

The Sanctity of Settlement: Stopping CERCLA's Volunteer Remediators from Sidestepping the Settlement Bar

by Joanna M. Fuller*

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INTRODUCTION

“Sooner or later, everyone sits down to a banquet of consequences.”

—Robert Louis Stevenson¹

In *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), the United States Supreme Court cleared up one aspect of hazardous waste law while making a mess of another. The clarity came from a Court mandate that *any* private party who incurs costs by remediating a hazardous waste site can make out a cost recovery claim to recoup expenses.² In sum, the Court has matched the plaintiff (private party remediator) to the cause of action (cost recovery). Now, however, a question arises: Who are the defendants? Perhaps, as has been suggested, the defendants can include parties who previously entered into settlement regarding the waste site—parties who attempted to resolve their liability in exchange for immunity from further litigation.³ Indeed, the Court’s decision has “cast[] a cloud of doubt” over these settlements and may be “destroy[ing] the expectations of literally thousands of [parties].”⁴ These potential defendants will be sure to put up a fight, leaving the clean-up of this mess to the shovels of the circuit courts.

The new disarray in hazardous waste law is not for the Court’s lack of trying to make sense of a complicated statute. In just three years, the Court heard two cases addressing the Comprehensive Environmental Response, Compensation, and Liability Act

1. Robert Louis Stevenson, *quoted in* WORTH REPEATING: MORE THAN 5,000 CLASSIC AND CONTEMPORARY QUOTES 64 (Bob Kelly ed., 2003).

2. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007).

3. See Jeffer, Mangels, Butler & Marmano, LLP, *Supreme Court Expands Superfund Cost Recovery Scheme*, ENV’T ALERT, <http://65.36.220.132/images/email/EnvironmentalAlert-AtlanticCERCLA.pdf> (last visited Feb. 3, 2008).

4. *Id.*

(CERCLA).⁵ Commonly known as “Superfund,” CERCLA was enacted in 1980 to address the health concerns posed by releases and threatened releases of hazardous waste.⁶ Now, over twenty-five years later,⁷ one might expect the principle of *stare decisis*⁸ to assure that CERCLA is maturing into a comfortable, quiet existence.⁹ Yet,

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601–75 (2000 & Supp. IV 2005), amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). The Court’s two recent decisions relating to CERCLA are *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), and *Cooper Industries, Inc. v. Aviall Services, Inc. (Aviall)*, 543 U.S. 157 (2004).

6. U.S. Environmental Protection Agency, CERCLA Overview, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Jan. 27, 2008). The Environmental Protection Agency (EPA) defines hazardous waste as: “By-products of society that can pose a substantial or potential hazard to human health or the environment when improperly managed. Possesses at least one of four characteristics (ignitability, corrosivity, reactivity, or toxicity), or appears on special EPA lists.” U.S. Environmental Protection Agency, Terms of Environment: Glossary H, <http://www.epa.gov/OCEPaterms/hterms.html> (last visited Oct. 30, 2008). Hazardous waste exists in liquid, solid, gas, or sludge form, and may include discarded commercial products, such as cleaning fluids or pesticides. U.S. Environmental Protection Agency, Hazardous Waste, <http://www.epa.gov/epawaste/hazard/index.htm> (last visited Oct. 30, 2008).

Several years before CERCLA, another federal statute addressing hazardous waste was enacted, the Resource Conservation and Recovery Act (RCRA). Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. § 6901–92k (2000)). Unlike CERCLA, RCRA is proactive, “regulat[ing] how wastes should be managed to avoid potential threats to human health and the environment. CERCLA, on the other hand, comes into play when mismanagement occurs or has occurred (i.e., when there has been a release or a substantial threat of a release in the environment of a hazardous substance or of a pollutant or contaminant that presents an imminent and substantial threat to human health).” U.S. ENVIRONMENTAL PROTECTION AGENCY, CERCLA: THE HAZARDOUS WASTE CLEANUP PROGRAM, at VI-7 (2006), <http://www.epa.gov/osw/inforesources/pubs/orientat/rom62.pdf>.

7. CERCLA was enacted in 1980. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. § 9601–75 (2000 & Supp. IV 2005)).

8. *Stare decisis* is the principle that a court is required to follow earlier judicial decisions on the same issue, the rule of an adherence to case precedent, BLACK’S LAW DICTIONARY 1443 (8th ed. 2004), and is associated with providing clarity in the law. The Supreme Court stated that a demonstration of even a “willingness [to overturn a decision] could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.” *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 757 (2008). Justice Brandeis, for instance, advocated adherence to *stare decisis*, claiming that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

9. Bankruptcy law serves as an example of how *stare decisis* can lead to settled law and reduced litigation. A 1978 enactment, the Bankruptcy Reform Act, is the basis for the Bankruptcy Code. 9 AM. JUR. 2D *Bankruptcy* § 12 (2007). Although a “sweeping” amendment was adopted in 2005, *id.* § 15, prior to that time, chapter 11, 11 U.S.C. ch. 11 (2000), a provision allowing an honest debtor an opportunity to reorganize, was described as “a

like a fussy child, it continues to demand attention.¹⁰ One could blame CERCLA's insolence on the nature of hazardous waste law, for as Francis Ford Coppola said: "Anything you build on a large

carefully matured enactment." *In re Coupon Carriers Co.*, 77 B.R. 650, 652 (N.D. Ill. 1987) (quoting *Guessefeldt v. McGrath*, 342 U.S. 308, 319 (1952)). In fact, the number of bankruptcy trials declined over a few decades causing one scholar to state: "[O]ne point on which everyone agrees is that the data demonstrate bankruptcy law's maturation. Newsome puts it succinctly: 'With so many published decisions on so many subjects literally at their fingertips, experienced chapter 11 players are much more capable of predicting outcomes in a particular jurisdiction than they were 20 years ago.'" Robert M. Lawless, *Are Bankruptcy's Trials Vanishing? If So, Who Cares?*, 79 AM. BANKR. L.J. 995, 998, 1001 (2005) (quoting Randall Newsome, *Vanishing Trials: What's All the Fuss About?*, 79 AM. BANKR. L.J. 973, 976 (2005)).

10. One aspect of CERCLA that continually demands attention is the financing for the Superfund. Superfund monies initially came from both an industry tax and a mechanism based on the "polluter pays" principle. Press Release, U.S. Environmental Protection Agency New England, Superfund: Setting the Record Straight (Oct. 1, 2003), <http://yosemite.epa.gov/opa/admpress.nsf/search?OpenForm&view=Press%20Releases%20from%20Region%201> (search for title) [hereinafter *Superfund: Setting the Record Straight*]. Since enactment, however, both prongs of funding have changed dramatically.

CERCLA initially imposed a tax generally on the chemical and petroleum industries, though the tax has not been renewed by Congress since 1995. U.S. Environmental Protection Agency, CERCLA Overview, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Jan. 27, 2008); *Superfund: Setting the Record Straight*. In just the first five years, in fact, the Superfund tax amassed \$1.6 billion. U.S. Environmental Protection Agency, CERCLA Overview, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Jan. 27, 2008). Now, appropriations by Congress maintain the fund. *Superfund: Setting the Record Straight*. Throughout the Clinton and Bush administrations, for example, appropriations remained relatively steady at approximately \$1.3 billion annually, though when corrected for inflation, the appropriations show a downward trend since 1993. See U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS WASTE PROGRAMS: INFORMATION ON APPROPRIATIONS AND EXPENDITURES FOR SUPERFUND, BROWNFIELDS, AND RELATED PROGRAMS 4 (2005), <http://www.gao.gov/new.items/d05746r.pdf> (showing that, when adjusted for inflation to the reference year of 2004, the annual appropriations in millions of dollars changed from \$1,797 in 1993, to \$1,403 in 1997, to \$1,223 in 2005). See also House Committee on Energy and Commerce, Hazardous Substance Superfund Account, http://energycommerce.house.gov/Press_110/110-itr.091207. EPA.JohnsonSuperfund.NPL.attachment.pdf (last visited Dec. 12, 2008) (listing enacted appropriations for fiscal years 1997 to 2007).

"Polluter pays" funding has also evolved. CERCLA assures that the polluter pays by creating a cause of action for the federal government to sue for "cost recovery" against parties responsible for hazardous waste at an individual site. U.S. Environmental Protection Agency, Recovering Cleanup Costs, <http://www.epa.gov/compliance/cleanup/superfund/recovercosts.html> (last visited Jan. 27, 2008). See also U.S. Environmental Protection Agency, CERCLA Overview, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Jan. 27, 2008). The "polluter pays" aspect has evolved to allow cleanup and recovery by private parties with new causes of action and defenses. See *infra* Part I.B. This prong of funding is crucial—historically 70 percent of Superfund cleanup activities have been paid by parties responsible for the contamination, totaling \$20.6 billion by 2003. *Superfund: Setting the Record Straight*.

scale or with intense passion invites chaos.”¹¹ Still, the protection of public health is of such import as to demand that efforts be put forth to perfect the CERCLA statute to provide not just clarity in the law but also prompt, thorough, and sensible cleanup of hazardous waste.¹²

To achieve cleanup of hazardous waste, CERCLA created the Superfund, a pool of money that provides the Environmental Protection Agency (EPA) with resources to conduct and enforce hazardous waste cleanup,¹³ though another method of cleanup is available: independent, voluntary cleanup by private parties.¹⁴

11. Francis Ford Coppola, *quoted in* BBC—h2g2—Francis Ford Coppola—Director, <http://www.bbc.co.uk/dna/h2g2/A6671685> (last visited Jan. 27, 2008). This quote aptly describes CERCLA, which grew from impassioned activism to address the complicated and vast problem posed by hazardous waste. CERCLA was prompted, in part, by the shock at the discovery of a hazardous waste site in the Love Canal neighborhood of Niagara Falls, New York. *See* Robert A. Kittle, *Living with Uncertainty: Saga of Love Canal Families*, U.S. NEWS & WORLD REP., June 2, 1980, at 32 (explaining the plight of Love Canal residents: “After three years of constant fear, an entire neighborhood is fleeing to escape the hazards of buried chemicals.”). Although legislators agreed that pollution needed to be addressed, enactment occurred only after three years of deliberation in the face of industry criticism. *See, e.g.*, Joanne Omang, *Senate Approves Fund to Clean Up Hazardous Wastes*, WASH. POST, Nov. 25, 1980, at A1 (explaining that one controversy centered on “the degree to which the chemical industry would be liable for damages and the kinds of spills that would be covered”); Editorial, *So Close and Yet So Far*, WASH. POST, Dec. 5, 1980, at A16 (explaining that a plan for dealing with nuclear waste “has eluded this country for the third of a century,” and pondering that it might be “a fantasy to expect that Congress might actually get a program on the books in the last frenzied days of this session”); Tom Alexander, *The Hazardous-Waste Nightmare*, FORTUNE, Apr. 21, 1980, at 52 (condemning Superfund as merely a reaction to the “dramatic events or the random enthusiasms of advocates with political and publicity skills”).

12. According to the World Health Organization, a quarter of all preventable illnesses are directly caused by environmental factors, including exposures to chemicals. World Health Organization, Public Health and Environment, <http://www.who.int/phe/en/> (last visited Feb. 11, 2008).

13. U.S. Environmental Protection Agency, Superfund: Basic Information, <http://www.epa.gov/superfund/about.htm> (last visited Feb. 1, 2008) (stating that the EPA has authority “to conduct removal actions where immediate action needs to be taken; to enforce against potentially responsible parties; to ensure community involvement; involve states; and ensure long-term protectiveness”).

14. *See, e.g.*, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2335 (2007). Independent hazardous waste cleanup may, of course, be done without regard to CERCLA, although a remediator that complies with CERCLA can avail itself of the remedies of CERCLA. *See infra* Part 0. In addition to a CERCLA remedy, a negligence claim may also lie in the event of a hazardous waste release. 57A AM. JUR. 2D *Negligence* § 376 (2007). A “toxic tort” negligence claim is governed by state law and requires proof that: “(1) the defendant owed a duty to the plaintiffs; (2) the defendant breached the duty; and (3) the breach proximately caused damages to the plaintiffs.” *Id.* Toxic tort claims require proof beyond that required in a CERCLA claim: proof of both causation and personal exposure to a

Cleanup by these “volunteer remediators” provides a viable alternative to EPA cleanup, especially as the EPA’s hazardous waste site backlog balloons, cleanups become more expensive, and CERCLA coffers dwindle.¹⁵ A party may undertake a voluntary cleanup of its site in an effort to save on overall cleanup costs, reduce liability, and/or address cleanup at a site otherwise overlooked by the EPA.¹⁶ Such a remediator may then look to the

hazardous level of substance. *See id.* CERCLA is also distinct from a toxic tort because CERCLA does not provide compensation for damages, but rather is designed as a financing mechanism for cleanup. *See Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000) (per curiam) (“CERCLA does not provide compensation to a private party for damages resulting from contamination.”); *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005) (“Congress enacted CERCLA . . . to establish a ‘financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.’” (quoting *Public Serv. Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1181 (10th Cir. 1999))).

15. One analysis determined that nearly 60% of CERCLA cases litigated in the federal courts between 1995 and 2000 involved voluntary cleanups. Brief for Amici Curiae Natural Resources Defense Council et al. in Support of Respondent at 28, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562). It is clear that EPA-managed cleanups are limited, in part, by the availability of funds. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21–22 (1989) (plurality opinion) (“[T]he [g]overnment’s resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time.”); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 352 (D.N.J. 1991) (“[T]he government’s ability to monitor numerous sites and initiate cleanups on a nationwide basis is constrained by limited resources.”). It is also clear that the annual number of EPA’s completed projects has decreased since the late 1990s. U.S. Environmental Protection Agency, Number of NPL Site Actions and Milestones by Fiscal Year, <http://www.epa.gov/superfund/sites/query/queryhtm/nplfy.htm> (last visited Feb. 3, 2008) (listing the total of sites reaching “construction completion” status from fiscal year 1995 to 1999 as: 68, 64, 88, 87, and 85; and from year 2000 to 2007 as: 87, 47, 42, 40, 40, 40, 40, and 24). The EPA attributes the reduction in cleanups to the increasing complexity of sites. *See* Letter from the House Committee on Energy and Commerce to Stephen L. Johnson, EPA Administrator 1 (Sept. 12, 2007), http://energycommerce.house.gov/Press_110/110-ltr.091207.EPA.Johnson.Superfund.pdf. Congress disputes the EPA’s analysis, asserting that “the dramatic slowdown in cleanups appears to be primarily caused by inadequate budget requests and funding shortfalls.” *Id.* at 2. Putting further strain on the Superfund is the fact that financing from responsible parties is becoming more difficult to obtain. *See* U.S. GEN. ACCOUNTING OFFICE, SUPERFUND PROGRAM: CURRENT STATUS AND FUTURE FISCAL CHALLENGES 23 (2003), <http://www.gao.gov/new.items/d03850.pdf> (relating that responsible parties funded about 70% of remedial actions in the prior three years, but that the percentage was decreasing, according to the EPA).

