

The Right of Contribution Under CERCLA After *Cooper Industries v. Aviall Services*

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I.	INTRODUCTION	339
II.	BACKGROUND OF COOPER INDUSTRIES V. AVIALL SERVICES.....	340
	A. <i>The Cooper Industries Decision</i>	342
	B. <i>The Decision's Impact</i>	344
	1. The Unavailability of Section 107(a)(4)(B) to PRPs.....	345
	2. The Availability of Section 107(a)(4)(B) to Other Persons	350
III.	ACHIEVING CERCLA'S PURPOSES	352

I. INTRODUCTION

In the wake of the United States Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc. (Cooper Industries)*,¹ environmental law observers have speculated about the impact of the Court's decision restricting contribution actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² The Court's holding in *Cooper Industries*—that the federal right of contribution found in section 113(f)(1) of CERCLA is

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1. 125 S. Ct. 577 (2004).
2. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000).

available only “during or following” a civil action brought under CERCLA’s abatement and liability provisions, sections 106 and 107(a)—has raised questions as to whether potentially responsible parties (PRPs) who voluntarily engage in site cleanup activities have any other avenue for obtaining, either directly or indirectly, federal contribution under CERCLA for their expended response costs.³ This Article addresses the questions and discusses why the Supreme Court’s interpretation of section 113 effectively closes all other doors to federal contribution under CERCLA, and, by so doing, best advances the policy objectives that initially prompted enactment of that legislation.

II. BACKGROUND OF *COOPER INDUSTRIES V. AVIALL SERVICES*

Cooper Industries involved the voluntary cleanup by Aviall Services, Inc. (Aviall) of four aircraft engine maintenance facilities located in and around Dallas, Texas. Aviall purchased the facilities in 1981 from Cooper Industries, Inc. (Cooper) and conducted engine maintenance activities there for the next several years. In 1984, without any prompting or involvement by state or federal environmental authorities, Aviall initiated an environmental cleanup of the facilities. Three years into the cleanup, Aviall contacted the Texas Natural Resource Conservation Commission (TNRCC) about the alleged contamination of the facilities. The TNRCC exchanged several letters with Aviall about the condition of its properties, but it took no judicial or administrative enforcement action. Aviall did not contact the Environmental Protection Agency (EPA), which remained unaware of the alleged contamination and of Aviall’s remediation activities. Aviall continued its cleanup of the facilities until approximately 1994, allegedly spending some \$5 million. During 1995 and 1996, Aviall sold all four facilities to other parties, but retained responsibility for any additional cleanup that might be necessary.

In August 1997, Aviall filed a complaint against Cooper in the federal district court for the Northern District of Texas, seeking recovery of its cleanup costs. As originally filed, the complaint included one count for direct recovery of its costs under CERCLA’s section 107(a) and another count for CERCLA contribution under section 113(f)(1).⁴ Aviall also asserted several claims under Texas state law. In January 1999, Aviall filed a First Amended Complaint that (1) dropped its count for

3. *Cooper Indus.*, 125 S. Ct. at 577 (interpreting the federal right of contribution under CERCLA §§ 106-107, 113(f)(1), 42 U.S.C. §§ 9606-9607, 9613(f)(1)).

4. CERCLA §§ 107(a), 113(f)(1), 42 U.S.C. §§ 9607(a), 9613(f)(1) (CERCLA’s liability and contribution provisions, respectively).

direct cost recovery under section 107(a); (2) retained its contribution claim under section 113(f)(1), asserting that, as a PRP within the meaning of section 107(a), Cooper was a proper defendant; and (3) added two contribution claims that arose under two Texas state environmental laws.

Cooper moved for summary judgment on Aviall's claim for contribution under section 113(f)(1), which provides:

(1) Contribution. 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.⁵

Cooper argued that, because Aviall had not been the subject of a civil action brought under CERCLA section 106 or section 107(a), it failed to satisfy section 113(f)(1)'s "during or following" requirement. The district court agreed and granted Cooper's motion. Aviall appealed to the United States Court of Appeals for the Fifth Circuit, and on August 14, 2001, a divided panel of the court of appeals affirmed, holding that a PRP such as Aviall "seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it."⁶

Aviall successfully moved for a rehearing en banc, and on November 14, 2002, a divided Fifth Circuit reversed the panel decision.⁷ Focusing on the last sentence of section 113(f)(1)—which provides 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 under section 9606 of this title or section 9607 of this title"⁸—the circuit court majority concluded that this savings clause language expanded the more limited right of contribution found in section 113(f)(1)'s first sentence. More specifically, it was the majority's view that the savings clause's directive, that "[n]othing . . . shall diminish" any contribution rights

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

6. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 138-39 (5th Cir. 2001).

7. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 679 (5th Cir. 2002) (en banc).

