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No Contribution Claims for Voluntary Cleanup of Superfund Sites: The Troubling Supreme Court Decision in *Cooper Industries v. Aviall Services*

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I. Introduction

In *Cooper Industries v. Aviall Services* ("*Cooper Industries*"),[1] the United States Supreme Court held that section 113(f)(1)[2] ("section 113(f)(1)") of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),[3] does not allow a potentially responsible party ("PRP") to seek contribution from another PRP for the costs of voluntarily cleaning up a hazardous waste site.[4] Instead, the Court held that before a PRP can bring a cause of action under section 113(f)(1), the PRP himself must have been subject to a civil action under section 106 or section 107(a) of CERCLA[5] ("section 106" and "section 107(a)"). Under section 106, the federal government may order the cleanup of a hazardous site, and under section 107(a), a party who has incurred cleanup costs, whether the government or a private entity, may sue a PRP for cost recovery.[6] Thus, according to *Cooper Industries*, a PRP who voluntarily undertook cleanup efforts (i.e., without being subject to a federal cleanup order and without having been sued for cleanup costs) may not seek contribution from another PRP under section 113(f)(1). *Cooper Industries* reversed an en banc holding

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1. *Cooper Industries v. Aviall Services*, 543 U.S. 157, 125 S. Ct. 577 (2004).

2. Codified at 42 U.S.C. § 9613(f)(1) (2005).

3. Both CERCLA and SARA are codified at 42 U.S.C. §§ 9601–9675 (2005).

4. *Cooper Industries*, 125 S. Ct. at 583.

5. *Id.*

6. 42 U.S.C. §§ 9606, 9607(a) (2005). *See infra* note 24 and accompanying text. *See infra* note 66.

of the Fifth Circuit Court of Appeals,[7] and it settled an issue over which federal courts had differed for many years.[8]

This comment argues that the Court's textualist[9] analysis[10] of section 113(f)(1) was overly narrow and that the Court erred in concluding that it had no need to look beyond the statutory language to analyze the broader purposes, legislative history, and judicial interpretations of CERCLA and SARA.[11] A closer look at these non-textual factors suggests, in fact, that a PRP should be able to seek contribution for voluntary cleanup costs under section 113(f)(1). This comment also argues that *Cooper Industries* will have the effect of chilling voluntary cleanup efforts, delaying or even preventing remediation on the many sites that still carry contaminants.[12] These results frustrate the very purpose of CERCLA.

II. The History and Legal Framework of CERCLA

Congress passed CERCLA in 1980, largely in response to the "Love Canal" incident.[13] Although the text of CERCLA itself does not articulate a purpose, the Fifth Circuit, for one, has stated that its purpose "is to facilitate the prompt cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefited from the wastes

7. *Aviall Services v. Cooper Industries*, 312 F.3d 677, 679 (5th Cir. 2002) [hereinafter *Aviall* III].

8. *See, e.g.*, *Aviall Services v. Cooper Industries*, 263 F.3d 134, 141–43 (5th Cir. 2001) (citing prior cases which held that a potentially responsible party ("PRP") could not bring a claim under section 113(f)(1) unless it was subject to liability under sections 106 or 107(a), as well as cases reaching the opposite conclusion) [hereinafter *Aviall* II].

9. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 623 (1990). The Court's textualist approach has roots in the jurisprudence of Supreme Court Justice Antonin Scalia, which Eskridge has termed "the new textualism." *Id.* Eskridge writes, "[t]he new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Such confirmation comes, if any is needed, from examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction." *Id.* at 623–624.

10. *Cooper Industries*, 125 S. Ct. at 583–584.

11. *Id.* at 584.

12. The National Priorities List (NPL) of February 11, 2005 listed 1,238 sites. U.S. Environmental Protection Agency, National Priorities List: NPL Site Totals by Status and Milestone, *at* http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last visited Nov. 18, 2005.). The Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database, as of February 24, 2005, had more than 10,000 potentially hazardous sites that have not been listed on the NPL. U.S. Environmental Protection Agency, Superfund Information Systems: CERCLIS Database: Search CERCLIS, *at* http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm (last visited Nov. 18, 2005) (searching for all CERCLIS sites "Not on the NPL"). The EPA has estimated that there are more than 450,000 brownfields in the U.S. U.S. Environmental Protection Agency, Brownfields Cleanup and Redevelopment: About Brownfields, *at* http://www.epa.gov/brownfields/about.htm (last visited Nov. 18, 2005).

13. Robert A. Simons & Kimberly Winson, *Brownfield Voluntary Cleanup Programs: Superfund's Orphaned Stepchild, or Innovation from the Ground Up?*, *in* Toxic Waste and Environmental Policy in the 21st Century United States 104 (Dianne Rahm ed., 2002). *See also* U.S. Environmental Protection Agency, Love Canal: Site Fact Sheet 1 (2005), http://www.epa.gov/region02/superfund/npl/0201290c.pdf ("Problems with odors and residues [near the former Love Canal landfill], first reported in the 1960's, increased during the 1970's . . . . In 1978 and 1980, President Carter issued two environmental emergencies for the Love Canal area. As a result, approximately 950 families were evacuated from a 10-square-block area surrounding the landfill. The Federal Emergency Management Agency (FEMA) was directly involved in property purchase and residential relocation activities.").

that caused the harm."[14] CERCLA established a mechanism for identifying contaminated sites,[15] which resulted in the creation of the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS")[16] and the National Priorities List ("NPL").[17] CERCLA also set up the Superfund to pay for the removal or remediation of hazardous waste[18] and authorized the Environmental Protection Agency ("the EPA") to recover costs from responsible parties.[19] PRPs include the owners and operators of contaminated sites and vessels as well as those disposing of, treating, or transporting hazardous waste.[20] Not only are past owners and operators liable, but so are current owners and operators, regardless of whether they actually contributed to the contamination, with minor exceptions.[21] SARA updated and clarified many of CERCLA's provisions[22] and reauthorized the Superfund.[23]

A. Section 107(a) and Its Judicial Interpretations

When Congress passed CERCLA, the statute included section 107(a), known as the "cost recovery" provision, which allows the federal government, a state, or any person

14. OHM *Remediation Servs. v. Evans Cooperage Co. Inc.*, 116 F.3d 1574, 1578(5th Cir. 1997) (citing *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993) and *United States v.* R.W. *Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989)). *See also, Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1143–42 (E.D. Pa. 1982).