16. *See* Brief for Amici Curiae Natural Resources Defense Council et al. in Support of Respondent at 29, *United States v. Atl. Research*, 127 S. Ct. 2331 (No. 06-562) (“[W]hile EPA and the [s]tates focus on the highest-priority sites, private parties often deal with smaller-scale contamination problems.” (citing JEFFREY G. MILLER & CRAIG N. JOHNSTON, *THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION* 564 (West 2d ed. 2005))); 1 JAMES T. O’REILLY & CAROLINE BROWN, *RCRA AND SUPERFUND: A PRACTICE GUIDE* § 9:13 (3d ed. 2007) (describing how statutory lender liability protection and written assurances of liability

courts to recoup its cleanup expenses.

While recouping cleanup expenses has been straightforward for the EPA, it has been a struggle for volunteer remediators.¹⁷ The EPA can sue for “cost recovery” by making a § 107(a) claim.¹⁸ Volunteer remediators, however, lack a clear legal mandate, and so they often hedge their bets by filing two alternative claims to recoup expenses:¹⁹ (1) a § 107(a) cost recovery claim,²⁰ like that sought by the EPA, and (2) a § 113(f) contribution claim.²¹ Prior to 2004, courts typically reserved the cost recovery claim for the EPA, believing it to be too generous for volunteer remediators.²² Instead, courts directed volunteer remediators to the § 113(f) “contribution” claim, a claim designed specially for private party plaintiffs.²³ Yet this result was never quite satisfying in light of the statutory text.²⁴ For one, volunteer remediators were not, arguably, requesting legal “contribution” at all,²⁵ and furthermore, § 113(f) seemed to apply only to claimants compelled to remediate by the EPA,²⁶ not to volunteer remediators. So, when the Court, in *Atlantic Research*, affirmed a “return to the text of CERCLA”²⁷ and

protection encourage participation in voluntary cleanups); Luis Nido & Jason Hutt, *Voluntary Cleanups—Alive After Aviall?*, 20 NAT. RESOURCES & ENV'T 57, 57–58 (2005) (describing five factors that favor voluntary cleanup: (1) the contamination exposure risk to employees and the associated liability, (2) the potential for third-party claims due to contamination that migrates off the property, (3) the effect of environmental liability on property value, (4) other laws that may require remediation, and (5) the increased cost of delaying cleanup).

17. See *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (D.C. Fla. 1984) (“Although private parties may recover response costs under [§ 107(a)(4)(B)], the fact remains that much of CERCLA’s language deals with government-sponsored clean-up efforts. . . . With Congress’ attention focused on government involvement in waste site clean up, it comes as no surprise that those portions of CERCLA’s text and legislative history discussing a private party’s rights against *other private parties* vis-à-vis the [Superfund] are ill-defined.”). See, e.g., *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (dismissing volunteer remediator’s cause of action).

18. 42 U.S.C. § 9607(a) (2000). For convenience, the text of this Article refers to the statute sections as designated in CERCLA, rather than as later codified.

19. See, e.g., *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2335 (2007) (describing voluntary remediator Atlantic Research seeking to recover cleanup costs by suing the United States under both § 107(a) and § 113(f)).

20. 42 U.S.C. § 9607(a) (2000).

21. 42 U.S.C. § 9613(f) (2000).

22. See *infra* Part I.B.

23. As compared to the 107(a) claim, the 113(f) claim has a shorter statute of limitations and may limit the plaintiff’s recovery. See *infra* Part 0.

24. See *infra* Part I.B.

25. See *infra* Part I.B.

26. See 42 U.S.C. § 9613(f).

27. *Atl. Research Corp. v. United States*, 459 F.3d 827, 834–35 (8th Cir. 2006)

gave volunteer remediators clear access to the cost recovery claim, volunteer remediators had reason to rejoice.

The Supreme Court's holding in *Atlantic Research*²⁸ now gives all volunteer remediators a "green light" to cost recovery actions.²⁹ This means that volunteer remediators—including those partly responsible for the hazardous waste—can take advantage of the same generous cause of action as does the EPA.³⁰ Under the new regime, two types of sites *may* be remediated sooner: (1) sites where liable parties are solvent and (2) sites with small-scale contamination. At sites where liable parties are identifiable and solvent, a viable "cost recovery" claim might encourage voluntary remediation, as the cost recovery claim has few defenses and the possibility of both strict, and joint and several liability.³¹ At sites where liable parties are uncertain, however, site owners will remain reluctant to voluntarily remediate. Of these, it is only at the least-contaminated sites, where cleanup is more affordable and the sites are, by law, overlooked by the EPA,³² that site owners might now be encouraged to remediate by the possibility of full cost recovery. Yet, even as the Court gave clarity to volunteer remediators, a state of unease befell others, specifically, parties who had previously settled their CERCLA liability.

Unlike the volunteer remediators, CERCLA "settlers" gave out a collective groan in response to the Court's decision. "Settlers," private parties who attempted to purchase their "peace" through settlement, may now find themselves back in the courtroom faced

(announcing a "return to the text of CERCLA"), *aff'd*, 127 S. Ct. 2331 (2007); *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2335 (2007) (affirming the Court of Appeals for the Eight Circuit).

28. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007).

29. Latham & Watkins LLP, New York, N.Y., CLIENT ALERT, *A Green Light to PRP Cost Recovery Actions Under CERCLA: The Supreme Court's Decision in Atlantic Research* (June 14, 2007), available at <http://www.lw.com/Resources.aspx?page=Publications> (search for title).

30. For example, following the Supreme Court's 2007 holding, the Third Circuit reversed its prior decision in order to allow a potentially responsible party to bring a § 107 cost recovery action. *E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126, 135 (3d Cir. 2007) ("Following [*Atlantic Research*], there is no doubt that, contrary to our precedents, a PRP may bring a cause of action for cost recovery under § 107 and need not rely upon § 113 as its exclusive remedy." (citation omitted)). *Accord* *ITT Indus. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007).

31. *See infra* Part I.B.

32. *See* 40 C.F.R. §§ 300.425(b)(1), 300.425(c) (2008) (limiting EPA "remedial action" to sites that are sufficiently contaminated to warrant inclusion on a national list).

with “yet another wave of . . . [CERCLA] litigation.”³³ Consider a typical scenario in which a score of parties are liable for a hazardous waste site. Some of the parties elect to settle their liability with the government. In so doing, these “settlers” benefit from the settlement bar, a legal release from future liability which provides assurance that they cannot later be sued by others regarding matters addressed in the settlement.³⁴ The other “recalcitrant parties”³⁵ eschew settlement to avoid paying the government. Now, years later, the recalcitrant parties may decide to undertake cleanup on their own and then sue the settlers in order to recoup expenses. Prior to the recent Supreme Court cases, the settlers were protected from lawsuit, but *Atlantic Research* may have undermined this protection.

On its face, the settlement bar prohibits “claims for contribution.”³⁶ Under the old regime, most claims by recalcitrant parties were characterized as “claims for contribution” and therefore prohibited.³⁷ Now, however, recalcitrant parties have the “green light” to file “cost recovery” claims.³⁸ Presuming that the two claims are distinct, the new holding may open a huge crack in what was designed to be an impenetrable contribution bar, making settlers vulnerable to new claims founded on old hazardous waste sites. In addition, without an assurance of the finality of a settlement, parties may be less likely to settle. Fewer settlements would mean less funding for the EPA, less CERCLA enforcement and cleanup, and delayed remediation. Although volunteer remediation cleanups may continue at isolated sites, like those described above, it seems unwise to leave the matter of public health in the hands of private parties who may prioritize cost-minimization over societal welfare. CERCLA was designed to provide a *comprehensive financing mechanism*³⁹ for hazardous waste cleanup, but without CERCLA settlements, the statute will fall far short.

33. James D. Barnette & Matthew Bostick, *Atlantic Research: Good Decision, Bad Outcome, and Ugly Results*, BNA ENVT. REP., Nov. 2007, <http://steptoe.com/publications-4970.html>.

34. See 42 U.S.C. § 9613(f)(2) (2000).

35. The EPA uses this term to describe parties that refuse to settle. See EPA Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

36. 42 U.S.C. § 9613(f)(2).

37. See *infra* Part I.B.

38. See Latham & Watkins LLP, *supra* note 29.

39. H.R. REP. NO. 96-1016, at 7 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6125.

This Article argues for the extension of the settlement bar to cover § 107(a) cost recovery claims by volunteer remediators. Part I will discuss the history of CERCLA, the provisions implicated in voluntary cleanup claims, and the effect of recent relevant Supreme Court holdings. Part II will introduce the settlement bar and the public and private interests implicated by the bar. Part II will then argue for a strong settlement bar to give “settlor”—parties who resolve their CERCLA liability with the government—protection from both contribution claims *and cost recovery claims* by private parties. This protection is justified by an important federal interest in carefully monitored CERCLA cleanup and common law equitable principles. Part III will analyze whether the settlement bar can survive under the current statutory text considering CERCLA precedent and will propose an amendment to clearly preserve the settlement bar. Part IV will argue that, even if the bar does not extend to cost recovery actions, courts have authority to mitigate the generous nature of cost recovery claims, an action that is particularly appropriate when the plaintiff itself is a polluter. The federal interests in finality of settlement, hastened cleanup, and holding responsible parties liable for the cleanup, justify this result.

I. VOLUNTEER CLEANUP AND SETTLING CLAIMS UNDER CERCLA

A. Enactment and the Twin Purposes of CERCLA

In the 1970s and 1980s, high-profile environmental disasters such as the “Love Canal” dumping at Niagara Falls, New York, drew attention to the environmental risks and health hazards posed by improper hazardous waste disposal.⁴⁰ After recognizing that “existing law [was] clearly inadequate to deal with this massive problem,”⁴¹ Congress enacted CERCLA.⁴² The law’s purpose was twofold. First, it was intended to “establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste

40. *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 826–27 (7th Cir. 2007).

41. H.R. REP. NO. 96-1016, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

42. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 55 (1988) (stating that CERCLA was enacted to remedy “serious environmental and health risks posed by pollution.”).

disposal sites.”⁴³ Second, it was meant to shift the costs of cleanup to the parties responsible for the contamination.⁴⁴

Despite CERCLA's ambitious goals, the Act is poorly drafted and ambiguous.⁴⁵ CERCLA was enacted by a lame duck Congress during the final days of the Carter administration; there was little debate and hence, a dearth of legislative history.⁴⁶ Considering the poor draftsmanship and the large amounts of money at stake, it is not surprising that CERCLA continues to generate controversy.⁴⁷

B. CERCLA Cleanup and Recouping Expenses Prior to 2004

The Environmental Protection Agency (EPA) is the primary enforcer of CERCLA, charged with ensuring that hazardous waste sites are properly cleaned.⁴⁸ The EPA begins by identifying sites in need of cleanup and maintaining a National Contingency Plan (NCP), with criteria for prioritizing remediation activities.⁴⁹ Based on NCP criteria, the EPA creates the National Priorities List (NPL), a list of “national priorities among the known releases or threatened releases of hazardous substances, pollutants, or

43. H.R. REP. NO. 96-1016, at 7 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

44. *See* Meghriq v. KFC W., Inc., 516 U.S. 479, 483 (1996). *See also* Key Tronic Corp. v. United States, 511 U.S. 809, 819 n.13 (1994) (“CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.”).

45. Kevin A. Gaynor & Benjamin S. Lippard, *Recent Developments in Hazardous Waste Litigation and Enforcement*, SM028 ALI-ABA 97, 101 (2006). *See also* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001) (“[N]either a logician nor a grammarian will find comfort in the world of CERCLA.”); CadleRock Props. Joint Venture, L.P. v. Schilberg, No. 3:01CV896, 2005 WL 1683494, at *5 (D. Conn. July 19, 2005) (“[W]ading through CERCLA's morass of statutory provisions can often seem as daunting as cleaning up one of the sites the statute is designed to cover.”).

46. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982); *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision [due to] inartful drafting and numerous ambiguities attributable to its precipitous passage.”).

47. *See* Grad, *supra* note 46, at 1 (explaining that the House of Representatives was constrained to adopt a “complicated bill on a take it-or-leave it basis,” while “groaning all the way”). Contrast the rushed process of CERCLA enactment with the “general agreement” that “the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 695 (tent. ed. 1958) (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

48. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007).

49. 42 U.S.C. § 9605(a) (2000).

contaminants.”⁵⁰ The NPL guides the EPA in determining which sites warrant further investigation.⁵¹ Currently, there are 1,650 sites on the NPL list⁵² and a multitude of lower-priority sites.⁵³

The CERCLA statute endorses site remediation by either the EPA or private parties. The EPA may clean the site itself, tapping into the “Superfund,” a pool of money set aside by the government.⁵⁴ Alternatively, a private party can remediate the site under one of two scenarios. First, the private party could be a “compelled remediator.” In this case, the President, by way of the EPA, *orders* the party to remediate pursuant to § 106(a).⁵⁵ Alternatively, a private party could be a “volunteer remediator.” In this case, a party voluntarily follows CERCLA cleanup requirements, but without initiation of any civil action⁵⁶ by the EPA.⁵⁷

50. U.S. Environmental Protection Agency, National Priorities List, *available at* <http://www.epa.gov/superfund/sites/npl/index.htm>; 42 U.S.C. § 9605(a)(8)(B).

51. *Id.*

52. U.S. Environmental Protection Agency, Superfund Information Systems: Superfund Site Information, *available at* <http://cfpub.epa.gov/supercpad/cursites/> (follow “View a list of all NPL sites.” hyperlink).

53. The NPL list does not include all known releases or threatened releases: it lists only the “highest priority” sites. 42 U.S.C. § 9605(a)(8)(B) (2005). Although EPA’s *full* inventory of sites is considerably larger, *see* U.S. Environmental Protection Agency, Superfund Site Information, *available at* <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm> (search “Region” by cumulatively selecting all regions, for a total of 12,327 sites), historically, even EPA’s full inventory of hazardous waste sites was far less than the number of potential sites estimated by the General Accounting Office. *See* U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: EXTENT OF NATION’S POTENTIAL HAZARDOUS WASTE PROBLEM STILL UNKNOWN 3 (1987), *available at* <http://www.gao.gov/index.html> (search “Report #” for “RCED-88-44” estimating, in 1987, that “the universe of potential hazardous waste sites ranges from 130,000 and 425,000 sites,” as compared to an EPA inventory of about 27,000).

54. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007). *See also* 42 U.S.C. § 9611(a) (2000 & Supp. IV 2005) (codifying the authorization of monies to the “Hazardous Substance Superfund”).

55. 42 U.S.C. § 9606(a) (2005).