8. *Id.* at 680; CERCLA § 113(f)(1); 42 U.S.C. § 9613(f)(1).

maintainable in the absence of a section 106 or section 107(a) civil action, independently created a broad federal right of contribution that could be brought even though no section 106 or section 107(a) civil action was pending or had been adjudicated.⁹ Three members of the en banc court dissented, arguing that the majority's enlargement of the savings clause impermissibly swallowed the limited right of contribution created by section 113(f)(1)'s enabling clause.¹⁰

Cooper petitioned for a writ of certiorari on February 12, 2003, seeking Supreme Court review of the question:

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107(a), 42 U.S.C. §§ 9606 or 9607(a), may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.¹¹

The Supreme Court granted the writ on January 9, 2004, heard oral arguments on October 6, 2004, and reversed the Fifth Circuit by a 7-2 vote on December 13, 2004.¹² The Court held that Aviall's section 113(f)(1) suit must be dismissed because it had not been commenced "during or following" adjudication of one of the prerequisite CERCLA civil actions.¹³

A. *The Cooper Industries Decision*

The Supreme Court majority, in an opinion by Justice Thomas, first recognized that the legislative impetus for enacting the *express* right of contribution codified in section 113(f)(1) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) was to confirm the availability of CERCLA contribution (previously made available by judicial implication only) to private entities that had been sued by the government or private parties in cost recovery actions.¹⁴ Tellingly for Congress, in two pre-SARA decisions, the Supreme Court had refused to read an implied right to contribution in other federal statutes because in neither case was it expressly authorized by the legislation.¹⁵ The Court also

9. Aviall Servs., 312 F.3d at 681.

10. *Id.* at 693 (Garza, J., dissenting); CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

11. Petitioner's Brief at *i, 2004 WL 341586, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577 (2004).

12. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 583 (2004).

13. *Id.* at 584.

14. *Id.* at 581; SARA, Pub. L. No. 95-510, 94 Stat. 2795 (amended 1986).

15. See *Cooper Indus.*, 125 S. Ct. at 581. The majority cited *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638-47 (1981), where the Court "refuse[d] to recognize implied common law right to contribution in the Sherman Act or Clayton Act" and *Northwest*

observed that SARA created a separate express right of contribution in section 113(f)(3)(B) for a person who had resolved its liability with the federal or state government in an administrative or judicially approved settlement.¹⁶ Thus, with the enactment of SARA, CERCLA contained two explicit rights to contribution: one found in section 113(f)(1), and the other in section 113(f)(3)(B).¹⁷

With this passing nod to section 113(f)'s origins,¹⁸ the Court focused on the statutory text, and why, by its very terms, "[s]ection 113(f)(1) does not authorize Aviall's suit."¹⁹ The "natural meaning" of section 113(f)(1)'s first sentence, Justice Thomas observed, was to authorize contribution suits only upon the occurrence of the conditions specified—i.e., "during or following" a civil action.²⁰ Thus, neither the terminology nor phraseology of the enabling clause supported Aviall's contention that the sentence's use of the word "may" carried a more permissive connotation.²¹ The Court rejected Aviall's urging that section 113(f)(1)'s savings clause be read as the Fifth Circuit majority had held, i.e., to authorize contribution actions at any time, regardless of an underlying section 106 or Section 107(a) civil action.²² To do so, the Court ruled, would render superfluous not only the "during or following" language of section 113(f)(1), but also the express right of contribution authorized by section 113(f)(3)(B) following a settlement.²³

The *Cooper Industries* opinion also discusses what the Court did not decide. Noting that Aviall had neither raised nor discussed in the lower courts whether PRPs might have an alternative implied right of

Airlines, Inc. v. Transport Wonders, 451 U.S. 77, 90-99 (1981), where the Court "refuse[d] to recognize implied or common-law right to contribution in the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964." *Id.*

16. *Id.* at 581-82. Section 113(f)(3)(B) states:

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 a party to a settlement referred to in [section 113(f)(2)].

CERCLA § 113 (f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (2000).

17. *Cooper Indus.*, 125 S. Ct. at 582; CERCLA §§ 113(f)(1), 113(f)(3)(B), 42 U.S.C. §§ 9613(f)(1), 9613(f)(3)(B).

18. According to the Court, the straightforward meaning of section 113(f)(1)'s text obviated any need to look further to the purpose or policies behind CERCLA. *Cooper Indus.*, 125 S. Ct. at 584.

19. *Id.* at 583.

20. *Id.*; CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

21. *Cooper Indus.*, 125 S. Ct. at 583.