15. 42 U.S.C. § 9605(a)–(c) (2005). *See also* Edward E. Shea, Environmental Law and Compliance Methods 177–79 (2002) (stating the "regulations prescribe methods, procedures and criteria for remedial site evaluation which consist of a remedial preliminary assessment (PA) and a remedial site inspection (SI)"); U.S. Environmental Protection Agency, Superfund: Cleanup Process, *available at* http://www.epa.gov/superfund/action/process/sfproces.htm (last visited Nov. 18, 2005) ("The Superfund cleanup process begins with site discovery or notification to EPA of possible releases of hazardous substances. Sites are discovered by various parties, including citizens, State agencies, and EPA Regional offices. Once discovered, sites are entered into [CERCLIS] . . . .") [hereinafter Superfund Cleanup Process].

16. Superfund Cleanup Process, *supra* note 15 (stating that CERCLIS is "EPA's computerized inventory of potential hazardous substance release sites"); U.S. Environmental Protection Agency, Superfund Information Systems: CERCLIS Database, *at* http://www.epa.gov/superfund/sites/cursites/index.htm (last visited Nov. 18, 2005) ("The CERCLIS Database . . . contains information on hazardous waste sites, potentially hazardous waste sites, and remedial activities across the nation. The database includes sites that are on the National Priorities List (NPL) or being considered for the NPL.").

17. U.S. Environmental Protection Agency, National Priorities List: NPL Site Listing Process, *at* http://www.epa.gov/superfund/sites/npl/npl_hrs.htm (last visited Nov. 18, 2005) (stating that the NPL is a list of hazardous waste sites which are "national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States").

18. Under CERCLA, the original statute establishing the Superfund was located at 42 U.S.C. § 9631. SARA repealed that provision and created a new statute at 26 U.S.C. § 9507(a) (2005). *See also* Shea, *supra* note 15, 170–71 (stating that CERCLA "created a multi-billion dollar trust fund (the "Superfund") . . . for the use of the [EPA] in removal and other response actions").

19. *Aviall* II, 263 F.3d at 137. *See also* Joel B. Goldsteen, The ABC's of Environmental Regulation 218 (2d ed. 2003) ("[CERCLA] provides for compensation for cleanups of hazardous waste spills until responsible parties are identified and payment can be arranged.").

20. 42 U.S.C. § 9607(a).

21. Wendy Wagner, *Overview of Federal and State Law Governing Brownfield Cleanups, in* Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property 21 (Todd S. Davis ed., 2d ed. 2002) (citing as exceptions "state and local governments that acquire a property involuntarily, and purely 'innocent' landowners who have made a thorough, good-faith investigation of the site before purchase and mistakenly believe the site to be clean").

22. *See e.g., infra* note 55 and accompanying text.

23. *See supra* note 18.

who has incurred cleanup costs to sue a PRP for reimbursement. As amended by SARA, section 107(a) currently reads as follows:

> Notwithstanding any other provision or rule of law . . . (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 (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 plan, (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 104(i).[24]

Federal courts reached several important conclusions about section 107(a) before the passage of SARA. First, pre-SARA courts agreed that paragraph B of section 107(a) created a private cause of action against a PRP.[25] Second, despite conflicting opinions at first,[26] most pre-SARA courts ultimately held that the clause "necessary costs of response . . . consistent with the national contingency plan" in paragraph B did not require governmental involvement as a prerequisite to a private cause of action.[27] For example, in *Wickland Oil Terminals v. Asarco, Inc.*,[28] the Ninth Circuit rejected the argument that a private cause of action under section 107(a) required that the private party act pursuant to a government-authorized cleanup program.[29] In reaching this conclusion, the Ninth Circuit deferred to the "EPA interpretation that the 1982 national contingency plan does not require lead agency approval of cleanup programs as a prerequisite to section

24. 42 U.S.C. § 9607(a) (2005).

25. *See, e.g., Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986); *Walls*, 761 F.2d at 318 (citing as precedent *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1442–44 (S.D. Fla. 1984); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984); and other cases); *Stepan Chemical*, 544 F. Supp. at 1141; *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 288 (N.D. Cal. 1984).

26. *See* U.S. Environmental Protection Agency, National Oil and Hazardous Substances Pollution Contingency Plan: Final Rule, 50 Fed. Reg. 47,912, 47,934 (1985) (discussing the "widespread confusion and conflicting judicial interpretations of the issue").

27. *See, e.g., Tanglewood East*, 849 F.2d at 1575; *NL Industries v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Cadillac Fairview v. Dow Chemical Co.*, 840 F.2d 691, 694–695 (9th Cir. 1988); *Richland-Lexington Airport Distributors v. Atlas Properties, Inc.*, 901 F.2d 1206, 1208 (4th Cir. 1990); and *Rockwell International Corp. v. IU International Corp.*, 702 F. Supp. 1384, 1387 (N.D. Ill. 1988).

28. *Wickland*, 792 F.2d at 887.

29. *Id.* at 892.

30. *Id.* (citing National Oil and Hazardous Substances Pollution Contingency Plan: Final Rule, 50 Fed. Reg. 47,912, 47,934 (1985) (to be codified at 40 CFR pt. 300), which states "[i]n this rule, EPA makes it absolutely clear that no Federal approval of any kind is a prerequisite to a cost recovery under section 107 . . . .").

107(a) actions by private parties."[30] The *Wickland* court also noted, "[t]his reading is buttressed by the lack of any procedure whereby a private party could seek to obtain prior governmental approval of a cleanup program."[31] Similarly, courts have held that a cost recovery claim under section 107(a) does not require NPL listing of the site as a prerequisite.[32]

Third, pre-SARA courts held that section 107(a) constitutes a separate, independent cause of action from section 111[33] and section 112[34] of CERCLA ("section 111" and section 112"), which govern the use of the Superfund.[35] For instance, in *United States v. Reilly Tar & Chemical Corp.*,[36] the court rejected the argument that recovery under section 107(a) was limited to the amount that a party could recover from the Superfund under sections 111 and 112, holding "[l]iability under section 107(a) is independent of the authorized uses of the Fund under section 111 . . . ."[37] Similarly, the court in *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*[38] rejected the argument "that CERCLA envisions governmental action as a condition precedent to any and all private liability"[39] and held "that section 107 and sections 111 and 112 provide causes of action that are distinct and independent."[40]

31. *Id.*

32. *See, e.g., State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045–1047 (2d Cir. 1985); *Pinole Point Properties*, 596 F. Supp. at 287–88; *Interchange Office Park, Ltd. v. Standard Industries, Inc.*, 654 F. Supp. 166, 168–89 (W.D. Tex. 1987); and *Allied Towing v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1349 (E.D. Va. 1986).

33. Codified at 42 U.S.C. § 9611 (2005). Section 111(a) reads in pertinent part, "[t]he President shall use the money in the Fund for the following purposes: . . . (2) Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 311(c) of the Clean Water Act and amended by section 105 of this title: Provided, however, That [sic] such costs must be approved under said plan and certified by the responsible Federal official [and] (3) Payment of any claim authorized by subsection (b) of this section and finally decided pursuant to section 112 of this title, including those costs set out in subsection 112(c)(3) of this title." 42 U.S.C. § 9611(a) (2005).