56. A claim for contribution under § 113(f)(1) can be made by a “person who is liable or potentially liable . . . during or following any *civil action* under section [106] of this title,” among other things. 42 U.S.C. § 9613(f)(1) (2000) (emphasis added). An open question remains as to whether an EPA administrative order under § 106 is a “civil action,” enabling a contribution claim under 113(f)(1). *Id.* *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs, Inc.*, 543 U.S. 157, 168 n.5 (2004) (“[W]e need not decide whether such an order would qualify as a ‘civil action under section [106] . . . or under section [107(a)].” (quoting 42 U.S.C. § 9613(f)(1)). *But see* *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1190–92 (10th Cir. 1997) (indicating that although the issue was not before the court, the court would conclude that a unilateral administrative order does not constitute a civil action for purposes of § 113(f)(1)); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1143 (D. Kan. 2006) (dismissing plaintiff’s argument that a “unilateral administrative order or other administrative order” is a “civil action,” under § 113(f)(1)). This issue is further

1. CERCLA Liability: PRPs and Strict Liability

Once either the EPA or a private party remediates a site, the remediator may initiate action to recoup cleanup costs.⁵⁸ CERCLA creates liability in a host of possible defendants and holds them retroactively and strictly liable.⁵⁹

CERCLA holds liable all “potentially responsible parties”⁶⁰ (PRPs)—roughly, any party ever associated with the site or the waste. The PRPs, as “covered persons,” range from site owners all the way to “arrangers,” or parties who arranged for a waste transfer.⁶¹ The term “potentially responsible party” (PRP) has been adopted by courts to refer to these entities collectively.⁶²

CERCLA holds PRPs retroactively and strictly liable.⁶³ Retroactive liability holds PRPs liable for hazardous wastes released prior to CERCLA enactment.⁶⁴ Strict liability means that a PRP is

complicated by the fact that the EPA may enter into an administrative order, sometimes called an “administrative order by consent” (AOC), pursuant to various subsections of § 122, and those settling parties may be able to sustain a contribution action under a separate subsection, § 113(f)(3)(B). *See, e.g.,* ITT Indus. v. BorgWarner, Inc., 506 F.3d 452, 455 (6th Cir. 2007) (noting district court disagreement as to whether an AOC is a settlement for purposes of § 113(f)(3)(B)).

57. *See, e.g.,* Atl. Research Corp. v. United States, 459 F.3d 827, 836 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331 (2007).

58. *See, e.g.,* United States v. Atl. Research Corp., 127 S. Ct. 2331 (2007).

59. *See* 42 U.S.C. § 9607(a)(1)–(4) (2000) (describing four categories of potentially responsible persons); Claussen v. Aetna Cas. & Sur. Co., 888 F.2d 747, 750–51 (11th Cir. 1989) (describing CERCLA as imposing retroactive and strict liability).

60. *See* 42 U.S.C. § 9607(a)(1)–(4) (2000) (describing four categories of PRPs); *see also infra* note 146.

61. *See* 42 U.S.C. § 9607(a)(1)–(4) (2000) (describing four categories of PRPs); *see also infra* note 146. Although CERCLA refers to “persons,” 42 U.S.C. § 9607(a) (2000), CERCLA broadly defines “person” as an “individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” 42 U.S.C. § 9601(21) (2000).

62. Although neither “potentially responsible party” nor “PRP” appears in the text of § 107 or 113(f), these terms are generally adopted by courts to refer to parties that, if sued, would be liable under § 107. 42 U.S.C. §§ 9607, 9613(f) (2000). *See, e.g.,* Atl. Research, 127 S. Ct. at 2334 (adopting the terms in the first paragraph). *But, see*, Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 98 n.8 (2d Cir. 2005) (eschewing the terms because they “may be read to confer on a party that has not been held liable a legal status that it should not bear”).

63. *See, e.g.,* Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976, 997 (3d Cir. 1996) (holding the owner and operator of a facility strictly, retroactively, jointly, and severally liable).

64. *See* United States v. Alcan Aluminum Corp., 315 F.3d 179, 188–89 (2d Cir. 2003) (rejecting an attack on the constitutionality of CERCLA’s retroactive liability and stating that:

still liable if, for instance, it arranged the transfer of hazardous waste, even if it believed the waste to be benign.⁶⁵ PRPs can only avoid liability in the rare situation where they qualify for either the “innocent landowner” defense or another defense under § 107(b).⁶⁶ In addition, a recent amendment to CERCLA allows a few parties, including bona fide prospective purchasers, to evade liability.⁶⁷

2. Causes of Action: Recouping Cleanup Expenses

CERCLA provides remediators two potential causes of action to recoup expenses: (1) § 107(a) cost recovery⁶⁸ and (2) § 113(f) contribution.⁶⁹ When the EPA seeks to recoup expenses, the appropriate claim is straightforward: the EPA files a § 107(a) cost

“[M]any potentially responsible parties have challenged the constitutionality of retroactive CERCLA liability. A review of the case law reveals that, historically, this has not been a winning argument.”); *see also* *Brown v. Georgeoff*, 562 F. Supp. 1300, 1311 (N.D. Ohio 1983) (recognizing the first retroactive application of CERCLA). Although U.S. case law has faithfully retained retroactive application of CERCLA, *see* *Alcan*, 315 F.3d at 188–89, a recently-adopted European Union (EU) Directive on Environmental Liability rejects retroactivity. *See generally* Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 2004 O.J. (L 143) 56–75. As further comparison, the EU Directive embraces a “polluter pays” principle, like CERCLA, but addresses a wider array of environmental damage, including damage to species, natural habitats, water, and land. *Id.* at 57, 59. Like CERCLA, the Directive imposes strict liability, but the Directive limits the application of strict liability to facility operators and to certain activities enumerated in Annex III. *Id.* at Arts. 3(1)(a), 5, 6, & Annex III (including, under the list of activities exposed to strict liability, the “collection, transport, recovery and disposal” of hazardous waste).

65. *See* BLACK’S LAW DICTIONARY 934 (8th ed. 2004) (defining strict liability as: “Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.”).

66. *See* 42 U.S.C. § 9607(b) (2000) (listing just three defenses: acts of God, acts of war, and acts or omissions of certain third parties); *id.* § 9607(a) (2000) (limiting PRPs only to the defenses set forth in subsection (b)); *see also* *W. Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 688 (9th Cir. 2004) (explaining that the innocent landowner defense applies when a purchasing party did not know or have a reason to know of the existing waste); *United States v. Twp. of Brighton*, 153 F.3d 307, 318 n.12 (6th Cir. 1998) (clarifying that defendants are only limited to the statutory defenses when the harm is indivisible).

67. *See* 42 U.S.C. §§ 9601(40), 9607(r)(1) (Supp. IV 2005); Small Business Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 222, 115 Stat. 2356, 2369–70 (2002). In addition, other unlikely exclusions from CERCLA liability exist. *See, e.g.*, 42 U.S.C. § 9607(n) (2000) (fiduciaries); 42 U.S.C. § 9607(q) (Supp. IV 2005) (contiguous properties).

68. 42 U.S.C. § 9607(a)(4)(A).

69. 42 U.S.C. § 9613(f)(1).

recovery action.⁷⁰ However, when private parties seek to recoup expenses, unsettled law and uncertain text has required them to hedge their bets by filing both claims. When used by private party plaintiffs, these provisions demonstrate CERCLA's inartful drafting, as both recent Supreme Court decisions serve merely to clarify *who* can make out the claims under §§ 107(a) and 113(f).⁷¹ Confusion about the claims is also evidenced by the Court itself first describing them as "similar and somewhat overlapping"⁷² and then as "clearly distinct."⁷³

At enactment, CERCLA contained no explicit contribution cause of action.⁷⁴ The need for such a claim becomes apparent, however, in the wake of an EPA cost recovery claim. Faced with a cost recovery claim, defendant PRPs will want to apportion costs among as many parties as possible. If, however, the EPA fails to join all possible PRPs as defendants, the absent PRPs pay nothing while the defendant PRPs overpay. In this case, defendant PRPs arguably deserve a right to sue the absent PRPs, the co-debtors, to force them to "contribute" to the shared debt. To address this unfairness, a number of district courts held that "such a right arose either impliedly from provisions of the statute, or as a matter of common federal law."⁷⁵

In 1986, Congress responded with the Superfund Amendments and Reauthorization Act (SARA),⁷⁶ modifying CERCLA to include § 113, an express authorization for contribution actions.⁷⁷

70. 42 U.S.C. § 9607(a)(4)(A).

71. See *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004).

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

73. *Cooper*, 543 U.S. at 163 n.3 (explaining, however, that *both* descriptors are apt).

74. See *Schaefer v. Town of Victor*, 457 F.3d 188, 190 (2d Cir. 2006).

75. *Cooper*, 543 U.S. at 162 (collecting cases). See *City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (implying the first contribution cause of action under CERCLA). As the Supreme Court acknowledged:

In its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other PRP[s]. In numerous cases, however, [d]istrict [c]ourts 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.

Key Tronic, 511 U.S. at 816.

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

77. 42 U.S.C. § 9613(f) (2000).

Following amendment, courts declined to continue the implied right to contribution, instead directing almost all private parties, both PRP defendants *and even volunteer remediator plaintiffs*, to this new cause of action.⁷⁸ After SARA, circuit courts faced with claims by volunteer remediators “direct[ed] traffic” between the two provisions.⁷⁹ Not until 2004, with *Cooper Industries, Inc. v. Aviall Services, Inc. (Aviall)*,⁸⁰ and 2007, with *Atlantic Research*,⁸¹ did the Supreme Court provide needed clarity. To understand the Court’s decisions, it is important to distinguish the two provisions.

a. Section 107(a) cost recovery

Section 107(a) describes four categories of PRPs and identifies recoverable costs and damages.⁸² A § 107(a) civil action for cost recovery holds a PRP liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan⁸³

Nearly all EPA claims fall under subsection (A), allowing recovery for removal and remedial costs, including monitoring costs.⁸⁴

78. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). *See also Atl. Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006) (“Congress’s addition of § 113 posed a dilemma. Courts saw that CERCLA, as amended, created a situation where litigants might ‘quickly abandon section 113 in favor of the substantially more generous provisions of section 107,’ thus rendering § 113 a nullity.” (quoting *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997))), *aff’d*, 127 S. Ct. 2331 (2007).

79. *Atl. Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006), *aff’d*, 127 S. Ct. 2331 (2007).

80. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

81. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007).

82. 42 U.S.C. § 9607(a) (2000). *See also infra* note 146.

83. 42 U.S.C. § 9607(a)(4)(A)–(B) (emphasis added).

84. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 719–20 (2d Cir. 1993) (identifying the elements of an EPA cost recovery claim: “In bringing an action under [CERCLA], the [G]overnment must establish that: (1) defendant is one of the four categories of covered persons listed under [§ 107(a)] as liable for the costs of remedial action, (2) the site of the clean-up is a facility under [§ 101(9)], (3) there is a release or threatened release of hazardous substances at the facility, (4) as a result of which plaintiff has incurred response costs, and (5) the costs incurred conform to the national contingency plan under [§ 107(a)(4)(A)] as administered by the EPA.”).

Subsection (A) is unforgiving. In addition to holding PRPs strictly liable, courts have interpreted subsection (A) to hold PRPs jointly and severally liable, meaning that each individual PRP could be held responsible for all costs.⁸⁵ The only way for a party to escape joint and several liability is to prove that the harm is divisible, meaning it can be apportioned among the parties.⁸⁶

Subsection (B) is at the heart of the controversy addressed in this Article, and was the cause of action asserted by the plaintiff in *Atlantic Research*.⁸⁷ Prior to *Atlantic Research*, courts often denied volunteer remediators, particularly PRPs, access to a claim under this subsection. Some courts expressed that PRPs, as polluters, were not entitled to *full* recovery, which is the recovery expected if joint and several liability is imposed.⁸⁸

Although they have “similar structures,”⁸⁹ subsections (A) and (B) contain subtle differences.⁹⁰ Subsection (B) refers to “other” costs incurred by “other” persons.⁹¹ Additionally, note that while subsection (A) presumes the government cleanup complies with the NCP, subsection (B) requires the claimant to prove compliance.⁹²

b. Section 113(f)(1) contribution

Since enactment of SARA, an express civil action for contribution

85. Joint and several liability is defined as: “Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.” BLACK’S LAW DICTIONARY 933 (8th ed. 2004).

86. *See, e.g.*, *United States v. Monsanto Co.*, 858 F.2d 160, 171–72 (4th Cir. 1988) (“Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm.” (citations omitted)).

87. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2334 (2007).

88. *See, e.g.*, *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 528–29 (3d Cir. 2006) (“[A] PRP seeking to offset its cleanup costs must invoke contribution under § 113; the express cause of action under § 107 (cost recovery) is limited to governments and Indian tribes (acting in their enforcement capacity) and innocent landowners . . .”), *vacated*, 127 S. Ct. 2971 (2007).

89. *Atl. Research*, 127 S. Ct. at 2336.

90. 42 U.S.C. § 9607(a)(4)(A)–(B) (2000).

91. *Id.*

92. *Id.*

is also available under CERCLA.⁹³ Unfortunately, “contribution” is left undefined in the CERCLA statute.⁹⁴ According to *Black’s Law Dictionary*, “contribution” is a right created when several parties owe a common debt, but the debt was not distributed fairly.⁹⁵ A party that pays more than his share earns a right to contribution, a right to sue the co-debtors to force them to contribute to the debt by paying their proportionate shares.⁹⁶ The contribution cause of action, § 113(f) (1), states:

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)], *during or following any civil action under section [106] or [107(a)]*. . . . 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 [106] or [107].⁹⁷

Unlike the cost recovery provision, which fails to characterize plaintiffs, the contribution provision describes who can seek contribution.⁹⁸ The first sentence, called the “enabling clause,” establishes the right of contribution and seems to make the claim widely available to “any person” who is a PRP.⁹⁹ Yet, limiting language is added. It appears that the claim may only occur during or following a “civil action under section [106] or [107(a)],” namely a presidential cleanup order, § 106,¹⁰⁰ or a cost recovery

93. 42 U.S.C. § 9613(f) (1) (2000).

94. *See generally* 42 U.S.C. §§ 9601, 9613 (2000 & Supp. IV 2005).

95. BLACK’S LAW DICTIONARY 352–53 (8th ed. 2004).

96. *Id.*

97. 42 U.S.C. § 9613(f) (1) (2000) (emphasis added).

98. Unlike the contribution provision, the cost recovery provision does not clearly authorize a citizen suit, especially when all four subsections are read together. *See* 42 U.S.C. § 9607(a) (2000). The provision describes liable parties and enumerates recoverable costs, but does not specify to whom the parties are liable nor the remedy. *See id.* Court decisions, however, are “virtually unanimous” in allowing private causes of action under § 107. *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (“District [c]ourt decisions have been virtually unanimous in holding that section [107(a)(4)(B)] creates a private right of action against [PRPs] for the recovery of [response costs].” (citing cases)).

99. 42 U.S.C. § 9613(f) (1); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165 (2004).

