

There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA

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I. INTRODUCTION

“‘It’s a dangerous business, Frodo, going out of your door,’ he used to say. ‘You step into the Road, and if you don’t keep your feet, there is no knowing where you might be swept off to.’”¹

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1. J.R.R. TOLKIEN, *THE LORD OF THE RINGS* 72 (1993).

Thus Frodo Baggins, J.R.R. Tolkien's beloved character, recalls his Uncle Bilbo's description of the unpredictability of what *appears* to be traditional and routine.

Surely no environmental law controversy in recent memory has followed a path filled with more surprises and twists than the strange progression and regression of contribution claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As a result of new developments, it is indeed difficult to "keep your feet" as the tides of change sweep away well-settled expectations—expectations that have guided the conduct of parties since the inception of cost recovery and contribution under federal environmental law.

CERCLA was passed in 1980 to provide a way for governments and private parties to conduct cleanups and recover their cleanup costs from the polluters, i.e., the "polluter pays" principle. CERCLA litigation quickly mushroomed. One of the early issues arising was how to distribute costs among responsible parties who were suing each other under section 107.² Was liability joint and several or just several? Many courts decided that an action by one responsible party against another was an action for contribution, and common law principles of equitable allocation would apply.³

To clarify the right of contribution, Congress amended CERCLA in 1986 and added section 113, which clarified and confirmed that contribution was available among parties and that cleanup costs were to be allocated equitably.⁴ Subsequently, courts began to hold that responsible parties did not have a cause of action under section 107, but that section 113 was the appropriate avenue.

On December 13, 2004, the Supreme Court held that parties who have not first been sued under sections 107 or 106 of CERCLA cannot file a contribution action under section 113.⁵ With many appellate courts holding that responsible parties cannot sue under section 107, it is unclear what, if any, CERCLA actions may be left for parties who

2. Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) § 107(a), 42 U.S.C. § 9607(a) (2000). Section 107 identifies four categories of responsible parties that may be liable for response costs. An action to recover costs may be brought by the federal government, a state government, or a private party. *Id.* § 107(a)(4)(A)-(B).

3. See *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-22 (3d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

4. CERCLA, Pub. L. No. 96-510, § 113, 94 Stat. 2767, 2781 (amended 1986).

5. See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 583 (2004) (stating that CERCLA section 113 is superfluous without the existence of sections 106 and 107).

undertake cleanups voluntarily or via government order.⁶ The underlying objectives of CERCLA—to encourage cleanups and make polluters pay cleanup costs—have now been gutted, and the status of CERCLA litigation is in limbo until the issue surrounding section 107 is resolved. As a result, parties have stopped cleanup activities until a more definite result surfaces.

II. HISTORY OF CERCLA

A. *Passage in 1980*

CERCLA was enacted to address the problem of contamination of real property by hazardous substances. It provides the federal government with powerful mechanisms to ensure the cleanup of such properties.⁷ For example, section 104 authorizes the federal government to undertake response actions itself.⁸ Those actions may be financed by a federal fund, known originally as the Hazardous Substance Superfund, and the federal government may sue a broad class of “potentially responsible parties” to recoup its “response costs.”⁹ Congress also gave the federal government the authority to compel private parties to undertake response actions themselves. Under section 106(a), the government may initiate a civil action in federal district court to compel a cleanup, or, alternatively, may issue an administrative order compelling a cleanup.¹⁰

Congress also authorized private parties to recover their own response costs. Section 107(a)(4)(B) provides a federal cause of action that allows “any other person” who undertakes a response action to recover costs from any entity potentially responsible for the contamination, often referred to as a “potentially responsible party” or PRP.¹¹

6. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-25 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group*, 118 F.3d at 1306; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E.R.R.*, 50 F.3d 1530, 1534-36 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

7. CERCLA, Pub. L. No. 96-510, §§ 101-175, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675).

8. CERCLA § 104, 42 U.S.C. § 9604 (2000).

9. CERCLA § 111, 42 U.S.C. § 9611 (establishing Superfund); CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (enumerating classes of potentially responsibility parties liable for response costs).