Section 111(b) reads in pertinent part, "[c]laims asserted and compensable but unsatisfied under provisions of [S]ection 311 of the Clean Water Act which are modified by section 304 of this Act may be asserted against the Fund under this title . . . ." 42 U.S.C. §§ 9611(b) (2005).

34. Codified at 42 U.S.C. § 9612 (2005). Section 112(a) reads in pertinent part, "[n]o claim may be asserted against the Fund pursuant to section 111(a) unless such claim is presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 107."

35. *See, e.g., Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1079 (1st Cir. 1986) ("Because section 112(a) refers exclusively to section 111 claims, it differs fundamentally from section 112(d), which explicitly applies not only to 'claims,' but also to judicial actions for damages commenced under section 107(a)(2)(C). Because of this distinction, we need not read the 'all claims' language of section 112(a) as necessarily referring to the private judicial actions contemplated by section 107."); *Walls*, 823 F.2d at 980; *United States v. Moore*, 698 F. Supp. 622, 625 (E.D. Va. 1988); *United States v. Carolina Transformer Co.*, 650 F. Supp. 157, 159 (E.D.N.C. 1987); and *United States v. Dickerson*, 640 F. Supp. 448, 452 (D. Mary. 1986).

36. *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

37. *Id.* at 1117–1118.

38. *Pinole Point Properties*, 596 F. Supp. at 283.

39. *Id.* at 288 (rejecting defendant's arguments "that section 107 merely establishes liability for purposes of sections 111 and 112, which govern use of the Superfund;" that "[u]nder section 112(a), a claimant against the Superfund must first present its claim to any party that might be liable under section 107;" and "[p]ayments from the Superfund are limited to 'necessary response costs incurred by [any party other than the government] as a result of carrying out the National Contingency Plan, provided, however, that such costs must be approved under said . . . Plan and certified by the responsible federal official.'" (citing 42 U.S.C. § 9611(a)(2) (2005))).

40. *Id.*

Fourth, pre-SARA courts held that PRPs were subject to joint and several liability for environmental cleanup costs under section 107(a). In the seminal case of *United States v. Chem-Dyne Corp.*,[41] the United States brought suit against 24 defendants to recover Superfund money that it spent on cleanup.[42] Defendants made a motion for partial summary judgment, alleging that as a matter of law, CERCLA did not expressly provide for joint and several liability between PRPs.[43] The district court held that Congress intended for CERCLA to establish a uniform federal rule, that PRPs could be held jointly and severally liable.[44] The court applied the concept of joint and several liability to CERCLA, as follows:

> When two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Furthermore, where the conduct of two or more persons liable under [section 107] has combined to violate the statute, and one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant.[45]

The *Chem-Dyne* court then denied the motion for summary judgment, because "there [were] genuine issues of material fact concerning the divisibility of the harm and any potential apportionment."[46] Congress explicitly endorsed the *Chem-Dyne* decision when it adopted SARA in 1986,[47] and courts have since recognized joint and several liability for PRPs under section 107(a).[48]

Fifth and finally, federal courts interpreted CERCLA as allowing a PRP to bring a claim for cost recovery against another PRP, even though the language of CERCLA did not explicitly provide for it. The courts justified this interpretation through a broad reading of the term "any other person" in paragraph B of section 107(a). For example, in *City of Philadelphia v. Stepan Chem Co.*,[49] the district court rejected defendant's argument that the phrase "any other person" referred only to non-responsible parties and precluded suit by the City, a partially liable party.[50] The court said:

> [I]n the context in which it appears . . ., the term 'any other person' is quite conceivably designed to refer to persons other than federal or state governments and not . . . to persons other than those made responsible under the act. Thus . . ., the provision does not specifically exclude parties who may be liable for the costs of governmental action nor does its language necessarily support such a construction.[51]

41. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (D. Ohio 1983).

42. *Id.* at 804.

43. *Id.* at 810.

44. *Id.* at 809.

45. *Id.* at 810 (citations omitted).

46. *Id.* at 811.

47. H.R. Energy and Commerce Committee Rep. No. 99-253, Pt. 1, 74 (1985) *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 ("The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corporation*, which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases . . . . 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 modity [sic] this uniform rule. Thus, nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court.").

48. *See, e.g.*, R.W. *Meyer*, 889 F.2d at 1507.

49. *Stepan Chemical*, 544 F. Supp. at 1135.

50. *Id.* at 1141–1142.

51. *Id.* at 1142.

Many other pre-SARA cases reached the same conclusion — that PRPs could bring suit against other PRPs under section 107(a).[52] When Congress passed SARA in 1986, it did not disturb these judicial holdings.[53]

B. Section 113 and Its Judicial Interpretations

As part of SARA, Congress adopted section 113(f)(1) to confirm its intent to provide PRPs with a cause of action for cost recovery.[54] Known as the "contribution" provision, section 113(f)(1) reads in pertinent part as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.[55]

But far from adding clarity, section 113(f)(1) raised a new question of interpretation: did Congress intend for section 113(f)(1) to replace or coexist with the section 107(a) cause of action? Post-SARA courts reached three conclusions about the relationship between sections 107(a) and 113(f)(1). First, they held that section 113(f)(1) created no new liability separate from section 107(a), but functioned as a mechanism for seeking relief under section 107(a).[56] Second, section 113(f)(1) differed

52. *See Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1406, 1406 n.7 (D. Ariz. 1996) (The court states "substantial weight should be given to the fact that [in passing SARA in 1986,] Congress expressly intended [s]ection 113 to confirm preexisting case law. That case law generally interpreted [s]ection 107 broadly to afford a cause of action to liable and non-liable parties alike.").

53. SARA did not amend paragraph B of section 107(a). 42 U.S.C.S. § 9607 (LexisNexis 2005) (History; Ancillary Laws and Directives: Amendments). Had Congress wished to overrule the *Stepan Chemical* or *Wickland* lines of cases, it would surely have amended that paragraph. Also, SARA did not make any amendments to sections 107 or 111 that would have subjected section 107(a) claims to the requirements of section 111. 42 U.S.C.S. §§ 9607, 9611 (LexisNexis 2005) (History; Ancillary Laws and Directives: Amendments). In fact, SARA made amendments to section 112(a) which clarified that it pertains only to claims against the fund, and not to section 107(a) actions. *Id.* Those amendments included the addition of a catchline reading "[c]laims against the Fund for response costs," and deleting the phrase, "the claimant may elect to commence an action in court against such owner, operator, guarantor, or other person." *Id.*

54. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) ("This conclusion—that section 107 implicitly incorporates a claim for contribution—is unremarkable; most courts had so held even before Congress settled the issue by enacting section 113(f)." (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994)) ("The legislative history behind section 113(f) also supports the conclusion that, in enacting that provision, Congress was only confirming and clarifying an existing claim for contribution under section 107." (citing H.R. REP. NO. 99-253, Pt. 3, 18–19 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 3038, 3041)) [hereinafter *Pinal Creek Group* II].