100. 42 U.S.C. § 9606(a) (2000).

lawsuit, § 107.¹⁰¹

Also unlike the cost recovery provision, the contribution provision clarifies how courts should allocate costs, namely by use of “equitable factors.”¹⁰² In allocating costs, courts tend to consider such factors as “volume, toxicity, and cooperativeness.”¹⁰³

The final sentence of the section, the so-called “savings clause,”¹⁰⁴ preserves parties’ rights and claims. Prior to *Aviall*, this sentence was used to expand the provision to plaintiffs outside of the procedural circumstances enumerated in the enabling clause.¹⁰⁵

c. Comparing the cost recovery claim and the contribution claim

The 107(a) cost recovery claim is “substantially more generous” than the 113(f)(1) contribution claim, so claimants will opt for the cost recovery provision if given the choice.¹⁰⁶ Section 107(a) has a six-year statute of limitations and, through joint and several liability, it allows plaintiffs to recover 100% of response costs.¹⁰⁷ By contrast, § 113(f)(1) has a three-year statute of limitations, and, because recovery is several only, plaintiffs can only recover costs in excess of their equitable share and can only collect the shares due

101. 42 U.S.C. § 9607(a) (2000). *See also supra* Part I.B.2.a.

102. *See* 42 U.S.C. § 9613(f)(1). To judge whether an apportionment is equitable, “a court may consider several factors, a few factors, or only one determining factor, . . . depending on the totality of the circumstances presented to the court.” *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992). In addition, many courts look to the “Gore Factors,” proposed by then Senator Albert Gore, as a moderate approach to joint and several liability, for apportionment of contribution claims under § 113(f)(1). *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1536 n.5 (10th Cir. 1995). The six Gore Factors are: (1) the ability of the parties to distinguish its contribution to the pollution, (2) the total amount of hazardous waste, (3) the degree of toxicity, (4) the parties’ involvement in the polluting activity, (5) the care taken by the parties to avoid pollution, and (6) the parties’ cooperation with government officials. *Id.*

103. 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, § 8:13 (2007). *See also id.* at n.32 (describing cost allocation in a sweeping survey of cases).

104. *See, e.g.*, *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007).

105. Prior to *Aviall*, courts permitted volunteer remediators to make out a contribution claim by way of the savings clause language allowing the claims in the “absence of a civil action.” 42 U.S.C. § 9613(f)(1) (emphasis added). In *Aviall*, however, the Court explained that this clause neither establishes a cause of action nor expands § 113(f)(1). *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

106. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997).

107. 42 U.S.C. § 9612(d)(1) (2000); *Atl. Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), *aff’d*, 127 S. Ct. 2331 (2007).

from named defendants.¹⁰⁸

C. Volunteer Remediators in Search of a Claim

In actions to recoup cleanup costs prior to 2004,¹⁰⁹ confused volunteer remediators attempted to characterize their action as one for cost recovery, contribution, or both.¹¹⁰ Plaintiffs preferred the generous § 107(a)(4)(B) cost recovery action, which, on the one hand, seems appropriate, because volunteers incur cleanup costs like the EPA.¹¹¹ Yet, allowing such a claim leads to the perhaps unsatisfactory result that any volunteer,¹¹² even a polluting volunteer, can hold other PRPs jointly and severally liable and recover *all* cleanup costs.¹¹³ Courts, on the other hand, preferred the § 113(f) contribution claim,¹¹⁴ due, in large part, to the explicit permission it gives courts to divide contribution liability by considering equitable factors.¹¹⁵ Courts reasoned that a contribution claim is not necessarily inconsistent with a volunteer's cause of action, as a volunteer has effectively paid more than its fair share of a shared CERCLA debt.¹¹⁶ The courts' active role was summarized in one CERCLA opinion: "To prevent § 107 from swallowing § 113, courts began directing traffic between the sections."¹¹⁷

108. 42 U.S.C. § 9613(g)(3); *Atl. Research*, 459 F.3d at 832; *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 653 (6th Cir. 2000).

109. *Aviall* was decided in 2004. *Cooper*, 543 U.S. at 157 (2004). See also *infra* Part I.D.1.

110. See Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 105–07 (1997) (grouping cases into "three broad categories: (1) cases disallowing PRP cost recovery claims and limiting PRPs to contribution claims; (2) cases allowing PRPs to pursue cost recovery claims and the imposition of joint and several liability; (3) cases recognizing the right of PRPs to bring a cost recovery action but allocating liability as if the claim were for contribution.").

111. 42 U.S.C. § 9607(a)(4)(B) (2000).

112. Volunteer remediators are generally site owners who are suing for either past or planned cleanup costs. See, e.g., *Cooper*, 543 U.S. at 163–64.

113. See Hernandez, *supra* note 110, at 111.

114. 42 U.S.C. § 9613(f)(1) (2000). See *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 521 (3d Cir. 2006) (collecting cases), *vacated*, 127 S. Ct. 2971 (2007).

115. 42 U.S.C. § 9613(f)(1).

116. See Hernandez, *supra* note 110, at 100–04.

117. *Atl. Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331 (2007).

D. Recent Developments: From Contribution to Cost Recovery

In two cases, the Supreme Court authoritatively played the role of traffic cop and directed all volunteer remediators to cost recovery claims. In *Aviall* and *Atlantic Research*, the Court heard arguments from volunteer remediators who initially asserted claims for both cost recovery and contribution. In the pair of holdings, the Court stayed close to the text with only a cursory nod to the confusion of the circuits.

1. Cooper Industries v. Aviall Services (2004)

In *Aviall*, the Supreme Court rejected a voluntary remediator's claim for contribution under 113(f)(1).¹¹⁸ In *Aviall*, first Cooper and then Aviall owned and contaminated¹¹⁹ several properties in Texas.¹²⁰ Under threat of state enforcement, Aviall spent several million dollars to clean up the site.¹²¹ To recoup expenses, plaintiff Aviall filed claims under both § 107(a) for cost recovery and § 113(f)(1) for contribution.¹²² The Supreme Court withheld judgment on the 107(a) claim, stating that the parties did not adequately brief the issue, but did address the 113(f)(1) claim.¹²³ Looking at the "natural meaning"¹²⁴ of 113(f)(1), the Court held that the section "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a)."¹²⁵ Noting that "it is undisputed that Aviall has never been subject to such an action," the Court summarily dismissed the claim.¹²⁶

The Court's foreclosure of Aviall's claim led to apocalyptic headlines pondering the end of volunteer cleanups.¹²⁷ Now barred

118. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168 (2004).

119. Both Aviall and Cooper conceded their status as PRPs under CERCLA. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 679 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004).

120. Cooper, 543 U.S. at 163–64.

121. *Id.*

122. Cooper, 543 U.S. at 164.

123. *Id.* at 168–70. For an analysis of how the Fifth Circuit considered the 107(a) claim to effectively merge with the 113(f) claim, see Armand M. Perry, Comment, *Will the Legislative Branch Please Stand Up: Ending Three Years of Uncertainty in a Post-Cooper World*, 20 TUL. ENVTL. L.J. 407, 413–15 (2007).

124. Cooper, 543 U.S. at 166.

125. *Id.* at 168 (quoting 42 U.S.C. § 9613(f)(1) (2000)).

126. *Id.*

127. *E.g.*, Peter M. Gillon & Reed D. Rubinstein, Cooper Indus. v. Aviall: *The End of CERCLA As We Know It?*, (Jan. 2005), <http://www.gtlaw.com/pub/alerts/2005/0101.pdf>;

from claims for contribution, volunteer remediators tried to persuade courts to resurrect the cost recovery provision.¹²⁸ For three years, circuit courts struggled to synthesize precedents.¹²⁹

2. United States v. Atlantic Research Corp. (2007)

The issue left open in *Aviall* of whether a volunteer remediator can make a claim for cost recovery under 107(a) percolated back to the Supreme Court in 2007 in the case of *Atlantic Research*.¹³⁰ From 1981 to 1986, Atlantic Research leased property at an Arkansas facility operated by the Department of Defense where it retrofitted rocket motors for the United States.¹³¹ At the site, propellant waste, in the form of wastewater and burned fuel, contaminated the soil and groundwater.¹³² After a voluntary cleanup, Atlantic Research sought to recoup a portion of expenses from the United States under both 107(a) for cost recovery and 113(f) for contribution.¹³³ The parties began negotiations, but talks ended with the Supreme Court's holding in *Aviall*.¹³⁴ Because Atlantic Research undertook cleanup without a CERCLA enforcement action, *Aviall* foreclosed the § 113(f) claim, and Atlantic Research amended its complaint to rely solely on § 107(a) and federal common law.¹³⁵ The United States moved to dismiss, arguing that a PRP, such as Atlantic

David Ledbetter et al., *Cooper Industries v. Aviall: The Aftermath*, 26 No. 25 ANDREWS ENVTL. LITIG. REP. 5 (2006); Gabrielle Sigel & Katherine Rahill, *United States v. Atlantic Research Corp.: Is the Sky Falling On Environmental Cost Recovery Actions?*, 27 No. 22 ANDREWS ENVTL. LITIG. REP. 13 (2007).

128. See *infra* note 129 (introducing the four key cases that arose after *Aviall*).

129. After *Aviall*, circuit courts disagreed as to whether a PRP could maintain an action for cost recovery under 107(a). See, e.g., *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 99 (2d Cir. 2005) (holding that a person has an 107(a) action upon satisfaction of a two-part test, "whether [the plaintiff] is a 'person' and whether [he] has incurred 'costs of response'"); *Atl. Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006) (implying a right to cost recovery for volunteer remediators), *aff'd*, 127 S. Ct. 2331 (2007); *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 543 (3d Cir. 2006) (holding that there is no implied cause of action for PRPs), *vacated*, 127 S. Ct. 2971 (2007); *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 837 (7th Cir. 2007) (implying a right to cost recovery). See generally Perry, *supra* note 123, at 416–21.

130. *Atl. Research Corp. v. United States*, 127 S. Ct. 2331 (2007).

131. *Id.* at 2335; *Atl. Research*, 459 F.3d at 829.

132. *Atl. Research*, 127 S. Ct. at 2335.

133. *Id.*

134. *Atl. Research*, 459 F.3d at 829.

135. *Atl. Research*, 127 S. Ct. at 2335.

Research, could not use § 107(a) for cost recovery.¹³⁶ Relying on pre-*Aviall* Eighth Circuit precedent, the district court agreed and dismissed the claim.¹³⁷

The Court of Appeals for the Eighth Circuit reversed to allow the § 107 cost recovery claim,¹³⁸ stating that *Aviall* undermined circuit precedent.¹³⁹ The court rejected an approach that “categorically deprives a liable party of a § 107 remedy,” choosing to “return to

136. *Id.*

137. *Atl. Research Corp. v. United States*, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484 (W.D. Ark. June 1, 2005), *rev'd*, 459 F.3d 827 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331 (2007). In dismissing Atlantic Research's 107(a) claim, the district court relied on *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003). The court explained that circuit precedent denied access to a § 107(a) claim unless the plaintiff is “deemed innocent.” *Atl. Research Corp. v. United States*, 2005 U.S. Dist. LEXIS 20484, at *7–8 (W.D. Ark. 2005) (quoting *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 531 (8th Cir. 2003)), *rev'd*, 459 F.3d 827 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331 (2007).

After acknowledging that “existing precedent appears to preclude [Atlantic Research's] Section 107(a) claims,” the district court discussed the precedent relied on by both parties:

[Atlantic Research] acknowledges this precedent but argues that *Aviall* has undermined the fundamental support for *Dico* and other circuits' decisions that Section 113(f) limits PRP's claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a). [Atlantic Research's] position finds support from some district courts who have passed on this issue. *See Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005) (holding despite *Aviall* and existing circuit precedent, PRP can bring a claim under Section 107(a) when it cannot meet the specific requirements of Section 113(f)(1)); *Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp.*, 365 F. Supp. 2d 913 (N.D. Ill. 2005) (same). *See also Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005) (recognizing in dicta that *Aviall* combined with existing Second Circuit precedent would leave a PRP with no mechanism for recovering response costs until proceedings are brought against the PRP; expressing opinion that such a result “would create a perverse incentive for PRPs to wait until they are sued before incurring response costs”).

In contrast, other district courts confronted with this issue have found that *Aviall*, combined with existing precedent, effectively precludes an implied cause of action pursuant to CERCLA Section 107(a). *See City of Waukesha v. Viacom Int'l, Inc.*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005) (denying plaintiff's motion to amend as futile, finding *Aviall* did not vacate Seventh Circuit precedent that held landowner who was a party liable in some measure for the contamination must seek contribution under § 113(f)); *Mercury Mall Assoc. v. Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 519 (E.D. Va. 2005) (denying plaintiff's motion to amend, recognizing that although result was quixotic, the combined result of *Aviall* and existing precedent precluded implied right of contribution under 107(a) and left PRP without a remedy); *Elementis Chems., Inc. v. TH Agric. & Nutrition, LLC.*, 373 F. Supp. 2d 257, 272 (S.D.N.Y. 2005) (finding a PRP without defense to damages precluded from bringing 107(a) cost recovery action following *Aviall*).

Id. at *7–9 (formatting altered and citations updated).

138. *Atl. Research*, 127 S. Ct. at 2335.

139. *Atl. Research Corp. v. United States*, 459 F.3d 827, 830 n.4 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331 (2007).

the text of CERCLA,” and allow Atlantic Research’s § 107(a) claim.¹⁴⁰ The Supreme Court granted certiorari and a unanimous Court affirmed.¹⁴¹

Faced with opposing interpretations of the cost recovery provision, the Court analyzed the text of § 107(a)(4) and agreed with Atlantic Research’s reading.¹⁴² Recall that § 107(a)(4) holds PRPs liable for:

(A) all costs of removal or remedial action incurred by *the United States Government, or a State or an Indian tribe* not inconsistent with the national contingency plan;

(B) any *other* necessary costs of response incurred by *any other person* consistent with the national contingency plan¹⁴³

The Court focused on the “remarkably similar structures”¹⁴⁴ of the provisions and decided that the phrase “any other person” must refer to any person other than the three referred to in subsection (A), making the claim available to Atlantic Research.¹⁴⁵

The Government argued that the “any other person” language referred to any person other than a PRP, as described in § 107(a)(1)–(4), but the Court said that such an interpretation “makes little textual sense” and would “destroy the symmetry” of

140. *Id.* at 834–35. The Eighth Circuit also rejected use of the term “potentially responsible parties,” reminding that “PRP” was developed by courts and not found in the relevant provisions of CERCLA. *Id.* at 831 n.6. Instead, the court refers to “liable parties.” *Id.* at 831.

141. *Atl. Research*, 127 S. Ct. at 2334.

142. *Id.* at 2336.

143. 42 U.S.C. § 9607(a)(4)(A)–(B) (2000) (emphasis added).

144. *Atl. Research*, 127 S. Ct. at 2336.