10. CERCLA § 106(a), 42 U.S.C. § 9606(a).

11. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

However, the underlying purpose of CERCLA was and has always been to promote the quick and efficient cleanup of contaminated sites, to reduce litigation and transaction costs, and to encourage private parties to conduct the cleanups.¹²

B. Early Judicial Interpretation of CERCLA Section 107

CERCLA has never been considered a model of legislative drafting, and there was considerable litigation in the years following its adoption. By 1986, four issues had been almost universally accepted by courts. First, each of the parties within the class of PRPs was jointly and severally liable with other PRPs for the entire cost of cleanup.¹³ Second, section 107(a)(4)(B) established a federal cause of action for the recovery of response costs by private parties who undertook an appropriate cleanup.¹⁴ Third, private parties who were themselves PRPs also had this right of cost recovery against other responsible parties.¹⁵ Finally, there was no prerequisite for government involvement in the cleanup in order to recover under CERCLA.¹⁶ In other words, prior to the 1986 amendment to CERCLA, courts had, among other things, clearly held that PRPs who undertook a voluntary cleanup had a cause of action under CERCLA against other PRPs.¹⁷

12. See Memorandum from Steven Herman, Assistant Administrator, EPA, to Regional Administrators, I-X, EPA, Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals (June 3, 1996), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/orphan-share-rpt.pdf> (stating that the goals of enforcement policy reform are “to provide greater fairness, reduce litigation and transaction costs, and promote private party cleanup of Superfund sites”); 131 CONG. REC. H4652 (daily ed. June 20, 1985) (statement of Rep. Lent) (“I am especially proud of a key groundbreaking structural reform that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create.”); *Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearing Before the House Subcomm. on Admin. Law and Governmental Relations, Comm. on the Judiciary*, 99th Cong. 38 (1985) (stating the success of the Superfund enforcement program rested in part on its ability to discourage unnecessary and costly litigation).

13. See, e.g., *United States v. Wade*, 577 F. Supp. 1326, 1337-38 (E.D. Pa. 1983).

14. See, e.g., *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985).

15. See *City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1135-36 (E.D. Pa. 1982); *Pinole Point Props. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-91 (D. Del. 1985).

16. See, e.g., *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 1357 (D. Del. 1985).

17. See *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (stating that the courts allow cost recovery by a PRP in the absence of any government order or lawsuit); see also *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (relying on *Stepan Chem. Co.*, 544 F. Supp. 1135, to conclude “that under 42 U.S.C. § 9607(a)(4)(B), a private party, even though a responsible party under CERCLA, who voluntarily pays CERCLA response costs may bring an action in its own behalf to collect cleanup

However, a question remained regarding the mechanism for apportioning costs among PRPs. Under section 107, each PRP was potentially liable for the entire cost of a cleanup, under the principles of joint and several liability.¹⁸ To allow for a more equitable apportionment of costs, a series of court opinions held that CERCLA contained an implied right to contribution, to be developed pursuant to a uniform, federal common law.¹⁹ Additionally, some courts found the right of contribution arose from existing federal common law.²⁰ The United States Supreme Court reviewed this history in a case decided before *Cooper Industries, Inc. v. Aviall Services, Inc. (Aviall)* was argued, but did not reach a clear holding regarding these issues.²¹

C. Clarifying Contribution—Section 113 (f)(1) and the Superfund Amendment and Reauthorization Act

Concerns arose about the authority of federal courts to find an implied cause of action in a federal statute.²² This concern prompted Congress to adopt an express right of contribution with the Superfund Amendment and Reauthorization Act of 1986 (SARA).²³ Section 113(f)(1) provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In

costs against the parties allegedly responsible for the production and dumping of hazardous wastes”).

18. See *Wade*, 577 F. Supp. at 1337.

19. See *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1486 (D. Colo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983).

20. See *United States v. New Castle County*, 642 F. Supp. 1258, 1265-68 (D. Del. 1986). Other courts found an implied right of contribution in section 107 of CERCLA. *Wehner*, 616 F. Supp. at 31.

21. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994):

In its original form CERCLA contained no express provision authorizing a private party that incurred cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, 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 such a cause of action.

22. *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981); *Northwest Airlines v. Transp. Workers Union of Am.*, 451 U.S. 77, 91-95 (1981); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100-01 (1st Cir. 1994).

23. Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

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.²⁴

Additionally, in section 113(f)(3)(B) Congress expressly authorized a right of contribution following “an administrative or judicially approved settlement” with the Environmental Protection Agency (EPA).²⁵

Though the legislative history on section 113(f) is limited, it acknowledges both the growing body of case law finding an implied right of contribution and the uncertainty regarding federal courts’ authority to establish such implied rights.²⁶ It seems clear, however, that in adopting section 113(f), Congress intended to “clarify” and “confirm” the right of contribution that federal courts had previously found implied in the statute.²⁷ Nothing in the legislative history indicates that Congress intended to cut back on the then prevailing right of PRPs who cleaned up property either voluntarily or in response to a government order to seek cost recovery or contribution under section 107.²⁸ Nowhere in the limited legislative history does Congress suggest any intent to drastically curtail a PRP’s preexisting right to seek cost recovery under CERCLA.²⁹

Beyond confirming Congress’s intent to approve a right of contribution, the legislative history must be viewed with caution. Section 113(f) was preceded by several drafts with varying language. Therefore, selective quotation from the legislative history obscures the fact that many references were to differing versions of the current section 113(f).

24. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000).

25. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

26. See H.R. REP. NO. 99-253, pt. 1, at 59 (1985); S. REP. NO. 99-11, at 44 (1985); 131 CONG. REC. S1155 (daily ed. Sept. 20, 1985) (statement of Sen. Stafford) (predicting that section 113 would “remove any doubt as to the right of contribution”).

27. See sources cited *supra* note 26.

28. All of the numerous cost-recovery claims by PRPs recognized by federal courts under section 107 were *inherently* actions for contribution. As the Fifth Circuit explained, in the pre-SARA era, “lower federal courts were implementing, albeit unevenly, contribution rights that did not depend on pre-existing EPA administrative orders and that did not arise solely ‘during or following’ CERCLA enforcement actions.” *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 683 (5th Cir. 2002) (en banc) (*Aviall II*).

29. As the en banc Fifth Circuit noted in *Aviall II*:

[I]t would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts’ development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution. In no event does the history “overwhelmingly support” the panel majority’s narrow view of the statute.

Aviall II, 312 F.3d at 685.

The legislative history is particularly confusing and inconsistent regarding any congressional intent on the timing of a right of contribution. Some statements in the legislative history indicate that Congress generally intended to confirm a right of contribution by responsible parties.³⁰ Other statements indicate that members of Congress understood that the right of contribution exists during or following a federal civil action.³¹

These snippets of language add little to understanding the availability of a right to contribution in the absence of a prior civil action or the meaning of the last sentence in section 113(f)(1). At most, the phrases indicate that Congress intended a right of contribution during and following a federal civil action; they are simply silent on whether a federal right to contribution exists at other times.³²

D. Post-SARA Interpretations of Sections 107 and 113

As amended by SARA, CERCLA contained both the original cause of action for contribution established by section 107 and the express right of contribution recognized by section 113(f).³³ Courts were thus required to determine whether PRPs seeking cost recovery from other PRPs were entitled to sue under section 107, under section 113, or both.

The answer was important for two principal reasons. First, the statutory provision selected may have implications for PRPs who settle with the government. Under section 113(f)(2), a settling party receives

30. See H.R. REP. NO. 99-253, pt. 1, at 59 (1985) (“The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site.”); *id.* pt. 1, at 266 (“The section would also establish a federal right of contribution or indemnity for persons *liable* under § 106 or § 107 of current law” (emphasis added)).

31. See *id.* pt. 1 at 79 (“This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.”).

32. Judge Weiner, in his dissent from the original panel decision in *Aviall Services v. Cooper Industries*, expressed appropriate concern about reliance on fragments from the legislative history in this case.

I am mystified by the majority’s willingness to cast aside its healthy skepticism about legislative history to read so much into the *absence* of legislative discussion on this issue, especially when the plain language of the statute, through its savings clause, *expressly* contemplates actions for contribution in the absence of civil actions under § 106 or § 107(a).

263 F.3d at 151; see also Pfohl Bros. Landfill Steering Comm. v. Allied Waste Sys., Inc., 255 F. Supp. 2d 134, 153 n.17 (W.D.N.Y. 2003) (rejecting the implication drawn from the legislative history by the majority panel decision in *Aviall I*).

33. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (describing “similar and somewhat overlapping remedies”).

protection from contribution actions by PRPs who did not settle. If PRPs could bring an independent claim under section 107, then some would argue that the contribution protection offered by section 113 would be rendered largely meaningless.³⁴ Even more fundamentally, the degree to which PRPs may recover could be different under the two sections. Courts were concerned that a section 107 cause of action would entitle PRPs to a full recovery of all of their response costs, under joint and several liability rules, rather than to the equitable share provided for by section 113.³⁵

Without exception, the federal courts of appeals resolved these issues in favor of section 113, holding that PRPs may sue each other for apportionment of costs only under section 113.³⁶ The courts' reasoning as to a PRP's right to pursue a "pure" claim under section 107 was as uniform as the result: PRPs must sue for contribution under section 113 because the very nature of their claim, one for an equitable allocation of costs among jointly liable parties, is inherently or quintessentially a claim for contribution.³⁷ The end result was a uniform and clear structure for private cost-recovery claims under CERCLA. Non-PRPs—innocent landowners who did not contribute to contamination on their property—could sue for full cost recovery under section 107. However, PRPs were limited to actions for contribution under section 113, where they would

34. See *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 102 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *United States v. Colorado & E.R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995). *But see* *United States v. Hardage*, No. Civ-86-1401-P, 1990 U.S. Dist., LEXIS 19640 (W.D. Okla. Feb. 26, 1990) (holding that the settlement did not discharge the independent response cost claims).

35. See *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-22 (3d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

36. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-25 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998); *Pinal Creek Group*, 118 F.3d at 1301; *New Castle County*, 111 F.3d at 1121-23; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Colorado & E.R.R.*, 50 F.3d at 1534-36; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

37. In certain contexts, such as when limitations issues arose in cases where there was no prior governmental or private party order or suit that motivated the cleanup, the line between the two sections became substantially more blurred. In such cases, some federal circuits recognized that actions by a PRP brought in the absence of a prior judgment or settlement are "initial actions for recovery" of costs under section 107 subject to section 113(g)(2)'s statute of limitations. See *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924-25 (5th Cir. 2000); *Sun Co. v. Browning-Ferris, Inc.* 124 F.3d 1187, 1191 (10th Cir. 1997); *Cytec Indus. v. B.F. Goodrich Co.*, 232 F. Supp. 2d 821, 831 (S.D. Ohio 2002) (applying the Sixth Circuit opinion in *Centerior Serv. Co.*, 153 F.3d at 344). Based upon these precedents—which were not disapproved by the Supreme Court in *Aviall*—it can be argued that claims made by PRPs without prior governmental or private party actions are simply another type of cost recovery action under section 107.

benefit from “contribution protection” if they settled with the government but could only recover an equitable portion of their response costs.³⁸

III. THE AVIALL CASE

A. Summary of Facts

The *Aviall* case concerned the right of a property owner, Aviall Services, Inc. (Aviall), to recover an equitable share of its cleanup costs from the property’s prior owner, Cooper Industries, Inc. (Cooper).³⁹ Cooper owned and operated several aircraft engine maintenance facilities in Texas resulting in the release of petroleum and other hazardous substances into the soil and groundwater. In 1981, Cooper sold the facilities to Aviall, which operated the facilities until a sale to a third party in the mid-1990s. While Aviall owned the property, petroleum and hazardous substances apparently continued to leak into the soil and groundwater through underground storage tanks and spills.

Aviall discovered hazardous substances in the soil and groundwater on several occasions during the early 1990s. Aviall reported the discoveries to the Texas environmental regulatory agency as required by Texas law.⁴⁰ The State of Texas directed Aviall to clean up the properties, under threat of issuing an administrative order, and Aviall did so under the State’s supervision.

B. Summary of Case History

In August 1997 Aviall filed an action against Cooper in the United States District Court for the Northern District of Texas, seeking to recover the share of its cleanup costs charged from Cooper.⁴¹ In its original complaint, Aviall sought recovery of its costs under several causes of action, including section 107 and section 113 of CERCLA.⁴² Aviall later amended its complaint to add new state law claims, drop several common law claims, and combine its CERCLA claims into one, joint claim.⁴³

38. CERCLA § 113, 42 U.S.C. § 9613 (2000). Section 113(f)(2) provides that “[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.” CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

39. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001) (*Aviall I*).

40. *See id.* at 134, 136.