22. *Id.*

23. *Id.* The Court read the savings clause in section 113(f)(1)'s last sentence as having the limited impact of rebutting any presumption that the express right of contribution created by that provision is the exclusive cause of action for contribution available to a PRP. *Id.* at 583-84.

contribution under section 107(a)(4)(B)'s cost recovery provision, the majority declined the invitation to decide that issue.²⁴ It observed that numerous federal appellate courts have uniformly held section 107(a) is unavailable to PRPs for purposes of seeking cost recovery from other PRPs²⁵ and expressed concern about deciding, without the benefit of briefing and a more direct ruling below, the correctness of those appellate decisions,²⁶ or, if incorrect, the "significant issue" of whether section 107(a) supports an alternative contribution right by implication.²⁷ Accordingly, the majority simply noted that the Court has previously rejected attempts to read an implied right of contribution into federal statutes.²⁸

Justices Ginsburg and Stevens dissented, not expressing disagreement with the majority's interpretation of section 113(f)(1), but criticizing the Court's refusal to find that section 107(a) "enable[s] a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred."²⁹ In the opinion of those two Justices, the Court's earlier decision in *Key Tronic Corp. v. United States*³⁰ compelled such a conclusion, with the only disagreement on the Court in that case being whether the section 107(a) right of action was express or implied under the statute.³¹ There was thus no need, Justice Ginsburg wrote, for "protracting this litigation" with a remand to the Fifth Circuit for a decision on the section 107(a) issue.³² In the dissenters' view, the Court should have addressed it in *Cooper Industries*, and found an alternative right of contribution available to Aviall under section 107(a)(4)(B).³³

B. *The Decision's Impact*

With the *Cooper Industries* ruling, the Supreme Court has ended all controversy as to the availability of contribution suits by PRPs under section 113(f)(1) of CERCLA. Section 113(f)(1) actions can and must

24. *Id.* at 584-85.

25. *Id.* at 585; *see, e.g.*, *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998).

26. *Cooper Indus.*, 125 S. Ct. at 585.

27. *Id.*

28. *Id.* at 586 (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91-95 (1981)).

29. *Id.* at 587.

30. 511 U.S. 809, 816 (1994).

31. *See Cooper Indus.*, 125 S. Ct. at 587.

32. *Id.* at 588.

33. *Id.*

be brought against other PRPs only “during or following” a section 106 or section 107(a) civil action.³⁴

To be sure, the dissent suggests that a PRP might still be able to pursue a separate section 107(a)(4)(B) suit “in the nature of contribution” against other PRPs for recovery of cleanup costs.³⁵ However, neither the language of section 107(a) itself, nor the legislative determination to add section 113(f) in order to create an explicit right of contribution under CERCLA, seems to support implying such a cause of action under section 107(a).³⁶ Moreover, with the enactment of SARA, past efforts by PRPs to invoke section 107(a)(4)(B)’s cost recovery provisions in this manner have been uniformly rejected by every federal appeals court to have entertained the question.³⁷ Thus, only two federal statutory options remain for a PRP seeking contribution from another PRP for costs spent to clean up hazardous waste contamination, and both reside in section 113(f)—either “during or following” a section 106 or section 107(a) civil action, or following an administrative or judicially approved settlement of an existing cleanup claim with either state or federal environmental authorities.³⁸

1. The Unavailability of Section 107(a)(4)(B) to PRPs

With the enactment of section 113, numerous federal appeals courts have concluded that Congress’s addition of an explicit right of federal contribution through the enactment of SARA superseded and supplanted any implied right of contribution that may have previously been judicially

34. *Id.* at 584; CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000).

35. *Cooper Indus.*, 125 S. Ct. at 587-88.

36. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

37. *See* *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (stating “[t]he district court in the present case properly held that [plaintiff] could not pursue a § 107(a) cost recovery claim against [other PRPs] due to its status as a potentially responsible person . . . CERCLA § 113(f) plainly governs such contribution actions”); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (stating that “[a]s the case before the court involves entirely potentially responsible parties, such parties must seek contribution under section 9613”); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1316 (9th Cir. 1997) (stating that “[b]ecause a claim asserted by a PRP under § 107 requires the application of § 113, a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113”); *see also* *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 355 (6th Cir. 1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colo. & G.R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *Amoco Oil v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

38. *See* *Cooper Indus.*, 125 S. Ct. at 584; CERCLA §§ 113(f)(1), 113(f)(3)(B), 42 U.S.C. §§ 9613(f)(1), 9613(f)(3)(B).

recognized under section 107(a) of CERCLA.³⁹ Thus, the question as to whether section 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.”⁴⁰

Moreover, strong statutory and policy reasons mandate a post-SARA reading of CERCLA in precisely the manner counseled by the federal appeals courts. There is the language of section 107(a), which identifies the four categories of “covered persons” who may be held jointly and severally liable for the costs of cleaning up hazardous waste sites.⁴¹ These “covered persons” include essentially private PRPs who own or owned contaminated property, who transported or assisted in the transport of hazardous substances, and/or who contributed (in whole or in part) to a contaminated condition.⁴² On its face, section 107(a) reserves private rights of action to “any other person” seeking to recover from these “covered” PRPs whatever necessary response costs that “other person” may have legitimately incurred.⁴³ While not entirely free from doubt,⁴⁴ a reasonable interpretation of this provision, particularly

39. As stated in the House Report, SARA’s section 113(f) was understood as a codification of the implied right of contribution that some federal courts had found to exist under section 107(a), the enactment of which was intended 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.” H.R. REP. NO. 99-253, pt. 1, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2861.