55. 42 U.S.C. § 9613(f)(1) (2005).

56. *See, e.g., Garaghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924 (5th Cir. 2000) (stating that section 113(f) "is a mechanism for apportioning costs that are recoverable under section 107" and "a claim for collection of the costs referred to in section 107." The court adds that "a contribution action is merely one type of cost-recovery action" (citing *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191–92 (10th Cir. 1997))); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3rd Cir. 1997); *Pinal Creek Group* II, 118 F.3d at 1302; *Bancamerica Commercial Corp. v. Mosher Steel*, 100 F.3d 792, 800 (10th Cir. 1996) (stating that section 113(f) "does not of itself create any new liabilities. Rather, it simply confirms the right of a person potentially . . . liable under section 107(a) to obtain contribution from other potentially liable persons"); and *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268, 1270 (7th Cir. 1994).

from section 107(a) in that it does not impose joint and several liability, but calls for equitable apportionment of costs between joint tortfeasors.[57] Third, based on these first two conclusions, many courts held that PRPs could seek *only* contribution under section 113(f)(1) and *not* cost recovery under section 107(a) from another PRP, because, those courts reasoned, PRPs should not be able to impose joint and several liability on other PRPs, but should only be able to seek contribution.[58] However, courts split with respect to the main issue in *Cooper Industries*: whether the section 113(f)(1) action required PRPs to be subject to prior or pending liability under sections 106 or 107(a).[59]

III. The Supreme Court Decision in *Cooper Industries*

A. Factual and Procedural History

A discussion of *Cooper Industries* requires an overview of the case's factual and procedural history. In 1981, Aviall Services ("Aviall") purchased the aircraft engine maintenance business of Cooper Industries ("Cooper"), including Cooper's maintenance facilities, and several years later, Aviall discovered contaminated soil and groundwater at those locations.[60] After Aviall notified the Texas Natural Resource Conservation Commission ("TNRCC") of the contamination,[61] the TNRCC sent letters to Aviall instructing the company to undertake investigative and remedial activities, alleging statutory and regulatory violations, and warning of enforcement action if Aviall failed to respond adequately.[62] The EPA never contacted Aviall, nor did it designate the facilities as contaminated.[63] In 1984, Aviall voluntarily initiated cleanup operations, which lasted a decade and cost several million dollars.[64]

In 1997, Aviall sued Cooper for cost recovery, based on separate causes of action under section 107(a) and section 113(f)(1), but later amended the complaint by combining the two into a single, joint CERCLA claim.[65] The District Court for the Northern District of Texas, based on a "plain meaning" analysis, held that CERCLA allows a section 113(f)(1) claim for contribution only "during or following" a civil action under

57. *See, e.g.*, *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347 (6th Cir. 1998) ("CERCLA provides two causes of action for parties to recover the response costs incurred by the cleanup effort: joint and several cost recovery actions governed exclusively by section 107(a) . . . and contribution actions as set forth in section 113(f)."); OHM, 116 F.3d at 1581–82 (After quoting S. REP. NO. 99-11, 44 (1985), the court concludes "that section 113(f) was not meant to be duplicative of section 107(a), but meant instead to allow [PRPs] a cause of action to mitigate the harsh effects of joint and several liability.").

58. *See, e.g.*, *Pinal Creek Group* II, 118 F.3d at 1301 ("Because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution. A PRP's contribution liability will correspond to that party's equitable share . . . and will not be joint and several. CERCLA simply does not provide PRPs who incur cleanup costs with a claim for the joint and several recovery of those costs from other PRPs.") (footnote omitted); *Cooper Industries*, 125 S. Ct. at 585 (citing *Bedford Affiliates v. Sills*, 156 F.3d 416, 423–424 (2d Cir. 1998); *Centerior*, 153 F.3d at 349–356; *Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Halliburton NUS Corp.*, 111 F.3d at 1120–1124; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996); *United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1534–1536 (10th Cir. 1995); and *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 98–103 (1st Cir. 1994)).

59. *See infra* notes 134–177 and accompanying text.

60. *Aviall* II, 263 F.3d at 136.

61. *Id.*

62. *Aviall* III, 312 F.3d at 679 n.2.

63. *Aviall* II, 263 F.3d at 136.

64. *Id.*

65. *Cooper Industries*, 125 S. Ct. at 582.

section 106[66] or section 107(a).[67] Also, it held that the last sentence of section 113(f)(1), the so-called "saving clause," does not undo the "during or following" requirement, but simply preserves a party's right to bring "contribution claims that are otherwise available, such as under state law."[68] Since Aviall could not demonstrate a pending action against it, the court ruled that Aviall could not seek contribution under section 113(f)(1) and dismissed the claim without prejudice pursuant to Cooper's motion for summary judgment.[69]

A three-judge panel of the Fifth Circuit ("Fifth Circuit panel") affirmed,[70] but in a subsequent en banc proceeding ("Fifth Circuit en banc"), the court reversed, holding that a "PRP may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site."[71] The Fifth Circuit en banc based its decision on an analysis of the statutory text, the legislative history, judicial precedent, and public policy.[72] Cooper then appealed to the United States Supreme Court.

B. The Majority Opinion

Seven justices joined in the majority opinion, which Justice Thomas wrote.[73] The entire analysis of section 113(f)(1) consists of a brief textualist interpretation.[74] First, the Court focused on section 113(f)(1)'s enabling clause (i.e., the first sentence of the section) which reads in pertinent part, "[a]ny person may seek contribution . . . during or following any civil action under [section 106] . . . or . . . [section 107(a)]."[75] Aviall argued "that 'may' should be read permissively, such that 'during or following' a civil action is one, but not the exclusive, instance in which a person may seek contribution," but the Court rejected this argument.[76] The Court said that "the natural meaning of 'may' in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others."[77] The Court further reasoned that if it were to read the phrase permissively, it would render superfluous the "during or following" part of the phrase, as well as section 113(f)(3)(B), which permits contribution claims after settlement.[78] Justice Thomas wrote, "[t]here is

66. 42 U.S.C. § 9606 (2005) (Section 9606(a) reads in pertinent part, "when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat . . . [or] after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.")