41. *See id.*

42. *See id.*

43. *See id.*

Both parties filed motions for summary judgment and the district court granted Cooper's motion.⁴⁴ The court interpreted the first sentence of section 113, "Any person may seek contribution . . . during or following any civil action under section 9606 [section 106] of this title or under section 9607(a) [section 107(a)] of this title," to allow an action for contribution *only* during or after a civil action under CERCLA.⁴⁵ Furthermore, the court held that the last sentence of section 113, which states, "[N]othing 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 [section 106] of this title or section 9607 [section 107] of this title," did not "save" a contribution action without an independent right.⁴⁶ Therefore, because there was no prior or pending CERCLA action, the court reasoned, Aviall could not maintain its contribution action.⁴⁷ A divided panel of the Fifth Circuit affirmed, on substantially the same reasoning.⁴⁸

On rehearing, the en banc court reversed and held that Aviall could pursue its contribution action.⁴⁹ In an opinion written by Judge Edith Jones, the court of appeals held that section 113, which provides that a party "may" seek contribution during or following any civil action, does not by its terms preclude a contribution action in other circumstances.⁵⁰ Rather, use of the permissive "may" reflects congressional intent to permit contribution actions in the absence of civil suits.⁵¹ Similarly, section 113's "savings clause," which provides expressly that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action" indicates that Congress did not intend to foreclose contribution actions brought by parties who have undertaken cleanups without first litigating the issue.⁵² Finally, the court of appeals noted that its construction of section 113 was consistent with the purposes underlying CERCLA as a whole, in that it would "promote prompt and effective cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions

44. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. Civ.A.397CV1926D, 2000 WL 31730 (N.D. Tex. Jan. 13, 2000).

45. *Id.* at *2.

46. *Id.* at *3-*4. Aviall argued that the independent right to sue arose under section 107 and that section 113 provided the mechanism for contribution. *Id.*

47. *Id.* at *4.

48. *Aviall I*, 263 F.3d 134.

49. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc) (*Aviall II*).

50. *Id.* at 686.

51. *Id.*

52. *Id.* at 687.

created the hazards.”⁵³ Cooper’s petition for writ of certiorari was thereafter granted by the Supreme Court.⁵⁴

On December 13, 2004, Justice Thomas, writing for a seven-member majority, held that section 113 was plain on its face and did not provide for contribution without a prior or pending section 107 or section 106 action.⁵⁵ The Court reversed the decision of the en banc court and remanded the case to that court to determine whether Aviall may pursue a cause of action under section 107.⁵⁶

The Court based its decision on the plain meaning of section 113 and not on the underlying policy of CERCLA or the nearly twenty years of CERCLA precedent. The Court determined that the language of section 113(f)(1) was clear—an action for contribution under 113(f)(1) may *only* be brought during or following a civil action filed under section 106 or section 107(a).⁵⁷ Justice Thomas disagreed with Aviall’s argument that “may” is permissive and found that the meaning of “may” meant “may only,” although “only” is absent from section 113.⁵⁸ In addition, the Court held that the last sentence of section 113(f)(1) (the savings clause) was present to permit independent contribution actions, such as ones brought under section 113(f)(3)(B), which specifically provides for contribution for a PRP who has resolved its liability to the United States or a state in an administrative or judicially approved settlement.⁵⁹ Finally, because the meaning of section 113(f)(1) was clear, the Court stated that there was no need to “consult the purpose of CERCLA at all.”⁶⁰

The Court’s holding sent a chill through PRPs across the country that have pending contribution claims. Because the Court left open the issue of whether a PRP has an action under section 107, PRPs who have conducted cleanups voluntarily, pursuant to a state order, via an EPA section 106 order, or via an EPA order under the Resource Conservation and Recovery Act do not know whether they have a viable CERCLA action.⁶¹

As these words are written, the controversy between Aviall and Cooper Industries shows no sign of abating. After the case was

53. *Id.* at 681.

54. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 312 F.3d 677 (5th Cir. 2002), *cert. granted*, 540 U.S. 1099 (U.S. Jan. 9, 2004) (No. 02-1192).

55. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577 (2004).

56. *Id.* at 586.

57. *Id.* at 583.

58. *Id.*

59. *Id.* at 583-84.

60. *Id.* at 584.