145. *Id.* at 2335–36 (2007). After *Atlantic Research*, a district court considered whether a plaintiff who had met the procedural circumstances for initiating lawsuit under § 113 could none-the-less initiate a lawsuit under § 107 when it had *voluntarily* incurred the specific costs at issue. See *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1041–42 (E.D. Wis. 2008). In *Appleton Papers*, plaintiff-PRPs alleged that they had voluntarily incurred costs above and beyond those outlined in their prior consent decrees and settlement agreements, and that these voluntary expenses were recoverable through § 107. *Id.* at 1042. The court pondered whether it should analyze the plaintiffs’ costs “to determine which costs were compelled and which were voluntary” or if “once a Government enforcement action began, all costs incurred by the PRP no longer qualified as voluntarily incurred costs.” *Id.* at 1041–42. “In other words, should the focus be on the nature of the costs themselves or on the procedural status of the party seeking to recover those costs?” *Id.* at 1042. The court held that the focus is properly on the procedural status of the claimant, agreeing with the defendant and the United States, as amicus, and granted defendant’s motion to dismiss the § 107 claim. *Id.* at 1042, 1044.

the provisions.¹⁴⁶ Due to the statute's broad definition of a PRP, the Court determined that limiting 107(a)(4)(B) to only innocent parties, as the Government argued, "would reduce the number of potential plaintiffs to almost zero," rendering the provision a dead letter.¹⁴⁷

The Government has habitually argued to limit volunteer remediator claims.¹⁴⁸ In *Aviall*, the Government argued to deny

146. *Id.* CERCLA § 107(a) lists four broad categories of "covered persons" as PRPs, by definition liable to other persons for various costs:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for [various costs].

42 U.S.C. § 9607(a)(1)–(4) (2000).

147. *Atl. Research*, 127 S. Ct. at 2337. *See also* Transcript of Oral Argument at 6–7, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562) (quoting Deputy Solicitor General Thomas G. Hungar while struggling to identify just two potential plaintiffs—an innocent city and an innocent private party).

148. *See Perry*, *supra* note 123, at 415–16. Even after *Aviall* foreclosed volunteer remediators from the contribution claim, the Government urged courts to dismiss volunteer remediators' cost recovery claims. *See, e.g.*, Brief for the United States as Amicus Curiae at 2, *UGI Utils., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 127 S. Ct. 2995 (2007) (No. 05-1323) (urging the Supreme Court to reject review of the case, while disagreeing with the court of appeals' holding that a PRP can bring a cost recovery claim); Brief for the Respondents at 2, *E.I. DuPont de Nemours & Co. v. United States*, 127 S. Ct. 2971 (2007) (No. 06-726) (urging the Supreme Court to hear the case and affirm the dismissal of PRP's cost recovery claim); Brief of the United States as Amicus Curiae at 5, *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007) (No. 05-3299) ("A PRP may not bring a cost recovery action under section 107(a)(4)(B) of CERCLA."). If courts abided the Government's argument, volunteer remediators would be unable to ever recoup cleanup expenses. *See, e.g.*, *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 518 (3d Cir. 2006), *vacated*, 127 S. Ct. 2971 (2007). Perhaps acknowledging what courts might perceive as a harsh result, in at least one brief, the Government argued that traditional federal common law would have manifested the same harsh result, meaning that the § 113(f) contribution claim, even with its limitations, generously expanded the rights of private parties. *See* Brief of the United States as Amicus Curiae at 26–27, *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007) (No. 05-3299) (quoting Easterbrook's dissent in *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 772–73 (1994)).

volunteer remediators access to § 113(f).¹⁴⁹ Then, in *Atlantic Research*, the Government argued to deny volunteer remediators access to § 107(a)(4)(B), albeit allowing the claim for innocent parties.¹⁵⁰ In defending this position at oral argument, the Deputy Solicitor General expressed the fear that another provision of CERCLA, the settlement bar,¹⁵¹ would be “eviscerate[d].”¹⁵² The Government’s further assertion that “the sky is falling”¹⁵³ shows that even as *Atlantic Research* was being decided, the United States, at least, was preparing for the worst.

II. THE SETTLEMENT BAR AND THE CASE FOR PROTECTING SETTLORS FROM COST RECOVERY CLAIMS

Atlantic Research is clear in holding that volunteer remediators, even polluters, can file cost recovery claims,¹⁵⁴ yet *Atlantic Research* leaves open the question of how this cause of action will interact with other CERCLA provisions, most notably, the settlement bar.¹⁵⁵ As envisioned, the settlement bar protected settlors from claims by recalcitrant parties, but *Atlantic Research*’s “green light” to cost recovery claims may circumvent that bar.¹⁵⁶ If so, two concerns arise: (1) public and private interests in finality of settlement would be frustrated and (2) CERCLA’s purposes would be disserved. Allowing recalcitrant parties to make an end run around the bar presents the immediate possibility that settlors of the past, who already bought their peace with the government, may be exposed to new litigation, frustrating an interest in finality. As one court stated, the “protection [of the settlement bar] would be of small comfort if another potentially responsible party could maintain a cost recovery action against that settlor.”¹⁵⁷ Additionally, without the incentive of a settlement bar, potential future CERCLA

149. Brief for the United States as Amicus Curiae Supporting Petitioner at 10–11, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192).

150. Reply Brief for the United States at 2, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562).

151. 42 U.S.C. § 9613(f)(2) (2000).

152. Transcript of Oral Argument at 21, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562) (statement of Deputy Solicitor General Thomas G. Hungar).

153. *Id.*

154. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2334 (2007).

155. *See* 42 U.S.C. § 9613(f)(2).

156. Latham & Watkins LLP, *supra* note 29.

157. *AlliedSignal, Inc. v. Amcast Int’l Corp.*, 177 F. Supp. 2d 713, 735 (S.D. Ohio 2001).

settlements are likely to be both fewer in number and of lesser amounts. CERCLA settlements, however, should be encouraged. Settlements help achieve the goals of CERCLA by hastening hazardous waste cleanup, decreasing litigation costs, and releasing funds for pursuing sensible and thorough cleanups. Because the settlement bar protects an important interest in finality and plays a vital role in encouraging settlements for achieving the goals of CERCLA, the strong settlement bar must be maintained.

A. Section 113(f)(2) Settlement Bar: An Inducement to Settle

CERCLA's "settlement bar" protects settlors from subsequent claims by non-settlors. To benefit from the protection of the settlement bar, a PRP must first resolve its liability to the United States or a State in an administrative or judicially-approved settlement.¹⁵⁸ According to § 113(f)(2), the settlor is thereafter not "liable for *claims for contribution* regarding matters addressed in the settlement."¹⁵⁹ A settlement also affects non-settling PRPs—it "reduces . . . [their] potential liability . . . by the amount of the settlement."¹⁶⁰ Section 113(f)(2) is the "settlement bar" that would be "eviscerate[d]" by *Atlantic Research*, according to the Deputy Solicitor General.¹⁶¹

The settlement bar serves as both a carrot and a stick in inducing PRPs to enter into settlement. The carrot is the protection that settlors receive from both future liability and overpayment. Settlor avoid litigation because they gain immunity from contribution actions,¹⁶² and they can avoid overpayment because they retain the right to sue non-settlors.¹⁶³ The stick is the threat of disproportionate liability. PRPs who choose not to settle may ultimately pay more than their equitable share and will be barred from suing settlors.¹⁶⁴ Working together, the carrot and stick of the

158. 42 U.S.C. § 9613(f)(2).

159. *Id.* (emphasis added).

160. *Id.*

161. Transcript of Oral Argument at 21, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562) (statement of Deputy Solicitor General Thomas G. Hungar).

162. The settlement bar, as described in both § 113(f)(2) and EPA's model consent decree preclude contribution actions. 42 U.S.C. § 9613(f)(2); Final Model CERCLA Past Costs Consent Decree and Administrative Agreement, 60 Fed. Reg. 62446, 62449–50 (Dec. 6, 1995).

163. 42 U.S.C. § 9613(f)(3)(B) (2000).

164. Because settlors can sue recalcitrant PRPs but are themselves immune from suit, recalcitrant PRPs take the risk of facing disproportionate future liability if they fail to join a

settlement bar nudge PRPs toward early settlement, thereby advancing funds for the EPA to manage hazardous waste site cleanups.¹⁶⁵

B. Public Interest in Settlement: A Congressional Mandate and Achieving CERCLA's Goals

Courts recognize a "clear policy" favoring the settlement of all civil lawsuits.¹⁶⁶ Courts provide several explanations for this policy, including the conservation of judicial resources, the reduction in the psychological and financial costs to litigants, and the chance for a more favorable result through the mutual agreement of parties.¹⁶⁷ Furthermore, the policy is particularly encouraged "where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals,"¹⁶⁸ such as in an area of law like CERCLA litigation.¹⁶⁹

settlement. *See* *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994) (stating that the disproportionate liability imposed by the settlement bar "is not a scrivener's accident"); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) ("Disproportionate liability, a technique which promotes early settlements and deters litigation for litigation's sake, is an integral part of the statutory plan."); *Alcan Aluminum Corp. v. Butler Aviation-Boston, Inc.*, 2003 WL 22169273, at *4 (M.D. Pa. 2003) ("[C]ontribution protection may result in situations where a non-settlor is responsible for a disproportionate share of liability."). *See generally* C. Travis Hargrove, Casenote, *Settling Environmental Cleanup Cases with Multiple PRPs under CERCLA: If One Party Jumps off the Bridge in Favor of Settlement, You Should Follow*, 11 MO. ENVTL. L. & POL'Y REV. 197 (2004).

165. *See* *United States v. Davis*, 261 F.3d 1, 23 (1st Cir. 2001) (explaining that CERCLA "seeks early settlement with as many PRPs as possible to further expeditious remediation").

166. *Marek v. Chesny*, 473 U.S. 1, 10 (1985).

167. Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 GEO. J. LEGAL ETHICS 543, 547 (1999). *See also* *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (describing an interest in settlement for mass tort actions: "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial." (citations omitted)); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (describing a particularly strong interest in protecting settlements involving the Executive Branch: "[I]t is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." (citations omitted)); *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972) (describing an interest in settlement for contract law: "The law actively encourages compromise and settlement of disputes." (citation omitted)).

168. *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771 (2d Cir. 1975) (identifying Title VII of the Civil Rights Act of 1964 as an area of law where settlements should be encouraged).

169. *See also* *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 222 (D. Ill.

Settlements also further CERCLA's other purposes of hastening cleanup and placing remediation costs on responsible parties.¹⁷⁰ By encouraging settlements, CERCLA reduces the inefficient expenditure of public funds on lengthy litigation and releases appropriate parties from liability.¹⁷¹

The CERCLA text and legislative history support the notion that Congress considered settlement to be at least one of CERCLA's purposes.¹⁷² CERCLA mandates that "the President shall act to facilitate agreements . . . that are in the public interest . . . in order to expedite effective remedial actions and minimize litigation."¹⁷³ Also, CERCLA's "elaborate settlement scheme"¹⁷⁴ expressly incentivizes parties to reach settlement.¹⁷⁵ When enacting the settlement bar, Representative Lent stated:

I am pleased to report that the idea of encouraging settlements is no longer considered groundbreaking but now a simple and obvious matter of good policy. Costly, protracted litigation threatens the effectiveness of the Superfund Program and consumes resources better spent on cleanup. It is essential that EPA and private parties join together to accomplish cleanup.¹⁷⁶

In encouraging early settlement, CERCLA is more likely to hasten cleanup, cut off pollutant spreading and reduce uncertainty, while enabling EPA monitoring of the cleanup process. Settlements provide funds that the government can immediately put to best use

1990) ("This interest [in promoting settlement] is especially pronounced in complex matters such as CERCLA claims, where the amount of evidence to be gathered for assessing liability is voluminous.").

170. See *supra* Part I.A.

171. *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119–20 (2d Cir. 1992).

172. *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 536–43 (3d Cir. 2006) ("SARA's legislative history also reveals an express bent toward encouraging settlement."), *vacated*, 127 S. Ct. 2971 (2007).

173. 42 U.S.C. § 9622(a) (2000).

174. *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997).

175. See *Allied Corp. v. ACME Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 222 (N.D. Ill. 1990) (finding that the "degree to which a bar on contribution cross-claims will facilitate settlement outweighs the prejudice of such a bar on non-settling defendants"); 2 JAMES T. O'REILLY & CAROLINE BROUN, *RCRA AND SUPERFUND: A PRACTICE GUIDE* § 13:20 (3d ed. 2007) (explaining that CERCLA's grant of contribution protection to settling PRPs induces higher value settlements and encourages early settlement); Wm. Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After Cooper Industries v. Aviall Services*, 18 TUL. ENVTL. L.J. 339, 349–50 (2005) (describing statutory incentives for early settlement of cleanup claims). See also *supra* Part I.A.

176. 132 CONG. REC. H9561-03 (daily ed. Oct. 3, 1986) (statement of Rep. Lent).

at the hazardous waste sites of highest priority, and they also assure that monies are recovered from responsible parties. Additionally, government settlements addressing a hazardous waste site assure EPA monitoring of the cleanup process, which is especially valuable when the waste crosses boundaries into neighboring properties or affects waterways or the air.¹⁷⁷ Incentivizing settlement with a strong settlement bar is crucial to promoting a public policy in favor of settlement and advancing CERCLA's remedial purposes.

C. Private Interest in Settlement: Certainty and Finality

Private parties benefit from both the certainty of entering into a negotiated settlement and the finality of settlement. Certainty comes from a party's active involvement in negotiating and consenting to terms without the unpredictable costs of litigation.¹⁷⁸ Finality usually comes from two grants of immunity from future liability—the settlement bar¹⁷⁹ and a “covenant [by the United States] not to sue.”¹⁸⁰ Working together, the private benefits of settlement have induced parties to enter into a multitude of consent decrees.¹⁸¹ It stands to reason that a weakening of the settlement bar would undermine these private interests. A *de minimis* settlor of the past, responsible for only a minor portion of

177. Reynolds & Hsiao, *supra* note 175, at 352–54 (describing the importance of EPA involvement in cleanup actions).

178. Settlements often deviate from an equitable apportionment of damages. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212–213 (1994). To begin with, settlements must rely on a mere prediction of the outcome of a trial. *Id.* In a CERCLA case, the trial outcome is especially unpredictable considering the size of damage judgments and the potential for absent parties. Absent parties in a CERCLA claim are often PRPs that are insolvent or defunct and their so-called “orphan shares” must be paid by the remaining PRPs in the action. *See* U.S. Environmental Protection Agency, Round 3-11: Orphan Share Compensation, <http://www.epa.gov/superfund/programs/reforms/reforms/3-11.htm> (last visited Nov. 13, 2008) (“An orphan share is the financial responsibility assigned to a potentially responsible party (PRP) who is insolvent or defunct, and unaffiliated with other viable liable PRPs.”). Additionally, a settlement may be significantly less than the settlor's equitable share because the settlement reflects the uncertainty of trial and may be entered into hastily by the plaintiff to provide funds for subsequent litigation. *McDermott*, 511 U.S. at 213 (1994). Providing PRPs with contribution protection, however, places more on EPA's side of the scale, promoting higher value settlements. *See* 42 U.S.C. § 9613(f)(2) (2000).

179. 42 U.S.C. § 9613(f)(2).

180. 42 U.S.C. § 9622(f).