(Section 9606(b)(2)(A) reads in pertinent part, "[a]ny person who receives and complies with the terms of any order issued under subsection (a) . . . may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund . . . ." If the President refuses the petition, section 9606(b)(2)(B) allows the petitioner to file suit against the President. To obtain reimbursement in the context of a lawsuit, section 9606(b)(2)(C) says that "the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) . . . .").

67. *Aviall Services v. Cooper Industries*, 2000 U.S. Dist. LEXIS 520, *8 (N.D. Tex. 2000) [hereinafter *Aviall* I].

68. *Id.* (citing *Rockwell*, 702 F. Supp. at 1389.

69. *Id.* at *13.

70. *Aviall* II, 263 F.3d at 137.

71. *Aviall* III, 312 F.3d at 681.

72. *Id.* at 691.

73. *Cooper Industries*, 125 S. Ct. at 577.

74. *Id.* at 583–584.

75. *Id.* at 583.

76. *Id.*

77. *Id.*

78. *Id.*

no reason why Congress would both specify conditions under which a person may bring a contribution claim, and at the same time allow contribution claims absent those conditions."[79]

Second, echoing the decision of the district court, the Supreme Court held that section 113(f)(1)'s saving clause does not change the Court's interpretation of the enabling clause.[80] The saving clause, according to the Court, does nothing more than rebut the presumption "that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP."[81] The saving clause "does not itself establish a cause of action; nor does it expand section 113(f)(1) to authorize contribution actions not brought 'during or following' a section 106 or section 107(a) civil action, nor does it specify what causes of action for contribution, if any, exist outside section 113(f)(1)."[82]

Third and finally, the Court pointed out that although the statute of limitations established in section 113(g)(3) of CERCLA ("section 113(g)(3)") runs from the date of judgment for section 113(f)(1) actions or from the date of settlement for section 113(f)(3)(B) actions, section 113(g)(3) includes no statute of limitations provision in the case of a voluntary cleanup, i.e., in the absence of a judgment or settlement.[83] The Court interpreted the absence of a statute of limitations in section 113(g)(3) relating specifically to voluntary cleanup to mean that section 113(f)(1) does not allow a cause of action following such cleanup.[84] Justice Thomas declined the opportunity to look beyond the text of section 113(f)(1), writing, "[g]iven the clear meaning of the text, there is no need to . . . consult the purpose of CERCLA at all."[85]

IV. A Critique of *Cooper Industries*: Interpreting Section 113(f)(1) in Context

A. The Limits of a Textualist Analysis

A textualist approach to statutory interpretation is not just the fashion of the day. Giving greater interpretive weight to the language of the adopted law over extrinsic sources makes intuitive sense.[86] However, textualist interpretation relies on the assumption, often erroneous, that the statutory text has a single, clear, and compelling meaning. Often, the search for the "plain meaning" of a statute actually means, in practice, that a judge makes a subjective choice between equally plausible textual interpretations.[87] The Supreme Court makes just such an error in *Cooper Industries*.

As noted, the Court in *Cooper Industries* interpreted the word "may" in section

79. *Id.*

80. *Id.*

81. *Id.* at 584.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See, e.g.*, Eskridge, *supra* note 9, at 667 ("By focusing on the planning meaning a statute would have for the ordinary, reasonable reader, the new textualism has the intuitive appeal of looking at the most concrete evidence of legislative expectations and at the material most accessible to the citizenry."); Richard J. Pierce, Jr., *Symposium: Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747, 753 (1995) ("[M]ost lawyers and judges . . . are textualists, at least to the extent that they believe that statutory language should be given effect and that words and phrases can support only a finite range of potential interpretations.").

87. Eskridge, *supra* note 9, at 674 ("Justice Scalia's approach [to statutory interpretation] requires choices among competing evidence just as much as the traditional approach does. Furthermore, he potentially expands upon the judge's range of discretion by his revival of the notoriously numerous and manipulable canons of construction.").

113(f)(1)'s enabling clause as having a "natural meaning,"[88] which authorizes only those contribution actions "which satisfy the subsequent specified condition,"[89] i.e., which occur "during or following any civil action under [sections 106 or 107(a)]."[90] In reaching this conclusion, Justice Thomas emphasized the canon of construction[91] that statutory interpretation should avoid rendering part of the statutory language entirely superfluous.[92] That is, according to Justice Thomas, a broad reading of the word "may" would render the "during or following" clause superfluous.[93] Similarly, the Court held that section 113(f)(1)'s saving clause does not expand the scope of the enabling clause,[94] because an expansive reading "would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect."[95]

However reasonable, a judicial canon of construction does not help the court understand the will of the legislature. As Eskridge has pointed out, legislators have little familiarity with canons, and therefore, they do not carefully script the language to pass a canonical test.[96] Even if legislators were familiar with judicial canons, it is unlikely that Congress would generate clearer statutory language, because statutory ambiguity often results from deliberate choice (i.e., Congress may lack the consensus necessary for greater clarity and leave a difficult decision to executive agencies or the courts) or unforeseen developments that arise after the passage of the statute.[97] By relying on judicial canons, which do not have the weight of law,[98] and paying scant attention to legislative history, the judiciary risks undermining the purpose of the law itself and intruding upon the law-making powers of the legislature.[99] In *Cooper Industries*, although the canon of non-superfluity provided the Supreme Court with a shorthand means of interpreting section 113(f)(1), it brought the Court nowhere closer to an understanding of what Congress actually intended to accomplish in adopting section 113(f)(1).

In addition to these conceptual problems, reliance on canons of construction leads to self-contradiction. As Karl Llewellyn famously explained in 1950, "there are two opposing canons on almost every point,"[100] suggesting that "rather than con-

88. *Cooper Industries*, 125 S. Ct. at 583.

89. *Id.*

90. 42 U.S.C. § 9613(f)(1) (2005).

91. Black's Law Dictionary defines "canon of construction" as a "rule used in construing legal instruments, esp. contracts and statutes . . . . Although a few states have codified the canons of construction . . ., most jurisdictions treat the canons as mere customs not having the force of law." BLACK'S LAW DICTIONARY 198 (7th ed. 1999). *See* Blake A. Watson, *Liberal Construction of* CERCLA *under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 208 (1996).

92. *Cooper Industries*, 125 S. Ct. at 583.

93. *Id.*

94. *Id.* at 584.

95. *Id.*

96. Eskridge, *supra* note 9, at 679 ("Justice Scalia assumes that both Houses of Congress and the President are aware of judicial interpretations of provisions that a statute borrows or reenacts, of the canons of statutory construction (including grammar and punctuation rules) that might be applied to the statute, and of the surrounding legal terrain into which the statute must be integrated. . . . Members of Congress are not omniscient about legal rules, and the nature of the legislative process gives them incentives to focus on the particular problem and not on future issues of interpretation. . . . Justice Scalia knows all this, for he calls these assumptions a 'benign fiction.'").