40. While one might arguably view the Seventh Circuit’s decision in *Rumpke v. Cummings*, 101 F.3d 1235 (7th Cir. 1997), as suggesting otherwise, that seems most unlikely. The very reason that *Rumpke* allowed the plaintiff to maintain his section 107(a) suit was because it was *not* an action for contribution between joint tortfeasors, but was an action for cost recovery by, in the Seventh Circuit’s view, a wholly innocent landowner (who was not at all involved in contaminating the site) against the party who was in fact principally responsible for the contaminated condition. *See* discussion *infra* Part II.B.2.

41. CERCLA § 107(a), 42 U.S.C. § 9607(a).

42. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). Specifically, the “covered persons” categories of statutorily identified individuals or entities who may be held liable for CERCLA cleanups include: (1) current owners and operators of vessels or facilities where hazardous substances were disposed of, (2) past owners or operators of any such facilities, (3) persons who arranged for transport for disposal or treatment of hazardous substances, and (4) persons who accepted any such substances for transport to disposal or treatment facilities. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

43. CERCLA § 107(a), 42 U.S.C. § 9607(a); *see* *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

44. In *Key Tronic*, the Supreme Court was not called upon to decide the extent or scope of the private right of action available under section 107(a), although all the Justices seemed inclined to recognize that a private action to recover “necessary” response costs from a PRP was available, either explicitly or by clear implication. *See* *Key Tronic*, 511 U.S. at 822 (Scalia, Blackmun, and Thomas, JJ., dissenting) (arguing for explicit recognition); *id.* at 818 (Stevens, J., writing for the majority) (finding clear implication). By the time the Supreme Court reviewed *Key Tronic*, that case dealt not with the recovery of cleanup costs, but with whether a PRP could recover legal fees spent in the investigatory effort to identify other involved “covered persons”;

given its structure, is that the “other persons” identified in subparagraph B refer to private parties *other than* those individuals described in section 107(a)(1)-(4) as “covered” PRPs.⁴⁵

Those “other persons” can pursue a direct “cost recovery” action under section 107(a) precisely because the section 113(f) right of contribution is not available to them.⁴⁶ They, unlike the past or present owners, transporters, or polluters of the contaminated facility—all of whom qualify as “covered persons”—are not actual or potential joint tortfeasors who bear strict liability for CERCLA cleanups.⁴⁷ Responsible parties, on the other hand, *must* pursue federal recovery of their necessary response costs from one another under section 113(f)’s contribution provisions (assuming the conditions are met),⁴⁸ since, by reason of Congress’s enactment of that explicit right of action, PRPs no longer have any implied CERCLA right of action for contribution costs under section 107(a).⁴⁹

the Supreme Court held that it could not. *Id.* at 820-21. *Key Tronic* is therefore not helpful in resolving the precise issue of whether a PRP can use section 107(a) to pursue other PRPs for recovery of actual cleanup costs “in the nature of contribution,” and certainly does not conflict with or contradict the federal circuit court decisions cited above that have held section 107(a) to be unavailable to PRPs for such purposes.

45. Section 107(a) first identifies “covered persons,” and then specifies in its following subparagraphs A and B two separate categories of injured parties who may pursue those “covered persons” for necessary response costs, one being governmental or quasi-governmental parties and the other being private parties, respectively. Since subparagraphs A and B each provide independent rights of action, and are tied not by text and syntax to one another, but instead to the provision’s lead-in “covered persons” language, the most common sense—and certainly not at all absurd—interpretation of the second subparagraph would be to read the private right of action found in subparagraph B as belonging to persons other than the “covered persons” identified in section 107(a)(1)-(4). CERCLA § 107, 42 U.S.C. § 9607. *See generally* *Lamie v. United States*, 124 S. Ct. 1023, 1030 (2004) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”)

46. *See In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc. v. Cummings Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 1000 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). Both section 113(f)(1) and the federal common law recognized a right of contribution to exist only between joint tortfeasors. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 586 (2004) (interpreting section 113(f)(1)); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634 (1981) (common law).

47. *See Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 87-88 (1981) (stating that a right of contribution “is recognized when 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” (emphasis added)).

48. *See Cooper Indus.*, 125 S. Ct. at 584; CERCLA § 113(f), 42 U.S.C. § 9613(f).