61. *See id.* at 586.

remanded to the Fifth Circuit, Aviall filed a motion to establish a briefing and argument schedule so that the remaining issues, including Aviall's right to proceed on its claim under section 107, could be resolved by the en banc court.⁶² Cooper opposed the motion and asked that the entire case be remanded to the district court so that all issues could be decided in that forum.⁶³ According to Cooper, additional discovery was necessary to resolve the issue of whether Aviall waived its section 107 claim when it consolidated that claim with its section 113 claim in the amended complaint.⁶⁴

The Fifth Circuit denied Aviall's request for en banc consideration of its right to proceed under section 107 and remanded the case to the district court—with an important instruction.⁶⁵ According to Judge Edith Jones, writing for a unanimous court, the district court was instructed to permit Aviall to amend its complaint to assert “*free of any challenge of waiver or forfeiture*, whatever statutory claims it urges in light of the Supreme Court's decision, without prejudice to Cooper Industries' other defenses.”⁶⁶ Although this language clearly reflects that the Fifth Circuit ruled on Cooper's waiver argument—and rejected it—Cooper promptly filed a petition for mandamus with the United States Supreme Court. In the petition, Cooper argued that the Fifth Circuit's order should be vacated because it conflicted with the Supreme Court's decision that all remaining issues receive “full consideration” by the lower courts.⁶⁷ At this time, the Supreme Court has docketed the petition for mandamus but has not taken any other action. Pursuant to an agreement between the parties, action by the district court is stayed pending the Supreme Court's ruling on the petition for mandamus.⁶⁸

IV. FUTURE OF CONTRIBUTION

With the future of contribution under CERCLA unclear, PRPs may look to state litigation. However, a contribution action in state court rather than federal court is unfavorable for several reasons. Many states do not have statutory contribution or cost recovery actions, so such an

62. See Cooper Industries Petition for a Writ of Mandamus, *In re Cooper Industries, Inc.* (No. 04-1182) app. 19a (U.S. Mar. 4, 2005) (on file with the *Tulane Environmental Law Journal*).

63. *Id.* app. 23a.

64. *Id.* app. 27a.

65. *Id.* app. 35a.

66. *Id.* app. 36a (emphasis added).

67. *Id.* at 5-7.

68. See Unopposed Order Staying Case Pending Further Supreme Court Review (N.D. Tex., Mar. 9, 2005).

action would be impossible.⁶⁹ While other states have statutes that provide for a CERCLA-like contribution action, a PRP that wishes to recover cleanup costs from the federal government (i.e., a major PRP at numerous sites across the country) will likely face the government's assertion of sovereign immunity.⁷⁰ Consequently, federal action is the only option for many.

With the ability to recover costs under section 107 in limbo, responsible parties will have to rely on section 113's prerequisites to recover cleanup costs under CERCLA. Responsible parties must either (1) seek an administrative or judicially approved settlement with the state or EPA; (2) wait to be sued by EPA, the state, or a private party under section 107; or (3) wait to be sued by EPA under section 106.⁷¹

None of these options furthers CERCLA's cause. Rather, they delay cleanups, increase cleanup costs, and shift control of the cleanup from private parties to government agencies.

For example, in order to be sued by EPA under section 106, a party would first have to receive an administrative order from EPA, fail to comply with it and then wait for EPA to sue.⁷² In the meantime, EPA could proceed to conduct the response action on its own, then seek to recover three times the cost of cleanup from the party.⁷³ In addition, the noncompliant PRP could be liable for daily penalties of \$32,500 per day over the course of a cleanup that could last for years.⁷⁴ Because a party receiving a section 106 order generally has no right to pre-enforcement

69. Thirteen states and the District of Columbia appear to have no statutes specifically authorizing a general right of contribution by parties who clean up property contaminated by hazardous substances. These include Colorado, the District of Columbia, Idaho, Iowa, Illinois (*see* *NBD Bank v. Krueger Ringier, Inc.*, 686 N.E.2d 704, 709-10 (Ill. App. Ct. 1997); *Chrysler Realty Corp. v. Thomas Indus.*, 97 F. Supp. 2d 877, 880-81 (N.D. Ill. 2000)), New Mexico, North Dakota (N.D. CENT. CODE § 23-29-16 (2002), limited right of contribution by officers and directors of solid waste landfill disposal facility), Rhode Island, South Carolina (S.C. CODE ANN. § 44-56-750 (1976) provides only for protection from CERCLA contribution if the cleanup is voluntary), South Dakota, Virginia, Wisconsin, and Wyoming.

70. *See* *Maine v. Dep't of Navy*, 973 F.2d 1007, 1010-11 (1st Cir. 1992); *O'Neal v. Dep't of Army*, 742 A.2d 1095, 1099-1101 (Pa. 1999) (dismissing environmental claims against the Army because of sovereign immunity).