97. *Id.* at 677.

98. *See* Watson, *supra* note 91, at 208.

99. Eskridge, *supra* note 9, at 683–684.

100. Watson, *supra* note 91, at 213–214 (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950)).

straining interpretive choices, the canons serve simply as post hoc 'tools of argument' utilized by judges to justify statutory construction arrived at 'by means other than the use of the canon.'"[101] Writing for the majority in the Fifth Circuit en banc decision, in fact, Judge Jones used a different canon to reach the opposite conclusion from Justice Thomas. Noting that the enabling clause used the permissive verb "may" without the narrowing term "only,"[102] Judge Jones wrote, "[e]lsewhere in CERCLA, Congress used 'only' many times, signifying its intent to narrow, exclude or define provisions. Had Congress similarly intended to make contribution actions available 'only' after the referenced CERCLA lawsuits have been brought, it could have done so."[103] On this basis, Judge Jones concluded that the word "may" in section 113(f)(1) should be read permissively, such that a party can bring suit even in the absence of a section 106 or section 107(a) cause of action.[104] Thus, with two equally plausible textual interpretations—his own and that of Justice Jones—Justice Thomas erred in limiting his analysis to the purportedly "natural meaning" of the word "may" and should have looked beyond the text of CERCLA to examine the purpose of the law, legislative history, and judicial precedent.

The Fifth Circuit panel raised two additional questions regarding the textual interpretation of section 113(f)(1). These warrant some discussion, even though the Supreme Court did not address them. First, the Fifth Circuit panel interpreted the word "may" as meaning "shall" or "must" in the context of a provision that creates a cause of action, in order to avoid creating overly broad causes of action.[105] However, this conclusion contradicts the well-established principle that remedial statutes should be read broadly.[106] Although the Supreme Court has declined opportunities to decide whether environmental laws like CERCLA are appropriately considered remedial,[107] lower courts construing CERCLA "have consistently . . . characterized the federal statute as being 'overwhelmingly remedial' in nature"[108] and have employed the remedial purpose principle "with remarkable frequency."[109] Indeed, Blake Watson has concluded, based upon an exhaustive analysis of CERCLA's legislative history and case law, that "the invocation of the remedial purpose canon is most appropriate in cases interpreting CERCLA's liability scheme, both in terms of who should be liable for incurred costs of response, and with regard to the types of costs that are recoverable."[110] Thus, the Fifth Circuit panel's summary conclusion that CERCLA causes of action should be construed narrowly is questionable at best.

Second, the Fifth Circuit panel noted that the word "contribution" typically refers to recovery between joint tortfeasors, concluding that the use of that term in section 113(f)(1) suggests that a party must first face judgment before seeking recovery from another party.[111] However, as Judge Wiener points out in his dissent to the Fifth Circuit

101. I*d*. at 214 (citing Llewellyn, *supra* note 100, at 401).

102. A*viall* III, 312 F.3d at 686.

103. I*d*. (footnote omitted).

104. I*d*.

105. A*viall* II, 263 F.3d at 138–9.

106. Watson, *supra* note 91, at 201, 201 n.1 ("The remedial purpose canon of statutory construction, which states that remedial legislation should be liberally construed in order to effectuate the beneficial purpose for which it was enacted, is firmly established in the Anglo-American legal system." (citing NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 60.01 (5th ed. 1992))).

107. I*d*. at 258–261.

108. I*d*. at 262–263.

109. I*d*. at 271.

110. I*d*. at 310.

111. A*viall* II, 263 F.3d at 138.

panel's decision, no definition of the term "contribution"—whether in Black's Law Dictionary, the Restatement (Second) of Torts, or American Jurisprudence Second[112]—"requires, as a condition precedent, that a party be sued or adjudged liable before seeking contribution; rather, the right to seek contribution arises independently when one tort-feasor, acting under a legal duty, discharges more than his fair share of a liability shared by joint tort-feasors."[113] Thus, employment of the word "contribution" in section 113(f)(1) does not require a narrow interpretation of the statute.

Looking beyond section 113(f)(1) itself, the Supreme Court majority argued that the statute of limitations in section 113(g)(3)[114] supports its interpretation of section 113(f)(1).[115] Justice Thomas wrote, "[n]otably absent from section 113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup." Thus, he continued, "[t]he lack of such a provision supports the conclusion that, to assert a contribution claim under section 113(f), a party must satisfy the conditions of either section 113(f)(1) or section 113(f)(3)(B)."[116] However, the language relating to statutes of limitations is not dispositive of the scope of the cause of action in section 113(f)(1). In *Sun Co. v. Browning Ferris*,[117] the Tenth Circuit considered the issue of what statute of limitations would apply for a section 113(f)(1) cause of action following an EPA administrative order.[118] The lower court had found that section 113(g)(3) established statutes of limitation only in the instance of a judgment or a settlement. Because section 113(g)(3) did not specify a tolling time for administrative orders, "the court turned to another area of federal contribution law"[119] to determine the applicable statute of limitations. The Tenth Circuit rejected this conclusion, and held that in the case of an administrative order, section 113(g)(2) of CERCLA[120] ("section

112. *Aviall* II, 263 F.3d at 148–149 (Wiener, J., dissenting) ("Black's Law Dictionary defines 'contribution' as the '[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.' Similarly, the Restatement (Second) of Torts provides, 'when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered against all or any of them*' and even 'without . . . suit against [them].' American Jurisprudence Second elaborates: 'The equity for contribution arises at the time of the creation of the relationship between the parties which gives rise to the right and ripens into a cause of action for reimbursement in favor of a party when, under a legal duty, he satisfies, by payment or otherwise, more than his just proportion of the common obligation or liability. Or, stated in terms applicable to actions at law, the implied promise to contribute is considered as made at the time the common liability is assumed, *and the right to sue thereon arises when a party has paid the whole of the obligation or more than his share thereof.*'").

113. *Id.* at 149 (Wiener, J., dissenting).

114. 42 U.S.C. § 9613(g)(3) (2005) ("No action for contribution for any response costs or damages may be commenced more than 3 years after—(A) the date of judgment in any action under this Act for recovery of such costs or damages, or (B) the date of an administrative order under section 122(g) (relating to de minimis settlements) or 122(h) (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.").

115. *Cooper Industries*, 125 S. Ct. at 584.

116. *Id.*

117. *Sun Co.*, 124 F.3d at 1187.

118. *Id.* at 1188.

119. *Id.* at 1189.

120. 42 U.S.C. § 9613(g)(2) (2005) ("An initial action for recovery of the costs referred to in [section 107] must be commenced – (A) for a removal action, within 3 years after completion of the removal action . . . ; and (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . .").