49. *See Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998), and cases cited therein; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989). The floor debate and House Reports on the SARA amendments make it abundantly clear that enactment of an explicit federal right of contribution in section 113(f) was intended to codify and supplant the

To underscore the import of SARA's codification, section 113(f)(1)'s enabling clause, contained in the provision's first sentence, was intended to, and did in fact, extinguish all judicially implied federal rights of contribution that PRPs had theretofore been allowed to assert in a section 107(a) civil action,⁵⁰ replacing the implied federal right with an explicit one.⁵¹ Section 113(f)(1)'s savings clause, contained in the provision's last sentence, makes no attempt to resurrect that replaced implied right—preserving “undiminished” only those rights of contribution available *in the absence of* a section 107(a) action,⁵² while affording no protection whatsoever to private rights of contribution previously dependent upon *an accompanying* section 107(a) action.⁵³

implied right of contribution that some federal courts had theretofore read into section 107(a). On the legislative language that eventually went to conference, Senator Stafford observed during the floor debate: “It was and is my understanding that the amendment is solely to correct a difficulty which some third-party plaintiffs are encountering in obtaining joinder of third-party defendants in claims for contribution under CERCLA.” 131 CONG. REC. S12021 (daily ed. Sept. 24, 1985) (statement of Sen. Stafford). Senator Specter echoed that same sentiment, stating: “defendants under Superfund should have a right of contribution to bring in additional defendants so that all parties may be before the court at the same time to determine issues of liability and damages with the appropriate determination as to contribution and/or indemnification.” 131 CONG. REC. S10852 (daily ed. Aug. 1, 1985) (statement of Sen. Specter); *see also* H. REP. NO. 99-253, p. 1, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (confirming that the legislation intended to validate holdings of federal court cases where contribution was allowed during pending section 107(a) enforcement actions); H. REP. NO. 99-253, pt. 1, at 80 (stating that the provision intended to allow all counterclaims, cross-claims and third-party actions to be dealt with in a single action).

50. *See Cooper Indus.*, 125 S. Ct. at 581-82.

51. The explicit right of action in section 113(f)(1) allows a PRP, through impleader, to maintain a federal contribution cause of action against other PRPs under section 113(f)(1) that will authorize a judicial allocation of costs among the joint tortfeasors as an element of the underlying section 107(a) remedy. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (observing that SARA “now expressly authorizes a *cause of action* for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping *remedy* in section 107” (emphasis added)).

52. As the Supreme Court recognized in *Cooper Industries*, section 113(f)(1)'s savings clause preserved, undiminished, those rights of contribution available to PRPs, such as Aviall, in other contexts, such as state law. *See Cooper Indus.*, 125 S. Ct. at 583-84. Also saved by section 113(f)(1)'s last sentence was the newly created federal right of contribution under section 113(f)(3)(B). *Aviall Servs. Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 138-39 (5th Cir. 2001).

53. It is doubtful that Ninth Circuit precedents suggesting a PRP could perhaps pursue other PRPs for federal contribution in a private, hybrid action brought under both section 107(a) and section 113(f)(1) can survive *Cooper Industries*. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) (suggesting that one PRP can seek contribution from another PRP by suing under both sections); *W. Props. Servs. Corp. v. Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004) (suggesting that a private, hybrid section 107(a) and section 113(f)(1) suit might satisfy the “during” requirement under section 113(f)(1)'s enabling clause). A PRP's section 113(f)(1) claim in such circumstances is not being advanced “during or following” the civil enforcement actions specified in section 113(f)(1)'s enabling clause, *see Cooper Indus.*, 125 S. Ct. at 584, and is, moreover, necessarily being maintained *in the presence of* a section 107(a) lawsuit, which finds no protection or validation in section 113(f)(1)'s savings clause. *See CERCLA*

This relatively restrictive right of contribution under CERCLA seems most consistent with the overall statutory scheme of the SARA amendments. The three-year limitations period in section 113(g)(3), for example, applies only to PRP contribution actions brought under section 113(f)(1) or section 113(f)(3)(B).⁵⁴ Nowhere does SARA provide a corresponding statute of limitations for section 107(a) suits “in the nature of contribution.”⁵⁵ As the Supreme Court observed in *Cooper Industries*, CERCLA’s statutory structure reflects a congressional codification of only a limited federal right of contribution under section 113(f),⁵⁶ and in fact undermines the Fifth Circuit’s suggestion that some more general open-ended contribution right can be found to reside as well (by implication or otherwise) elsewhere in CERCLA.⁵⁷

Any suggestion that section 107(a) offers some other federal recourse to PRPs seeking a contribution remedy under CERCLA is further undermined by the settlement scheme that Congress devised with its enactment of section 113’s contribution provision.⁵⁸ Specifically, under the SARA amendments, those who settle their cleanup claims with federal or state authorities receive an explicit right of contribution against other PRPs under section 113(f)(3)(B), as well as statutory protection under section 113(f)(2) from possible future contribution actions by other responsible parties.⁵⁹

Protecting the integrity of this legislative scheme to incentivize settlements was a key factor for the federal circuit courts in universally determining that parties responsible for the site contamination may not assert section 107(a) actions seeking to recover their cleanup costs from

§ 113(f)(1), 42 U.S.C. § 9613(f)(1) (preserving only contribution claims brought *in the absence of* section 106 or section 107(a) civil actions).