181. Roughly 1,000 CERCLA consent decrees were lodged by the Department of Justice as of February 2008. Westlaw, Search Results, <http://www.westlaw.com> (search the Federal Register database for: “CERCLA & ‘Notice of Lodging of Consent Decree’”) (last searched Feb. 10, 2008) (showing approximately 980 documents).

the response costs,¹⁸² might again be threatened with a lawsuit. Even the federal government might be threatened, perhaps explaining the Deputy Solicitor General's apocalyptic remarks at *Atlantic Research's* oral arguments.¹⁸³ Due to a waiver of sovereign immunity, the government can be sued under CERCLA like any private party.¹⁸⁴ In particular, the Departments of Energy and Defense are frequent CERCLA settlors, both of whom might once again be exposed to litigation.¹⁸⁵ It is without doubt that CERCLA's

182. See 42 U.S.C. § 9622(g)(1) (2000).

183. See *supra* text accompanying notes 151–153.

184. The Government's broad waiver of sovereign immunity means the Government can be held liable for cost recovery just like any other polluter. 42 U.S.C. § 9620(a)(1) (2000). See also *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 840–41 (3d Cir. 1994) (en banc) (“[I]f the United States, even as a regulator, operates a hazardous waste facility or arranges for the treatment or disposal of hazardous wastes, it should be held responsible for cleanup costs, just as any private business would be, so that it will ‘internalize’ the full costs . . . [that hazardous] substances impose on society and on the environment.” (quoting *United States v. Atlas Minerals & Chems., Inc.*, 797 F. Supp. 411, 413 n.1 (E.D. Pa. 1992))). Like any entity, the federal government becomes a PRP by operating a facility or managing the polluting operations of a facility associated with a hazardous waste site. 42 U.S.C. § 9607(a)(1) (2000). See *United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998). For instance, a federal appellate court held the federal government liable as an operator of a facility producing war-related products during World War II because, among other things, the government determined what product the facility would manufacture and controlled the supply and price of the facility's raw materials. *FMC v. U.S. Dep't of Commerce*, 29 F.3d at 843 (employing an “actual control” test to determine if the government was an operator under CERCLA, and explaining that, at a minimum, the government would need to be actively involved with the facility, i.e. have “substantial control”). But see *United States v. Bestfoods*, 524 U.S. 51, 66–70 (1998) (rejecting the “actual control” test in favor of a working definition of “operator” in the CERCLA context: “[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”); *United States v. Twp. of Brighton*, 153 F.3d 307, 316 (6th Cir. 1998) (distinguishing “mere regulation” from “actual operation” under the *Bestfoods* analysis).

185. The federal government is responsible for a considerable amount of the hazardous waste that CERCLA addresses. In fact, the environmental liability for the handling of its hazardous waste is the third largest category of federal government liability. U.S. GEN. ACCOUNTING OFFICE, LONG-TERM COMMITMENTS: IMPROVING THE BUDGETARY FOCUS ON ENVIRONMENTAL LIABILITIES 1 (2003), <http://www.gao.gov/index.html> (search “Report #” for “GAO-03-219”) (identifying the federal government's two largest liabilities as (1) federal debt securities and (2) federal employee and veteran benefits payable). Two departments, Energy and Defense, account for 98% of this liability, a total of \$307 billion reported in 2001. *Id.* at 2–3. The Department of Energy's (DOE) share represents the legacy from nuclear weapons production and the Department of Defense's (DOD) share is associated with nuclear materials and military installations. *Id.* at 7. Both the DOE and DOD frequently settle CERCLA claims with the EPA. See Westlaw, Search Results, <http://www.westlaw.com> (search the Federal Register database for “CERCLA & ‘Notice of Lodging of Consent Decree’ & (federal /1 agenc!)”) (last searched Feb. 14, 2008) (showing 52 documents).

past-settlors who have been enjoying certainty and finality would be profoundly impacted if the settlement bar were undermined.

Although a weakening of the settlement bar is likely to adversely affect all past settlors, parties reorganized through bankruptcy would be uniquely affected.¹⁸⁶ On a policy level, an “inherent tension” exists between CERCLA’s goal of assessing comprehensive liability and bankruptcy law’s goal of a complete release from liability.¹⁸⁷ As part of the Bankruptcy Code’s purpose to give debtors a “fresh start,” pre-petition claims against a debtor are discharged.¹⁸⁸ Even before *Atlantic Research*, courts disagreed as to which CERCLA claims should be discharged in bankruptcy,¹⁸⁹ but now with the prospect of private cost recovery claims, new challenges are presented. For one, bankruptcy becomes far more complex. For instance, the waste site described in *In re Reading Co.* was identified with over 600 PRPs, only thirty-six of whom were sued by the government.¹⁹⁰ As a practical matter, it is unlikely that a former debtor could even identify all the PRPs and potential cost recovery claims in its effort to have these claims discharged.¹⁹¹ Furthermore, a bankruptcy action discharges only debts “that arose before” the bankruptcy proceeding.¹⁹² Consider a contaminated

186. See generally Michael H. Reed, *Supreme Court’s Recent CERCLA Decision Could Affect Bankruptcy Cases*, 26 AM. BANKR. INST. J. 40 (2007).

187. Brief of Reading Company as Amicus Curiae in Support of the Petitioner at 3, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562).

188. 9 AM. JUR. 2D *Bankruptcy* § 7 (2007).

189. 61C AM. JUR. 2D *Pollution Control* § 1330 (2007). Courts have at least two views on the treatment of CERCLA claims against a debtor in bankruptcy:

One view is that response costs incurred by the EPA under CERCLA are prepetition claims, dischargeable in bankruptcy, regardless of when such costs are incurred, as long as they concern the release or threatened release of hazardous substances that occurred before the debtor filed its [c]hapter 11 petition. Another view is that so long as a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance that the claimant knows will lead to CERCLA response costs, and when the claimant has conducted tests concerning the contamination, then the claimant has a contingent claim dischargeable in bankruptcy.

Id.

190. *In re Reading Co.*, 115 F.3d 1111, 1116 (3d Cir. 1997).

191. Brief of Reading Company as Amicus Curiae in Support of the Petitioner at 9–10, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562).

192. See, e.g., 11 U.S.C. § 1141(d)(1)(A) (2006) (discharging the corporate debtor “from any debt that arose before the date of such confirmation”); 11 U.S.C. § 727(b) (2006) (discharging the individual debtor “from all debts that arose before the date of the order for relief under this chapter”).

site owned by *O1* at which *B* is identified as a PRP.¹⁹³ *B* files for bankruptcy and resolves its CERCLA liability to the EPA and *O1*.¹⁹⁴ After *B* emerges from bankruptcy, *O1* transfers the site to *O2*.¹⁹⁵ Prior to *Atlantic Research*, *O2* would have had no claim against *B*, as the contribution claim would have been barred.¹⁹⁶ Now, however, *O2* has a cost recovery claim, and since that claim “arose” after the bankruptcy proceeding, *B* may be open to lawsuit.¹⁹⁷ Since volunteer remediators undertake the majority of hazardous waste site cleanups,¹⁹⁸ and since CERCLA cleanups have been going on since 1980,¹⁹⁹ a significant number of parties are in positions akin to *O2* and might now pursue cost recovery claims.

III. SAVING THE SETTLEMENT BAR: BY LAW AND BY AMENDMENT

The best way to continue to encourage CERCLA settlement is to grant settlors full protection from cost recovery claims and allow settlors to prevail on a motion for summary judgment. Full protection may be obtained by extending the settlement bar under current law, or by amendment. Despite the holding in *Atlantic Research*, several arguments in favor of extending the settlement bar are possible based on the current CERCLA text and precedent. Presented together, it is plausible that a court would recognize a settlement bar against cost recovery actions. Additionally, Congress could resolve speculation and doubt through enactment of an amendment to extend the settlement bar to cost recovery claims. Parties seeking to advance CERCLA's remedial purposes and settlors pursuing repose will no doubt look to these possibilities.

A. Barring Cost Recovery Claims as a Matter of Law

The settlement bar would already prohibit cost recovery claims by volunteer remediators if a “cost recovery” claim is construed to be a “claim[] for contribution.”²⁰⁰ The text does not seem to prohibit

193. Reed, *supra* note 186, at 54.

194. *Id.*

195. *Id.*

196. See 42 U.S.C. § 9613(f)(2) (2000).

197. Reed, *supra* note 186. See also *supra* note 192.

198. See *supra* note 15.

199. Recall that CERCLA was enacted in 1980. See *supra* note 7.

200. 42 U.S.C. §§ 9607(a)(4), 9613(f)(2). During *Atlantic Research* oral argument, Chief Justice Roberts suggested such a possibility asking, “[W]hen one responsible party has paid out the cost and is seeking a cost recovery claim from another responsible party, it's not too

this interpretation by, for instance, including limiting language that the claim for contribution need be *under this section*.²⁰¹ Also, recall that “contribution” is left undefined in the CERCLA statute.²⁰² Without a clear congressional mandate, courts may be permitted to look beyond the text for guidance in interpretation, perhaps by looking to substantive canons or to the common law.²⁰³ Substantive canons of interpretation may be instructive as to how broadly “claims for contribution” should be read. For instance, one canon implores courts to construe “remedial” statutes liberally to give greater effect to the statutes’ purposes.²⁰⁴ Relying on this canon, settlers could urge courts to strengthen the settlement bar in order to advance CERCLA’s goal of promoting early settlement.²⁰⁵ Courts might also consider other bases for keeping a strong settlement bar, like an interest in adhering to precedent²⁰⁶ or an overarching federal interest in settlement.²⁰⁷

Since “contribution” has an established common law meaning, the common law will no doubt be a touchstone for judicial interpretation.²⁰⁸ Settlers will urge courts to recognize the

much of a stretch to call it a contribution claim, is it?” Transcript of Oral Argument at 23, *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007) (No. 06-562).

201. 42 U.S.C. § 9613(f)(2).

202. *See supra* note 94 and accompanying text.

203. *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 280 n.4 (9th Cir. 1989) (stating that the plain language of a statute is conclusive unless, for example, the text is unclear).

204. *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987).

205. *See, e.g., United States v. Mallinckrodt, Inc.*, No. 4:02-CV-01488, 2006 WL 3331220, at *3 (E.D. Mo. Nov. 15, 2006) (“[T]his Court will adopt the rulings of other federal courts that have granted contribution protection to private parties who have entered into CERCLA settlement agreements. In the absence of any CERCLA provision expressly addressing whether contribution protection applies to private party settlements, the Court must construe the statute ‘liberally to avoid frustration of the beneficial legislative purposes.’” (quoting *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986) (citation omitted))).

206. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986) (noting a “strong presumption of continued validity that adheres in the judicial interpretation of a statute”). *See, e.g., United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (“Whatever label [the cross-claimant] may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.”).

207. *See supra* Part II.

208. The Supreme Court instructs that when Congress uses a legal term of art in a statute without definition, the term should be given its established common law meaning. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) (“Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.”). *See, e.g., Cmty. for Creative Non-*

similarities between a common law claim for contribution and CERCLA's cost recovery claim, noting first that both claims are equitable claims for restitution, seeking only to make the injured party whole.²⁰⁹ Unfortunately for settlers, the analogy weakens soon thereafter. To begin, common law contribution claims can be asserted only by a plaintiff who has been "compelled" or "coerced" to pay the joint debt.²¹⁰ A cost recovery plaintiff, however, is a *volunteer* remediator.²¹¹ Furthermore, a common law right to contribution arises only when two or more persons become liable in tort to the same person for the same harm.²¹² Cost recovery claims by innocent volunteer remediators would not seem to qualify, as "innocent" volunteers will *never* be liable for the harm. Yet here, *Atlantic Research* restores the strength of the analogy by allowing cost recovery claims by PRPs, which *do* qualify, as their "PRP" status anticipates a shared liability to the EPA. In the past, courts have devised a series of fictions in order to equate cost recovery to contribution claims,²¹³ making sweeping proclamations

Violence v. Reid, 490 U.S. 730, 739–40 (1989) (inferring that when Congress left the term "employee" undefined in a statute, the settled common law meaning applied). *See also* Hernandez, *supra* note 110, at 100–04 (providing an overview of common law "contribution" from a CERCLA perspective).

209. *See* 18 AM. JUR. 2D *Contribution* § 54 (2004) ("In the case of contribution among joint tortfeasors, the rationale of contribution is that it is compensation for the release of one tortfeasor's positive liability for the wrong done, brought about by a payment to the injured party, and is governed by the *equitable* doctrines concerning *unjust enrichment* and *restitution*." (emphasis added)).

210. Hernandez, *supra* note 110 at 103–04.

211. The *Restatement (Second) of Torts* technically acknowledges claims for contribution by volunteers, but includes a comment that the person seeking contribution establish both his own liability and that of the contribution defendant, meaning that, under CERCLA, the claimant would have to prove itself to be a PRP. RESTATEMENT (SECOND) OF TORTS § 886A cmt. e (1979).

212. *Id.*

213. *See generally* Hernandez, *supra* note 110, at 104–12. Some courts have applied a two step process: (1) establishment of liability under § 107(a) and (2) equitable apportionment under § 113(f)(1). *See, e.g.,* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 934 (8th Cir. 1995). Others have allowed the cause of action to proceed under § 107(a), while holding that the claimant's remedies were governed by § 113(f)(1). *See, e.g.,* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672–73 (5th Cir. 1989). Still others have held that the cost recovery claim contained an implied right to contribution. *See, e.g.,* United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 99 n.8 (1st Cir. 1994). The implied right to contribution was founded, in part, on the Supreme Court's comment that CERCLA "expressly authorizes a cause of action for contribution in § 113 and *impliedly* authorizes a *similar and somewhat overlapping remedy* in § 107." *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (emphasis added). Some courts have simply termed any action between PRPs as being "in the nature of contribution." *See, e.g.,* Boyce v. Bumb, 944 F. Supp. 807, 809

that “any claim that would reapportion costs between these parties is the quintessential claim for contribution.”²¹⁴ Although *Atlantic Research* rejects this type of sweeping interpretation,²¹⁵ the new PRP cost recovery claim strongly tracks the common law definition of a claim for contribution, and may serve as a basis for extending the settlement bar to these claims.²¹⁶

Courts have already recognized the need for a strong settlement bar under CERCLA, most notably in the context of private party settlements. In a “private party settlement,” PRPs settle amongst themselves without any government involvement.²¹⁷ Although CERCLA is silent as to whether a settlement bar should apply in a private party settlement,²¹⁸ courts have permitted these settlors to receive contribution protection just like in government settlements.²¹⁹ Accordingly, CERCLA settlors should be protected from cost recovery claims in addition to the established protection from contribution claims. This is especially true because, when enacted, the bar provided protection against all CERCLA claims in existence.²²⁰ *Atlantic Research* effectively created a new claim over twenty years after the creation of the settlement bar,²²¹ so advocates can make a strong argument that Congress intended that the bar should extend to this claim as well.²²²

(N.D. Cal. 1996).

214. *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (citations omitted).

215. *See supra* Part I.D.2.

216. Advocates may also encourage courts to *imply* a settlement bar to cost recovery claims based on the broad CERCLA text and the need for achieving CERCLA’s remedial purposes. Although the Supreme Court might be more amenable to implying a defense into a statute, the Court’s treatment of implied causes of action has been noticeably guarded of late. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1422–24 (2001) (explaining that over the last several decades, the Supreme Court has limited the ability of courts to imply causes of action, instructing courts instead to engage exclusively in statutory construction analysis).