113(g)(2)") applies.[121] Although section 113(g)(2) normally applies only to section 107(a) actions, the court interpreted the section as applicable to section 113(f)(1) actions as well, so long as section 113(g)(3) did not interpose itself. Consistent with a majority of courts, the Tenth Circuit considers section 113(f)(1) not to have created a separate cause of action from section 107(a).[122] Thus, the availability of the statute of limitation under section 113(g)(2) suggests that section 113(g)(3), which is limited to judgments and settlements, cannot be construed to limit the scope of the causes of action available under section 113(f)(1).

B. The Legislative History

As noted, the Supreme Court did not examine the legislative history of CERCLA. The Fifth Circuit panel, however, while still focusing primarily on a textualist interpretation of the statute, did examine the legislative history.[123] Since section 113 came into being when Congress adopted SARA in 1986, the court reviewed the reports of the House of Representatives and Senate on SARA.[124] It found that "the legislative history of CERCLA reinforces our analysis of the statutory text"[125]—that in order for a PRP to seek contribution from another PRP under section 113(f)(1), the party must have been held liable under section 106 or section 107(a).[126] In particular, the court noted that the House report mentioned that a party may bring a section 113(f)(1) contribution action even if a CERCLA action is merely pending against it, suggesting to the court that some form of lawsuit was contemplated.[127]

However, the Fifth Circuit en banc disagreed with the panel's interpretation of the legislative history. Noting that "CERCLA is notorious for vaguely drafted provisions and an inconclusive, if not contradictory, legislative history,"[128] the Fifth Circuit en banc found that the legislative history was contradictory as to whether Congress intended to make the right of contribution available only after the party had been sued under sections 106 or 107(a). According to the Fifth Circuit en banc, congressional reports suggest that Congress intended CERCLA to allow federal courts to devise equitable solutions for apportioning waste cleanup costs among PRPs.[129] What is more, congressional statements expressing an intent to limit the scope of section 113(f)(1) referred to earlier versions that were never adopted.[130] Given the unclear legislative history, the Fifth Circuit en banc concluded that the legislative history provided "no guide that should color the textual interpretation of section 113(f)(1)."[131]

The Fifth Circuit en banc then proceeded to examine the purpose of CERCLA, finding that it was intended to promote cleanup and assign financial costs to the responsible parties.[132] The enormous costs associated with hazardous waste remediation make the availability of contribution among PRPs critical for achieving the goal of environmental cleanup.[133] Thus, the

121. *Sun Co.*, 124 F.3d at 1192.

122. *Id.*

123. *Aviall* II, 263 F.3d at 140–141.

124. *Id.* at 141.

125. *Id.* at 140.

126. *Id.* at 141 (citing H.R. REP. NO. 99-253, Pt. I (1985); S. REP. NO. 99-11, 43 (1985)).

127. *Id.* (citing H.R. REP. NO. 99-253, Pt. I (1985)).

128. *Aviall* III, 312 F.3d at 684 (citing *Bell*, 3 F.3d at 901 n.13 and *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989)).

129. *Id.* (citing H.R. REP. NO. 99-253, Pt. I, 74 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2856).

130. *Id.* at 685.

131. *Id.*

132. *Id.* at 681 (citing OHM, 116 F.3d at 1578).

133. *Id.* at 682.

court held that a narrow reading of the section 113(f)(1) cause of action would be incongruous with the purpose of CERCLA, saying, "it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs . . . would have rather arbitrarily cut back the then-prevailing standard for contribution."[134] Thus, it held that a section 113(f)(1) cause of action does not require a prerequisite action under sections 106 or 107(a).

C. Judicial Precedent Prior to *Cooper Industries*: Cases Requiring a Pre-Requisite Action

As noted, prior to *Cooper Industries*, courts differed about whether section 113(f)(1) required a prior or pending action under sections 106 or 107(a). Since the courts in the *Cooper Industries* line of cases cite to those earlier cases, they require some analysis here. This comment argues that, contrary to the holdings of the district court, the Fifth Circuit panel, and the Supreme Court, prior court decisions weigh in favor of *not* requiring a prerequisite action for a section 113(f)(1) claim.

The district court and the Fifth Circuit panel relied heavily on *Estes v. Scotsman Group, Inc.*[135] The plaintiff in that case, similar to Aviall, purchased a contaminated site, voluntarily undertook remedial action at the prodding of a state agency, and then sued the prior landowner for contribution under section 113(f)(1).[136] The court in *Estes* dismissed the section 113(f)(1) claim for want of a prior or pending action under sections 106 or 107(a).[137] It did so not based on its own independent interpretation of section 113(f)(1), but based on what it perceived to be the binding precedent of the Seventh Circuit in *Rumpke of Ind. v. Cummins Engine Co., Inc.*[138] The court in *Rumpke* cited no source for its holding that section 113(f)(1) required a prerequisite action, but put forth a "plain meaning" interpretation that a "section 106 or section 107(a) action apparently must either be ongoing or already completed before section 113(f)(1) is available."[139] As noted, a "plain meaning" analysis of section 113(f)(1) has inherent flaws, because of the ambiguity of the term "may." Also, as Judge Wiener pointed out in his dissent to *Aviall* II, the Seventh Circuit's comment about the scope of section 113(f)(1) in *Rumpke* was dicta,[140] and another district court in the same circuit refused to follow it.[141]

The district court also relied on *Ameritrust Co. National Association v. Lamson & Sessions Co.*,[142] in which a landowner, again similar to Aviall, purchased a contaminated property, voluntarily conducted cleanup operations, and then sued the prior landowner for contribution under section 113(f)(1).[143] The *Ameritrust* court held that because "Ameritrust does not, and cannot, point to a third party that has threatened it with potential liability . . . Ameritrust's invocation of the CERCLA provisions that allow a defendant to seek contribution is inapposite."[144] The court relied on the purportedly

134. *Id.* at 685.

135. *Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983 (C.D. Ill. 1998).

136. *Id.* at 985–986.

137. *Id.* at 989–990.

138. *Id.* at 989 (citing *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997)).

139. *Aviall* II, 263 F.3d at 142 (citing *Rumpke*, 107 F.3d at 1241).

140. *Id.* at 152 (Wiener, J., dissenting).

141. *Id.* at 152–153 (Wiener, J., dissenting) (citing *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684, 691 (N.D. Ind. 1997)).

142. *Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co.*, 1992 U.S. Dist. LEXIS 22647 (N.D. Ohio 1992).

143. *Id.* at *4.

144. *Id.* at *10.

plain meaning of the statute,[145] but again, a "plain meaning" analysis does not settle the issue.