54. See CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3).

55. The question of what limitations period might apply to a claim of contribution in a private suit under section 107(a) met with different judicial responses prior to the *Cooper Industries* decision, from adoption of the six-year statute of limitations applicable to section 107(a) “cost recovery” actions under section 113(g)(2) in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), to use of section 113(g)(3)’s three-year statute of limitations in *United Technologies Corp. v. Browning-Ferris Industries*, 33 F.3d 96 (1st Cir. 1994), to finessing the issue altogether in *Sun Co. v. Browning Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), where the six-year statute of limitations applied to actions that did not trigger events listed in section 113(g)(3), while a three-year limitations period applied to actions that did trigger such events.

56. 125 S. Ct. at 584.

57. See *Aviall Servs., Inc., v. Cooper Indus., Inc.*, 312 F.3d 677, 687 (5th Cir. 2001).

58. CERCLA § 113(f), 42 U.S.C. § 9613(f).

59. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (citing *United Techs. Corp.*, 33 F.3d at 100; *Centerior Servs. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 244, 349 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *In re Reading*, 115 F.3d 1111, 1114 (3d Cir. 1997).

other responsible parties, but must instead must seek contribution under section 113(f)(1). For example, in *In re Reading*, the United States Court of Appeals for the Third Circuit observed:

If a party could end run § 113(f)(2) and (3) by suing a settling party under § 107(a)(4)(B) for “costs of response,” the settlement scheme would be bypassed. The incentive to early settlement would disappear, and the extent of litigation involved in a CERCLA case would increase dramatically. Consent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses.⁶⁰

The United States Court of Appeals for the First Circuit used similar reasoning in *United Technologies Corp. v. Browning-Ferris Industries*, noting that section 113(f)'s mechanism for encouraging settlements would be “gutted” by allowing private parties who contributed to the contamination to maintain section 107(a) cost recovery actions against other potentially responsible parties prior to any government assessment of CERCLA liability.⁶¹ Thus, as previously indicated, the federal circuits have steadfastly barred PRPs from pursuing the contribution remedy through a CERCLA section 107(a) suit, and required them, instead, to utilize section 113(f) to obtain such relief.⁶² These decisions appear to be firmly grounded, both in the basic principles of statutory construction and in the policies Congress sought to advance through CERCLA.

2. The Availability of Section 107(a)(4)(B) to Other Persons

The foregoing reading of section 107(a) still leaves that provision available for private “cost recovery” actions by individuals or entities other than “covered persons,” for example, those who contract to remove (with no prodding from government authorities) hazardous substances that may have seeped or intruded upon adjacent land of an unsuspecting owner. The exact profile of who might fit within this Good Samaritan category has not been etched in stone. However, it is probably safe to say that (1) persons owning sites they knowingly contaminated, (2) persons purposefully transporting a hazardous substance, or (3) persons responsible for disposing of pollutants at or near a contaminated facility, would not qualify. At the other extreme, an independent contractor who contracts to clean up premises that became contaminated unbeknownst to

60. 115 F.3d at 1119.

61. 33 F.3d at 103.

62. See cases cited *supra* note 37.

the landowner (due to a hazardous discharge nearby, for example) is probably certifiably “innocent” enough to seek section 107(a) cost recovery.

Whether the actual, unsuspecting owner of the contaminated property can escape the “covered persons” provision⁶³ upon showing that it neither caused nor knew of the hazardous discharge—and is therefore, in very practical terms, an “innocent landowner”—is far more problematic. In such circumstances, the United States Court of Appeals for the Seventh Circuit seems to have fashioned an exception that would allow such an “innocent landowner” to pursue responsible parties for expended cleanup costs under section 107(a), reasoning that such a landowner was plainly not a joint tortfeasor seeking a shared distribution of costs with other liable parties, and as such should be treated differently, as an innocent bystander desirous of a full recoupment of its cleanup costs from the actual polluters of the premises.⁶⁴ The United States Court of Appeals for the Second and Ninth Circuits, however, seem to disagree.⁶⁵

The ultimate resolution of the circuit split on this discrete section 107(a) issue likely will have little impact, however, on the overall understanding of CERCLA, post-*Cooper Industries*, insofar as the statute provides federal rights of action to pursue cleanup response costs. The government enforcement apparatus in this regard under section 106 and section 107(a) is clear.⁶⁶ Responsible parties, i.e., “covered persons,” pursued in a civil action under either of these two provisions may seek contribution under section 113(f)(1),⁶⁷ or under section 113(f)(3)(B), if