217. *See, e.g.*, *United States v. Mallinckrodt, Inc.*, No. 4:02-CV-01488, 2006 WL 3331220, at *2 (E.D. Mo. Nov. 15, 2006).

218. *Id.*

219. *See United States v. SCA Servs. of Ind., Inc.*, 827 F. Supp. 526, 532 (N.D. Ind. 1993) (collecting cases).

220. *See* 42 U.S.C. § 9613(f)(2) (2000) (protecting settling defendants from claims for contribution); 42 U.S.C. § 9622(f) (2000) (authorizing the government to grant settling parties a covenant not to be sued by the government).

221. The settlement bar, CERCLA § 113(f)(2), was added in 1986 by SARA. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

222. Furthermore, the lack of clarity in the law of CERCLA cost recovery and

B. Barring Cost Recovery Claims by Amendment

Another way to protect settlers from volunteer remediators' cost recovery claims is by amending the settlement bar, § 113(f)(2), to bar cost recovery claims by volunteer remediators. Currently, the text of § 113(f)(2) bars "claims for contribution regarding matters addressed in the settlement."²²³ In order to bar cost recovery claims by volunteer remediators, this language could be amended to bar "claims for contribution [*and claims under section 107(a)(4)(B)*]." The specific reference to the subsection addressing cost recovery claims by volunteer remediators should do the least violence to the text, leaving alone any cost recovery claims by the EPA under § 107(a)(4)(A).²²⁴

Innocent volunteer remediators may complain that this amendment leaves them penniless, yet this is not exactly the case. A volunteer remediator benefits from increased land value, a clear release from liability, and an avoidance of litigation costs, which at least partially offsets cleanup costs. Also, the expansive liability imposed by CERCLA makes it possible that a non-settlor PRP will still be available to share costs. Finally, an innocent remediator may be able to recoup expenses directly from the Superfund by initiating an action under § 111.²²⁵ The test is "stringent" and these claims are accordingly rare,²²⁶ though this high threshold may be

contribution claims cautions against a purely literal reading of the text. *See Guessefeldt v. McGrath*, 342 U.S. 308, 319 (1952).

223. 42 U.S.C. § 9613(f)(2).

224. *See* 42 U.S.C. § 9607(a)(4)(A) (2000). After the Supreme Court's ruling in *Aviall*, but before the ruling in *Atlantic Research*, members of the U.S. Senate considered legislation that would have amended the § 113(f) claim for contribution to allow volunteer remediators to make out the claim. *EPA Concerns Highlight Hurdles for Congress' Superfund Fix on Aviall*, INSIDE EPA (Inside Wash. Publishers, Wash., D.C.), May 25, 2007, available at 2007 WLNR 9735380. The EPA responded noncommittally to the suggestion, saying: "While we recognize that the proposed legislative language is intended to address that portion of the statute upon which the Supreme Court focused, making such a change in the statute may raise unintended legal or policy consequences." *Id.* Since *Atlantic Research* gave volunteer remediators access to the § 107(a) cost recovery claim, however, the "push to reduce contentious cost recovery litigation by amending the Superfund law is unlikely . . ." *Cost Recovery Ruling May Blunt Hill Push, Spur New Litigation Issues*, INSIDE EPA (Inside Wash. Publishers, Wash., D.C.) (June 22, 2007), available at 2007 WLNR 11618086.

225. 42 U.S.C. § 9611(a)(2) (2000).

226. JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE 151-52 (2001). To recover remedial expenses from the Superfund, the costs must be "necessary," "approved," "certified by the responsible federal official," and incurred "as a result of carrying out the national contingency plan." 42 U.S.C. § 9611(a)(2) (2000). Furthermore, the claimant must first seek costs from all other known persons who

necessary to assure that the Superfund is directed first and foremost to the most threatening hazardous waste releases. It is unfortunate, yet unavoidable, that resources to address hazardous wastes are limited. The modern Superfund is financed solely from the general fund and from CERCLA settlement,²²⁷ so the EPA must take care in disbursement. Arguably, some of the roadblocks to recovering from the Superfund should be removed, and better yet, § 111 might be amended to allow a claimant to recover only a percentage of cleanup costs so that the Superfund could be more widely distributed and incentivize a greater number of cleanups. However, the dearth of case law and analysis caution against amendment of the § 111 provision.²²⁸

If the settlement bar is preserved, whether as a matter of law or by congressional amendment, settlors will be able to dispense with cost recovery claims early—at the summary judgment stage. Such early resolution best serves the public and private interests noted above, encouraging settlement and securing finality.²²⁹ However, because *Atlantic Research* has fully upended CERCLA law in this area, advocates for a strong settlement bar may need to rely on a “Plan B,” namely, a way to blunt the effect that a cost recovery lawsuit would have at the damages stage.

IV. EQUITABLE APPORTIONMENT: A LAST-DITCH OPTION TO PROTECT SETTLORS

A. Revisiting Joint and Several Liability for Cost Recovery Claims

Although it is “well-settled” that CERCLA cost recovery actions impose joint and several liability,²³⁰ allowing a plaintiff to recoup *all* cleanup costs would be inequitable if the plaintiff was partly responsible for the waste. Furthermore, when the claim is made

may be PRPs and the claim must be presented within six years of the remediation. 42 U.S.C. §§ 9612(a), (d)(1) (2000). One critic has written: “As the situations in which a nonliable person pays for remedial expenses under federal direction in order to carry out the National Contingency Plan are indeed rare, no great traffic in such claims exists. The occasional misconception of the Superfund as a grant program is certainly laid to rest by these parsimonious provisions.” MOSKOWITZ, at 152.

227. See *supra* note 10.

228. See MOSKOWITZ, *supra* note 226, at 152 (explaining that “no great traffic” exists in claims against the Superfund).

229. See *supra* Part II.

230. *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995).

against a settlor who already bought his peace with the government, the imposition of joint and several liability may even be absurd. In *Atlantic Research*, the Supreme Court asserts that joint and several liability can be easily overcome by a defendant PRP—a defendant need only file a § 113(f) counterclaim for contribution, triggering equitable apportionment.²³¹ The Court's simple solution, however, only averts the threat of joint and several liability if the defendant PRP can prove that the plaintiff is a PRP.²³² All defendants will prefer to be free of this burden of proof, and settlers, in particular, will want to trigger equitable apportionment even when the plaintiff is not a PRP because a prior settlement might be looked upon favorably by a court.²³³ Settlers, therefore, will advocate for the imposition of equitable apportionment for all cost recovery actions.²³⁴

231. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2339 (2007).

232. *See Raytheon Aircraft Co. v. United States*, No. 05-2328, 2007 WL 4530820, at *3 (D. Kan. Dec. 21, 2007) (explaining that after a plaintiff-PRP meets its burden of proving that the defendant-PRP is a liable party, the burden of proof shifts to the defendant-PRP to show that the harm is divisible and to prove the plaintiff-PRP's liability).

233. *See infra* Part IV.B. (describing how a prior settlement might affect the equitable apportionment calculus).

234. Under joint and several liability, equitable factors, such as a prior settlement, are not considered at the liability stage, however, a defendant may be able to trigger "apportionment." *See United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 935, 940 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 30 (2008). In *Burlington Northern*, the Ninth Circuit Court of Appeals considered a § 107(a) claim by government plaintiffs against landowners and an arranger. Although the district court had declined imposition of "full" joint and several liability, the Ninth Circuit reversed. *Id.* at 930. The Ninth Circuit stated that "joint and several liability need not be universally applied," *id.* at 941, and that "apportionment can be appropriate under CERCLA," *id.* at 935. According to the Ninth Circuit, "harm may be apportioned when 'there exists a reasonable basis for divisibility' of a single harm or when several 'distinct harms' are present." *Id.* at 936 (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)). The court expressly rejected consideration of equitable factors, *id.* at 940, and considered solely "whether defendants may avoid joint and several liability by establishing a fixed amount of damage for which they are liable," *id.* at 939. As applied to the defendants in the case at bar, the court stated that the landowners should focus on the amount of contamination that originated elsewhere and that the arranger should focus on "the relevant, arranged disposals in light of other contamination at the facility." *Id.* at 938. Under this analysis, the court found the evidence insufficient to support apportionment. *Id.* at 952. With respect to the landowners, for example, who had only a "minor connection to the contaminated facility," the court explained: "While the result may appear to fault a landowner PRP for failing to keep records[,] . . . CERCLA is not a statute concerned with allocation of fault. Instead, CERCLA seeks to distribute economic burdens." *Id.* at 945.

The Ninth Circuit considered, but denied, en banc reconsideration of the *Burlington Northern* panel decision. *Id.* at 952. Eight judges, in an opinion authored by Judge Bea, dissented from the denial, criticizing the panel for "appl[ying] CERCLA in a novel and

Although cost recovery claims are generally thought to impose joint and several liability,²³⁵ the CERCLA text does not demand this result.²³⁶ Indeed, in *Atlantic Research*, the Supreme Court merely assumed, without deciding, that joint and several liability applies in cost recovery actions.²³⁷ Joint and several liability was adopted, in part, by application of federal common law principles due to a recognition that CERCLA addressed a “problem of national magnitude involving uniquely federal interests.”²³⁸ When the EPA

unprecedented way to impose impossible-to-satisfy burdens on CERCLA defendants.” *Id.* (Bea, J., dissenting). Among other things, Judge Bea stated that the issue was whether the “[landowners], who were strictly liable under CERCLA, should be held jointly and severally liable.” *Id.* at 957 n.12 (Bea, J., dissenting). Judge Bea cited the “basic tort principle” that “[s]trict liability is *not* mandatorily joint and several liability,” and criticized the panel’s “confusion between strict (negligence free) liability and joint and several (apportionment free) liability.” *Id.* On October 1, 2008, the Supreme Court granted certiorari. Supreme Court of the United States, *Docket for 07-1601*, <http://origin.www.supremecourtus.gov/docket/07-1601.htm>.

The question presented to the Supreme Court is: “Whether the Ninth Circuit erred by reversing the district court’s reasonable apportionment of responsibility under CERCLA, and by adopting a standard of review and proof requirements that depart from common law principles and conflict with decisions of other circuits.” Supreme Court of the United States, *07-1601 Burlington No. & Santa Fe R. Co. v. United States*, <http://origin.www.supremecourtus.gov/docket/07-1601.htm> (select “Questions Presented”). Although the question presented does not ask the Court to reject the imposition of joint and several liability under § 107(a)(4)(A), the question could allow the Supreme Court to consider whether joint and several liability is the basic rule for cost recovery claims. *See id.*

235. *See* *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997) (“In general, a section 107 cost recovery action also imposes joint and several liability on potentially responsible persons.” (citations omitted)). *See generally* John M. Hyson, “Fairness” and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 HARV. ENVTL. L. REV. 137, 153–54 (1997).

236. *See* *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) (“CERCLA does not specifically provide for joint and several liability in a case involving multiple defendants.”).

237. *Atl. Research*, 127 S. Ct. at 2339 n.7. In *Aviall*, the Court also withheld judgment on the issue of whether a litigant may pursue a cost recovery action for some form of liability other than joint and several. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170, 171 n.6 (2004).

238. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808–10 (S.D. Ohio 1983) (holding that federal common law governs the rights, liabilities, and responsibilities of parties under § 107 and looking to similar statutes, case law, and the *Restatement (Second) of Torts* for guidance). SARA was enacted after the *Chem-Dyne* decision, and although SARA did not amend the cost recovery claim, SARA’s legislative history cited *Chem-Dyne* favorably and led almost all federal courts to follow common law joint and several liability principles. Hyson, *supra* note 235, at 150–54. In SARA’s legislative history, the Report of the House Committee on Energy and Commerce states: “The Committee believes that this uniform federal rule on joint and several liability is correct and should be followed. It is unnecessary and would be undesirable for Congress to modify [sic] this uniform rule. Thus, nothing in this bill is intended to change the application of the uniform federal rule of joint and several

is the plaintiff, the imposition of joint and several liability makes sense. This solution allows the EPA to immediately use the monies to fund other cleanups, while private parties are free to continue litigating amongst themselves to apportion costs. Now that the plaintiff may be a private party and perhaps also a PRP, however, settlers may be able to encourage courts to equitably apportion costs instead.²³⁹ Settlers can argue that equitable apportionment is necessary to avoid the inequitable or even absurd results that joint and several liability would manifest. Furthermore, advocates can show that both the House and Senate deleted provisions imposing joint and several liability.²⁴⁰ Perhaps, as one court concluded, Congress deleted the language “to avoid a mandatory legislative standard,” thereby authorizing courts to achieve equitable results by applying common law principles on a case-by-case basis.²⁴¹ Since PRP plaintiffs present a different case than that presented by the EPA, a departure from joint and several liability is arguably warranted.²⁴² Convincing a court to allocate costs by equitable

liability enunciated by the *Chem-Dyne* court.” H.R. REP. NO. 99-253(I), at 74 (1985), as reprinted in 1986 U.S.C.C.A.N. 2835, 2856.

239. *But see* Raytheon Aircraft Co. v. United States, No. 05-2328, 2007 WL 4530820, at *3 (D. Kan. Dec. 21, 2007) (“The policy considerations relied upon by the *Chem-Dyne* court in favor of its finding that section 107(a) imposes joint and several liability—rapid responses to threats posed by hazardous waste sites and the encouragement of voluntary responses to those sites—are very much in play regardless of whether the party asserting a cost recovery claim is the United States, an innocent party or a PRP.”).

240. *See* Alcan Aluminum, 964 F.2d at 268.

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

242. Since *Atlantic Research*, at least two district courts have revisited the imposition of joint and several liability for § 107(a) cost recovery actions, both choosing to retain the remedy. *See* Raytheon Aircraft Co. v. United States, No. 05-2328, 2007 WL 4530820, at *5 (D. Kan. Dec. 21, 2007). In the first case, Plaintiff United States EPA sued for cost recovery under § 107(a)(4)(A), though it was also possible that the United States, as the Department of Defense, was a PRP. *In re* Dana Corp., 379 B.R. 449, 452–53 (S.D.N.Y. 2007). The United States successfully argued that a § 113(f) counterclaim would be sufficient to blunt the harsh effect of joint and several liability. *Id.* at 7. In the second case, the United States was a defendant based on the Army Corps of Engineers’ status as an alleged co-PRP at the site. Raytheon Aircraft, 2007 WL 4530820, at *1. The United States argued that joint and several liability makes sense only when the cost recovery claimant is either the United States or an innocent party. *Id.* at *3. In rejecting the United States’ argument, the district court stated:

The United States has not explained to this court why, in [Dana Corp.], it should be able to pursue joint and several liability despite its potential status as a liable party and why the non-government PRP’s section 113(f) counterclaim in that case was sufficient to blunt any inequitable distribution but, in this case, Raytheon should be precluded from doing so and the section 113(f) counterclaim procedure is “unfair” and inadequate. Presumably, no reasonable explanation exists.

apportionment is only the first hurdle for settlors; they must then convince courts that a settlement should receive consideration in the calculus.

