually being sued, there seems to be no bright-line rule among the circuits for what meets the bar created in § 113(f)(1). Nor is there any clear guidance as to whether a PRP that does not meet the requirements of § 113(f)(1) can prevail under § 107(a). By leaving open the possibility for recovery under § 107(a), the United States Supreme Court has assured that the question will again come before it. It is equally likely that the Court will be called upon to address the sufficiency of EPA and state administrative orders and settlements in meeting the requirements of § 113(f)(1) and § 113(f)(3)(B). Perhaps the best alternative would be for Congress to clarify its intent by amending CERCLA to provide less room for interpretation by the courts. The current environment concerning voluntary cleanup is summed up quite well through the words of one Little Rock attorney who

187. Id. § 8-7-520(a)–(b).
189. Id. at 998–99.
190. Id.
191. Telephone Interview with Alan Gates, supra note 175.
recently stated, "[the voluntary cleanup process under CERCLA] has been stabbed, if not through the heart, at least through the foot."192

Chris Kinslow

192. *Id.

* J.D. expected May 2007; M.P.H., December 1999, Tulane University School of Public Health and Tropical Medicine; B.S., May 1996, University of Arkansas at Little Rock. I thank my family for their smiles and encouragement. To Luckey, your love and understanding enabled me to persevere through this phase of my life. I send a special thank you to Mr. Alan Gates for acting as a fountain of knowledge from which I filed my canteen. Finally, I thank the UALR Law Review for all that it has taught me during this journey.