71. The Supreme Court declined to determine whether an administrative settlement under section 106 of CERCLA would be sufficient to sue under section 113. One could argue that an administrative order is not a "civil action" and, therefore, would not fall within the plain meaning. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 584 n.5 (2004).

72. *See* CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (2000).

73. *See* CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3).

74. *See* CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004).

review, it would have to sit by helplessly and permit those treble damages and daily penalties to accrue as the cleanup slowly progresses.⁷⁵

If a PRP is conducting a cleanup under state supervision, it may be able to seek an administrative settlement with the state agency and bring an action for contribution under CERCLA section 113(f)(3)(B).⁷⁶ But what constitutes an “administrative settlement” remains to be decided. If a party conducts a cleanup under a state’s voluntary cleanup program and receives a certificate of completion, is that an administrative settlement? Such a certificate should resolve a party’s liability to the state.⁷⁷ This argument would be bolstered further if the EPA has entered into a Memorandum of Understanding with the state, supporting the resolution of liability.⁷⁸

The proper solution may be to revert to the pre-SARA interpretation of section 107 and allow a PRP to file a cost recovery action. Courts will need to reconsider their earlier decisions and find that an action by a PRP against another is available under section 107. The courts have historically disfavored this approach, mainly because it would provide joint and several liability.⁷⁹ But if the defendant files a counterclaim under section 113, this problem is eliminated. At that point, the entire action becomes one for contribution, subject to “equitable factors” as set forth in section 113(f)(1).⁸⁰ In any event, the “voluntariness” of a cleanup is probably not a relevant factor in the analysis. Although the *Aviall* parties sparred over whether “voluntary” cleanups result in “half-baked” remediations, those cleanups still need to be conducted in accordance with the national contingency plan in order to recover costs under CERCLA.⁸¹ This requirement ensures that cleanups, although done voluntarily, are done properly and cost-effectively.⁸²

75. See CERCLA § 113(h), 42 U.S.C. § 9613(h).

76. See CERCLA § 113(f)(3)(B), § 9613(f)(3)(B).

77. See TEX. HEALTH & SAFETY CODE ANN. §§ 361.609-.610 (2001).

78. The EPA has memoranda of understanding with many states regarding voluntary cleanup programs that may preclude or forestall federal enforcement and cost recovery actions. Under section 128 of CERCLA, parties who clean up sites voluntarily may be deemed to resolve their liability to the United States. See CERCLA § 128(b)(1)(A)(ii), 42 U.S.C. § 9628(b)(1)(A)(ii). To the extent that the cleanup is conducted after February 15, 2001, in compliance with a state program that “specifically governs response actions for the protection of public health and the environment,” it may be possible to secure contribution under section 113(f)(3)(B). See Daniel M. Steinway, *The Ramifications of the Aviall Decision: Where Do We Go from Here?*, 20 TOXICS L. RPTR. 190, 194 (Feb. 17, 2005).

79. See *infra* Part II.C.

80. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

81. See CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

82. 40 C.F.R. § 300.700(c)(3)(i) (2004).

V. CONCLUSION

In much the same way as Bilbo Baggins, we have indeed been “There and Back Again.”⁸³ We also have returned with something quite unexpected and, indeed, something that upsets traditional and settled expectations—something that threatens the fabric so carefully developed to allocate environmental liabilities equitably among responsible parties—and something that, for almost twenty years, *worked* to promote the protection of our nation’s environment. Only recalcitrant polluters can conclude that they are better off after the Supreme Court’s ruling than they were before.

For the first time in almost two decades, CERCLA is in a state of confusion and uncertainty as to whether responsible parties have a cause of action under CERCLA if they clean up a site voluntarily, under state supervision, or under an EPA consent decree. It may be several years before this issue makes its way back up to the Supreme Court and, of course, there is no assurance that the Supreme Court will review the issue even if it is presented. In the meantime, parties can appeal to Congress to clarify section 113, look to EPA or the states to initiate litigation or generate administrative settlements, or take their chances with proceeding solely under section 107. The only alternative is to seek cost recovery in state court under state environmental statutes—and, as noted above, that is not always a viable option.

83. In J.R.R. Tolkien’s *The Hobbit: or There and Back Again* (1937), the author chronicles the adventures of Bilbo Baggins, who returns from his fantastic journeys with a golden ring—an instrument that ultimately plunges the world into chaos in *The Lord of the Rings* (1993).