B. Settlement as an Equitable Factor and the Proportionate Share Rule

To avoid overpayment, settlors should argue that the prior settlement satisfied their equitable share of cleanup expenses. Since CERCLA is silent as to how courts should protect the interests of settled parties in cost recovery actions,²⁴³ federal common law serves as a guide.²⁴⁴ CERCLA cases usually involve multiple PRPs: some settled, some not. The *Restatement (Second) of Torts* § 886A describes three approaches for allocating costs in a CERCLA-type case: (1) *pro tanto*²⁴⁵ without contribution protection, (2) *pro tanto* with contribution protection, and (3) proportionate share.²⁴⁶ All three approaches block any further claim by the injured party, usually the plaintiff, against the settlor(s).²⁴⁷ However, they all continue to allow settlors to sue for contribution from non-settlors in the event of overpayment.²⁴⁸ The approaches differ as to whether non-settlors may sue settlors and how the costs are apportioned.

“*Pro tanto* without contribution protection” allows non-settlors to

Id. at *6. Although these cases do not bode well for asserting that joint and several liability be replaced by equitable apportionment, a settlor defendant can make a stronger argument for equitable apportionment because it entered into a settlement relying on future immunity from liability. Furthermore, unlike the United States, who is trapped into arguing both sides, a settlor can put forth a more impassioned plea and can argue that *all* cost recovery actions, by either the EPA or a private party, should be resolved by equitable apportionment. *See also supra* note 234 (describing the Supreme Court’s grant of certiorari on the question of “reasonable apportionment” for government-initiated cost recovery claims under § 107(a)(4)(A)).

243. *See generally* 42 U.S.C. §§ 9607, 9613 (2000).

244. *See supra* notes 236–238 and accompanying text.

245. *Pro tanto* is defined as: “To that extent; for so much; as far as it goes.” BLACK’S LAW DICTIONARY 1259 (8th ed. 2004).

246. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1979) (explaining that these approaches apply in a “situation in which one tortfeasor pays a sum to the injured party and takes a release or covenant not to sue that does not purport to be a full satisfaction of the claim”). *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 209 (1994) (referring to the approaches by the names “*pro tanto*” and “proportionate share”).

247. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1979)

248. *Id.*

sue settlors for contribution.²⁴⁹ The phrase “without contribution protection” explains that settlors are without protection from contribution claims. The remaining claim is then reduced by the settlement amount.²⁵⁰ Although this may fairly distribute costs, this approach discourages settlement by erasing the incentive to settle—namely, by not offering immunity from lawsuit.²⁵¹

“*Pro tanto* with contribution protection” blocks non-settlors from suing settlors.²⁵² Like above, the remaining claim is then reduced by the settlement amount.²⁵³ CERCLA expressly adopts this approach for “claims for contribution.”²⁵⁴ This approach places the risk of shortfall on non-settlors as a whole, who divide all but the settlement amount.²⁵⁵ This approach strongly encourages settlement, even perhaps “provid[ing] a clear incentive to collusion between [settlors].”²⁵⁶

The “proportionate share” approach also blocks non-settlors from suing settlors, but distributes liability differently than above.²⁵⁷ Instead of subtracting the *settlement amount* from the total liability, the proportionate share approach subtracts a settlor’s *equitable*

249. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m, subsec. 1 (1979).

250. *Id.*

251. *Id.*

252. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m, subsec. 2 (1979).

253. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208–09 (1994).

254. *See* 42 U.S.C. § 9613(f)(2) (2000) (“Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others *by the amount of the settlement.*” (emphasis added)); *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) (“The law’s plain language admits of no construction other than a dollar-for-dollar reduction of the aggregate liability. The weight of considered authority so holds.”). *But see* *United States v. W. Processing Co., Inc.*, 756 F. Supp. 1424, 1432 (W.D. Wash. 1990) (adopting the proportionate share rule by deciding that § 113(f)(2) concerns only the settlement itself, but that in subsequent actions, § 113(f)(1) controls, authorizing courts to use equitable factors). *See generally* Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1099–119 (1994).

255. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m, subsec. 2 (1979). A description of the *pro tanto* with contribution approach is found in § 4 of the Uniform Contribution Among Tortfeasors Act (UCATA). UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1996). An illustration of the effect of settlement under the *pro tanto* approach: *A* is injured by *B*, *C*, and *D*, jointly, accruing \$100,000 in damages. *A* settles with *B* for \$10,000. At trial, fault is apportioned between the parties as follows: *A* is 10% at fault; *B* is 40% at fault; and *C* & *D* are each 25% at fault. Under UCATA, *C* & *D* will jointly owe *A* a full \$90,000 to make *A* whole because their shares are only reduced by the amount paid by *B*. *See id.* *See also infra* note 259.

256. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m, subsec. 2 (1979). Some courts permit only good-faith settlements to benefit from the protection afforded under this approach.

257. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m, subsec. 3 (1979).

share.²⁵⁸ Since the equitable share is often more than the settlement amount, this approach places the risk of shortfall on the claimant alone.²⁵⁹ In cost recovery actions, the voluntary remediator, as claimant, would shoulder the risk and may be less inclined to initiate cleanup.

A CERCLA settlor will avoid liability as long as a court rejects the first approach, *pro tanto* without contribution protection. Fortunately for settlers, the Supreme Court did just that in *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994), an admiralty case.²⁶⁰ In *McDermott*, the Court compared the approaches, holding three considerations paramount:²⁶¹ equitable apportionment, promotion of settlement, and judicial economy.²⁶² The Court described the *pro tanto* without contribution protection approach as “clearly inferior[,] . . . because it discourages settlement and leads to unnecessary ancillary litigation.”²⁶³ Since the Court’s three considerations in *McDermott* reflect public policies also at issue in CERCLA,²⁶⁴ settlers can point to the Court’s dismissive treatment of the *pro tanto* without contribution protection approach as demonstrative of a strong policy in favor of the finality of settlement. Settlers can argue that any method of apportionment for a cost recovery action should begin with the assumption that a prior settlement is final and satisfies the settlor’s share of liability.²⁶⁵

258. *Id.*

259. *Id.* A description of the proportionate (or comparative) fault rule is found in § 6 of the Uniform Comparative Fault Act (UCFA). UNIF. COMPARATIVE FAULT ACT § 6 (1996). The uniform act states that though this approach “may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.” UNIF. COMPARATIVE FAULT ACT § 6 cmt. (1996). An illustration of the effect of settlement under proportionate fault: A is injured by B, C, and D, jointly, accruing \$100,000 in damages. A settles with B for \$10,000. At trial, fault is apportioned between the parties as follows: A is 10% at fault; B is 40% at fault; and C & D are each 25% at fault. Under UCFA, C and D will jointly owe A just \$50,000, because their share is reduced by B’s equitable share (\$40,000), not B’s actual settlement. Furthermore, if D’s share is determined to be uncollectible, everyone else’s share increases proportionately. *See id.* § 6 cmt., illus. 11–12. *See also supra* note 255.

260. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220 (1994).

261. Note that the *McDermott* Court also specifically expressed a desire for consistency with the proportionate fault approach of *United States v. Reliable Transfer*, 421 U.S. 397 (1975). *McDermott*, 511 U.S. at 211.

262. *Id.*

263. *Id.*

264. *See supra* Part II.

265. *See McDermott*, 511 U.S. at 208 (“It is generally agreed that when a plaintiff settles with one of several joint tortfeasors, the nonsettling defendants are entitled to a credit for that settlement.”).

As between approaches two and three, settlers present no clear unique interest, though for completeness, this Article will undertake the analysis. These two approaches differ most dramatically as to how costs are apportioned after a settlement failed to collect an equitable amount. Under the *pro tanto* rule, the liability of the remaining defendants inflates to satisfy all but the settlement amount.²⁶⁶ Under proportionate share, each defendant pays no more than its share of the judgment, leaving the plaintiff to bear the risk.²⁶⁷ In *McDermott*, plaintiff McDermott negotiated a settlement with a subgroup of tortfeasors on the eve of trial.²⁶⁸ A unanimous Court held that the liability of the non-settling defendants should be calculated using the proportionate share approach.²⁶⁹ The Court rejected the *pro tanto* with contribution protection approach because of its likelihood for inequitable results, stating that the approach “threaten[s] the nonsettling defendant with the prospect of paying more than its fair share” and that this additional incentive to settle “[came] at too high a price in unfairness.”²⁷⁰

CERCLA presents a unique case in that the EPA is a participant. In *McDermott*, it was sensible to place the risk on the plaintiff because the plaintiff negotiated and profited from the settlement. A volunteer remediator is bound to a settlement made in its absence, a settlement made between the PRP and the EPA, without benefiting the volunteer remediator. The volunteer, however, still has autonomy in choosing to pursue remediation without coordinating with other PRPs or the EPA, and benefits both through the cost recovery action and the appreciation in land value. Furthermore, the volunteer's recalcitrance may have frustrated site cleanup by delaying action and driving up costs, and may also have frustrated national efforts to distribute settlement funds efficiently. These offsetting aspects support a conclusion that the proportionate share method is as appropriate for volunteer remediator cost recovery actions as it was in *McDermott*. Note that *McDermott* held it equitable to place the risk on even an innocent plaintiff. Volunteer remediator plaintiffs, however, may themselves

266. *Id.* at 208–09 (explaining that the settlement amount is subtracted from the damages).

267. *Id.* at 209.

268. *Id.* at 205.

269. *Id.* at 204.

270. *Id.* at 215.

be PRPs, bolstering the argument that such plaintiffs should shoulder the risk of shortfall.²⁷¹

CONCLUSION

Atlantic Research's surprising effect on CERCLA jurisprudence creates an opportunity to re-examine the law and practical effects of CERCLA. Though no one would assert that hazardous waste is good for society,²⁷² few would agree on how to clean up abandoned and uncontrolled hazardous waste sites or who to hold responsible. As time ticks by, PRPs continue to disappear and the number of sites that are amenable to volunteer remediation will be exhausted. As it stands, the Supreme Court's *Atlantic Research* holding eases the way for some volunteer remediation but may stymie EPA settlement and, therefore, EPA-managed cleanup. Although the privatization of hazardous waste cleanup might be appealing to some site owners, yet unidentified PRPs,²⁷³ and industry giants who no longer pay the Superfund tax, relying solely on *sua sponte* cleanup at the whim of market forces endangers the public.

CERCLA's role as a financing mechanism to distribute funds nationwide for hazardous waste cleanup might seem to conflict with CERCLA's goal of making liable parties pay for individual waste releases, yet it is crucial to note that CERCLA does not

271. *Id.* at 217.

272. See generally JOHN C. STAUBER & SHELDON RAMPTON, TOXIC SLUDGE IS GOOD FOR YOU: LIES, DAMN LIES AND THE PUBLIC RELATIONS INDUSTRY (1995). Stauber and Rampton's cynical look at the public relations industry briefly mentions an organized effort to improve the image of sludge. *Id.* at 99–122. The book explains that in the early 1990s, the Water Environment Foundation (WEF), a non-profit organization, launched a search to find an alternative name for sludge. *Id.* at 105–06. After considering options such as "purenutri," "black gold," "geoslime," "sca-doo," and "ROSE," short for "recycling of solids environmentally," WEF settled on "biosolids." *Id.* at 106. Shortly thereafter, WEF received a grant from the U.S. EPA to educate the public about the benefits of sludge. *Id.* at 107. Presumably, the grant was offered to address concerns raised by the EPA in a 1981 public relations document: "The major public acceptance barrier which surfaced in all the case studies is the widely held perception of sewage sludge as malodorous, disease causing or otherwise repulsive. . . . There is an irrational component to public attitudes about sludge which means that public education will not be entirely successful." *Id.* at 99.

273. Reduced CERCLA enforcement would limit the EPA's ability to track down PRPs. Note also that claimants can learn of settlements and settlors through the U.S. Government Printing Office website. See U.S. Government Printing Office, Federal Register, <http://www.gpoaccess.gov/fr/index.html> (search, e.g., "Notice of Lodging of Consent Decree"). Thus, if the settlement bar is weakened, claimants can easily identify and sue all settlors associated with the hazardous waste site, while claimants will be less inclined to conduct extensive research to unearth as yet unidentified PRPs.

impose penalties but, rather, dollar-for-dollar recovery of cleanup costs. CERCLA has helped internalize the environmental costs of doing business in the chemical and petroleum industries, albeit retroactively. That the hazardous waste release occurred in the past does not alter the conclusion that the PRP played a role in the release and, if behaving as an economic actor, also benefitted in some way from the release. Even the hazardous waste “transporter” who lacked any knowledge of the load’s contents was maximizing the profits of the business. Accepting this reality is a step toward embracing CERCLA’s role as a financing mechanism and appreciating the role that settlements play in providing funds. Without settlements, a multitude of hazardous waste sites, potentially sites posing great threats to human health, will lie dormant. Remember, however, that hazardous waste itself never lies dormant, but travels along like *Pierson’s* wild fox bounding over invisible property lines.²⁷⁴ Those who are unlucky enough to reside near a site that lacks an eager volunteer remediator will live in danger as they wait patiently for the federal government to use its meager appropriations to remediate.

To achieve CERCLA’s purposes, settlement must be encouraged, and in order to induce parties to settle, the EPA must be authorized to offer parties a settlement bar, a full release from future liability. In the wake of *Atlantic Research*, it is uncertain whether this release exists as a matter of law under the CERCLA statute, though text and precedent suggest the possibility. For consistency and clarity, however, Congress should act to amend CERCLA and extend the settlement bar. This result would permit a settlor to prevail on a summary judgment motion at the outset of litigation and would deter future attempts at lawsuit.

If the legislature fails to amend, and the courts decline the opportunity to strengthen, the settlement bar, courts have one remaining, though less protective, option for safeguarding the

274. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). *Pierson v. Post*, a seminal case in property law, centers on a dispute about the ownership of a dead fox. See Bethany R. Berger, *It’s Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1089 (2006). In the case, Post and his hunting dogs were bearing down on the “noxious beast” when Pierson intervened, killed the fox and took it away. *Pierson*, 3 Cai. R. at 177. The court held that Pierson gained ownership of the fox by depriving the so-called “beast[] *feræ naturæ*” of its natural liberty. *Id.* at 179. Although CERCLA can be conceived as addressing “hazardous wastes *feræ naturæ*,” it is doubtful that any parties will be vying for ownership. Compare *Westmoreland & Cambria Nat’l Gas Co. v. DeWitt*, 18 A. 724, 725 (Pa. 1889) (deciding ownership of oil and gas, described by the court as “minerals *feræ naturæ*”).

interests of settlors. Courts can revisit the remedy imposed by the cost recovery claim and opt, in CERCLA's silence, to consider equitable factors in apportioning costs. In this event, settlors would still have to tolerate litigation but a settlor could plead his case to the court, highlighting his past cooperativeness, in hopes of decreasing his instant liability to zero. On the whole, protecting the interests of settlors is crucial to give CERCLA continued vitality for fostering remediation of the wastes of the past.