63. See CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

64. See *Rumpke of Ind., Inc. v. Cummings Engine Co.*, 107 F.3d 1234, 1240 (7th Cir. 1997) (“[W]e see nothing in the language of § 107(a) that would make it unavailable to a party suing to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs (*i.e.*, where it is seeking to recover on a direct liability theory, rather than trying to divide up its own liability for someone else’s injuries among other potentially responsible parties.”). The Seventh Circuit held in *Rumpke* that the allegedly “innocent landowner” could not seek contribution from the actual PRPs under section 113(f)(1) because it was not the subject of a pending or adjudicated section 106 or section 107(a) civil action. 107 F.3d at 1241; see also *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

65. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 425 (2d Cir. 1998) (declining to adopt an “innocent landowner” exception as creating a new defense not contemplated by CERCLA); *W. Props. Servs. Corp. v. Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004) (rejecting argument that a section 107(a) suit could be brought by “innocent landowners”).

66. See CERCLA § 106(a), 42 U.S.C. § 9606(a) (providing that the EPA may issue an administrative order or bring a civil action to compel PRPs to undertake response actions that EPA will monitor); CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (providing that the United States or a State may recover response costs against “covered persons”).

67. While not decided in *Cooper Industries*, a section 106 administrative resolution is different from a section 106 civil action and may well not serve as the predicate needed to

they obtain an administratively or judicially approved settlement of the government claims with federal or state environmental authorities; for the reasons previously stated, however, they may not sue PRPs for contribution under section 107(a). Parties with no culpability for the contaminated condition and with no past or present ownership interest in the polluted property or facility—who are, therefore, removed from the group of candidates potentially vulnerable to the section 106 or 107(a) predicate civil action needed to maintain a section 113(f)(1) suit for contribution—would qualify under section 107(a)(4)(B) as “other persons” (i.e., noncovered persons). Consequently, they may bring a private right of action under that provision to recover their expended cleanup costs and expect to prevail, so long as the hazardous substance was removed in accordance with the national contingency plan.⁶⁸

III. ACHIEVING CERCLA’S PURPOSES

Does this reading of the contribution and cost recovery provisions of CERCLA disserve the statute’s overall purposes? We submit that it does not.

Congress first felt compelled to legislate in this area in 1980, due to what appeared to be a noticeable increase in the number of hazardous waste sites around the country, and a disturbingly indifferent response from the private sector to building pressure from government authorities and environmental groups for prompt and comprehensive remediations.⁶⁹ Voluntary cleanup efforts had been, at best, sporadic, and, too often, far too superficial.⁷⁰ CERCLA was thus enacted to give the federal government “the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.”⁷¹

maintain a contribution action under section 113(f)(1). 125 S. Ct. at 584 n.5; *cf.* FED. R. CIV. P. 2 (providing that a “civil action” is understood to mean a judicial proceeding), *with* *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 351-52 (6th Cir. 1998) (suggesting that a section 106(a) administrative order is sufficient compulsion to allow section 113(f)(1) contribution).

68. Section 107(a)(4)(B) of CERCLA requires that response costs recoverable under this provision must be expended in accordance with the national contingency plan, 42 U.S.C. § 9607(a)(4)(B). *See also* *Morrison Enter. v. McSares, Inc.*, 302 F.3d 1127, 1135-36 (10th Cir. 2002).

69. *See generally* H. REP. NO. 96-1016, pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119.

70. *See id.*

71. *Deadham Water Co. v. Cumberland Farm Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)); *see also* *Witco Corp. v. Beakhuis*, 38 F.3d 682, 688 (3d Cir. 1994); *Sidney S. Anst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *Kaiser Aluminum & Chem.*

There is little to suggest that Congress created CERCLA's enforcement scheme as a "stick" to prod independent, voluntary remediations of Superfund sites. Indeed in promulgating CERCLA's implementing policies in the early 1980s, the EPA saw the statute as facilitating government-sponsored cleanups, not as encouraging wholly unsupervised private remediation activities. Thus, the agency defined "voluntary response" sites entitled to placement on the National Priorities List as those sites where a private party was taking response action pursuant to a consent order or an agreement to which the EPA was a party—i.e., in the context of a negotiated settlement.⁷² Answering concerns that these "voluntary response" sites failed to acknowledge cleanup efforts undertaken without formal EPA agreement, the EPA explained:

*EPA studies have shown that many of the response actions undertaken by private parties outside the sanction of EPA consent agreements have not been successful. Furthermore, some private parties have represented routine maintenance or waste management activities as response actions, thereby leading to the conclusion that only after a thorough technical review can the Agency describe actions by private parties as "responses." Thus EPA believes that to describe actions taken outside consent orders as "response" would in many instances be misleading to the public as EPA cannot assure the public that the actions are appropriate, adequate, consistent with the NCP, and are being fully implemented. Therefore, the Agency encourages any responsible parties who are undertaking voluntary response actions at NPL sites to contact the Agency to negotiate consent agreements.*⁷³

Further clarifying its position, the EPA declared that if responsible parties wished to undertake voluntary response actions without first engaging and settling with the agency, the EPA still had to sanction the cleanup, and if the remedial steps taken were not adequate, the PRPs who acted voluntarily could still be subject to enforcement action.⁷⁴ Other early EPA policy statements reflected a similar lack of confidence in cleanup activities performed on a purely voluntary basis by private PRPs, emphasizing that all such remediation efforts should occur pursuant to

Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (11th Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 167 n.8 (4th Cir. 1988).

72. Amendment to National Oil and Hazardous Substance Contingency Plan; 48 Fed. Reg. 40658, 40661 (Sept. 8, 1983).

73. *Id.* (emphasis added).

74. *See id.*

“negotiated settlements” with the agency so as to reduce litigation, including later litigation by other PRPs concerning the same site.⁷⁵

The regulatory incentives aimed at encouraging PRPs to involve the federal government, and particularly the EPA, in all Superfund cleanups became a feature of the SARA amendments in 1986. Thus, the right of contribution itself was, as the Supreme Court affirmed in *Cooper Industries*, made available under section 113(f)(1) solely to PRPs initiating response actions “during or following” enforcement suits under section 106 and section 107(a).⁷⁶ Moreover, the only other “federal contribution” door opened by SARA allowed one PRP to pursue another for an apportionment of cleanup costs under section 113(f)(3)(B), but only after the party seeking contribution had first secured an administratively or judicially approved settlement with the state or federal environmental authorities.⁷⁷

That this grand design of SARA was wholly intentional seems self-evident both from the amendment’s language and from the regulatory underpinnings codified by section 113(f). It is further reflected in the addition of section 113(f)(2), which protects PRPs who first settle their claims with the government from facing contribution claims by others.

The *Cooper Industries* decision keeps this well crafted statutory scheme intact. Purely voluntary cleanups of Superfund sites, without government involvement or supervision, were never CERCLA’s objective. Indeed, just the opposite is true.⁷⁸ Nor did SARA’s addition of an explicit right of contribution to the statute in section 113(f) signal any congressional change of heart or direction. The *Cooper Industries* Court thus properly rejected the Fifth Circuit’s effort to engraft onto section 113(f)(1)’s savings clause a free-standing federal right of contribution, wholly unhinged from any governmental involvement or oversight.⁷⁹ For similar reasons, as discussed above, all suggestions that the judiciary might still be able to fashion by implication a similar free-standing right of contribution under section 107(a) of CERCLA are equally unpersuasive.⁸⁰ To be sure, where Congress has seen fit to promote pure voluntarism to address environmental concerns, it has done so clearly

75. See Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5038 (Feb. 5, 1985).

76. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 584 (2004).

77. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B); see also *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 138-39 (5th Cir. 2001).

78. See *supra* note 72 and accompanying text.

79. See *Cooper Indus.*, 125 S. Ct. at 583-84.

80. See *id.* at 586 (recalling earlier Supreme Court decisions that refused to imply rights of contribution into federal statutes).

and emphatically.⁸¹ Promoting voluntarism was not, however, the essential purpose of the CERCLA legislation, nor of the SARA amendments thereto, and it is CERCLA's essential purposes to which the Supreme Court's decision in *Cooper Industries* remains faithful.

81. In 2001, Congress enacted the Brownfields Revitalization and Environmental Restoration Act, Pub. L. 107-118, tit. II, 115 Stat. 2356 (2001). Hazardous waste sites not placed on the National Priorities List—which essentially targets the worst of the hazardous waste locations (i.e., the Superfund sites) for federal intervention under CERCLA are—pursuant to the Brownfields legislation, subject to state and local oversight under EPA-endorsed “brownfields” programs. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 374 (1986). These programs facilitate voluntary, privately funded cleanups with minimal governmental involvement, with primary responsibility for identifying and following through on the remediation at designated “brownfields” sites delegated to State and local authorities. See CHARLES BARTSCH, NORTHEAST-MIDWEST INST., STATE OF THE STATES: AN END-OF-SESSION REVIEW OF INITIATIVES AND PROGRAM IMPACTS IN THE 50 STATES (Dec. 2002), available at http://www.nemw.org/brown_stateof/pdf; see also EPA, Interim Approaches for Regional Relations with State Voluntary Cleanup Programs, available at <http://www.epa.gov/brownfields/html-doc/vcp.htm> (Nov. 14, 1996).