The court also cited as support[146] the decision in *Rockwell International Corp. v.* IU *International Corp.*[147] As Judge Wiener notes, the court in *Rockwell* did not hold that the "during and following" clause prevents a party from seeking contribution in the absence of a prior or pending section 106 or section 107(a) action.[148] Rather, in cases where no prior or pending action exists, the court in *Rockwell* limited the immediate remedy to declaratory judgment.[149] The problem with *Rockwell* is that the court assumes its own conclusion, in that it undertakes no substantive analysis of whether section 113(f)(1) requires a prior or pending action under section 106 or section 107(a).[150] The lack of analysis in *Rockwell* suggests that the case provides only a weak basis for the conclusions reached by the district court.

The district court and the Fifth Circuit panel both cited to OHM *Remediation Services v. Evans Cooperage Co., Inc.*[151] The Fifth Circuit panel makes much of the fact that the OHM court interpreted section 113(f)(1) to allow "parties to bring contribution actions at least as soon as they are sued under CERCLA."[152] However, although the OHM court held that "a party may be 'potentially liable' by being sued under the statute,"[153] it did not hold that section 113(f)(1) requires an earlier lawsuit or judgment.[154] The OHM court did state that a "section 113(f) contribution action is derivative of an action under section 107(a)" and concluded that "the district court's dismissal of OHM's section 107(a) action served to void the statutory prerequisite to suit under section 113(f)."[155] However, the court immediately proceeded to explain that because it was remanding OHM's section 107(a) claim for reconsideration, "OHM still has a viable section 107(a) claim pending in the district court, and therefore the district court's first rationale for dismissing the company's section 113(f) claims no longer holds."[156] Thus, the court's suggestion that dismissal of the section 107(a) suit had the effect of voiding the section 113(f)(1) suit was not essential to the court's holding. As dicta, the language does not bind lower courts and provides a weak basis for a narrow reading of section 113(f)(1).

The Fifth Circuit panel also cited *United States v. Compaction Systems Corp.*[157] for the proposition that PRPs must be subject to liability under CERCLA in order to bring a claim under section 113(f)(1).[158] But as Judge Wiener noted, "that case merely held that the act of settling with the United States satisfies section 113(f)(1)'s liability requirement even though there has been no formal admission of liability."[159] The Fifth Circuit panel also cited *Southdown v. Allen*[160] for the proposition that the purpose of section 113(f) is to allocate liability among the parties found to

145. *Id.*

146. *Id.*

147. *Rockwell*, 702 F. Supp. at 1384.

148. *Aviall* II, 263 F.3d at 154 (Wiener, J., dissenting) (citing *Rockwell*, 702 F. Supp. at 1389).

149. *Id.*

150. *Id.*

151. OHM, 116 F.3d at 1574.

152. *Aviall* II, 263 F.3d at 142 (citing OHM, 116 F.3d at 1582).

153. OHM, 116 F.3d at 1582.

154. *Id.*

155. *Id.* at 1580.

156. *Id.*

157. *United States v. Compaction Systems Corp.*, 88 F. Supp. 2d 339 (D.N.J. 1999).

158. *Aviall* II, 263 F.3d at 142 (citing *Deby, Inc. v. Cooper Industries*, 2000 U.S. Dist. LEXIS 2677, *16 (N.D. Ill. 2000) and *Compaction Sys.*, 88 F. Supp. 2d at 350).

159. *Id.* at 153 (Wiener, J., dissenting) (citing *Compaction Systems*, 88 F. Supp. 2d at 351).

160. *Southdown v. Allen*, 119 F. Supp. 2d 1223 (N.D. Ala. 2000).

be liable under section 107(a),[161] but as Judge Wiener pointed out, that case addressed only whether plaintiff had contracted away his right to seek contribution.[162] Finally, the Fifth Circuit panel also relied on *Deby, Inc. v. Cooper Industries*,[163] but that court did not dismiss the complaint because plaintiff lacked the ability to bring a CERCLA claim, but rather because he had a CERCLA action pending in a different court.[164]

In conclusion, of the cases cited in support of a narrow interpretation of section 113(f)(1), none put forth a compelling argument. Instead, if they directly interpreted the statute at all, they relied on the same "plain meaning" interpretation that Justice Thomas later used in *Cooper Industries*. As discussed, the "plain meaning" approach falls far short of understanding what Congress meant to accomplish in enacting section 113(f)(1).

D. Judicial Precedent Prior to *Cooper Industries*: Cases Not Requiring a Pre-Requisite Action

While the case law supporting a narrow interpretation of section 113(f)(1) is questionable, there is case law on point that supports a broad reading of section 113(f)(1). The Fifth Circuit en banc pointed out that although few cases have addressed the direct question of whether section 113(f)(1) actions require a prior or pending section 106 or section 107(a) action, most circuits have allowed section 113(f)(1) claims without a section 106 or section 107(a) action.[165] In his dissent to the Fifth Circuit panel decision, Judge Wiener concluded that even though the issue of "whether a party may seek contribution under section 113(f)(1) in the absence of a CERCLA action was not a contested issue" in many cases, "[the] phenomenon only underscores the common understanding among courts and litigants alike that the plain language of section 113(f)(1) does not require a PRP to wait until it is haled into court to seek contribution under the statute."[166] For example, in *Crofton Ventures* LP *v.* G & H P*artnership*,[167] the Fourth Circuit "allowed a section 113 suit by a PRP who . . . had notified a state agency of the contamination and then cleaned up the facility," and the absence of a prior or pending section 106 or section 107(a) action "was of no moment."[168]

Several cases that have addressed the issue directly have found that section 113(f)(1) does not require a prerequisite action under section 106 or section 107(a). The Fifth Circuit en banc cited P*inal Creek Group v. Newmont Mining Corp.*, in which the Ninth Circuit rejected plaintiff's argument that it could not pursue a section 113(f)(1) action because it "had not incurred any liability which would trigger" a contribution claim under section 113(f).[169] The court held that a PRP may bring a contribution action so long as it has incurred the necessary costs of response for a hazardous waste site consistent with the National Contingency Plan, as called for in section 107(a).[170] That is, the only prerequisite for a section 113(f)(1) cause of action is the expenditure of the necessary cleanup costs. This inter-

161. A*viall* II, 263 F.3d at 142 (citing S*outhdown*, 119 F. Supp. 2d at 1245 n.41).

162. I*d*. at 153 (citing S*outhdown*, 119 F. Supp. 2d at 1245).

163. D*eby*, 2000 U.S. Dist. LEXIS 2677.

164. A*viall* II, 263 F.3d at 153 (Wiener, J., dissenting) (citing D*eby*, 2000 U.S. Dist. LEXIS 2677 at *16–17).

165. A*viall* III, 312 F.3d at 689 n.21.

166. A*viall* II, 263 F.3d at 152 (Wiener, J., dissenting).

167. C*rofton Ventures* LP *v.* G & H P*'ship*, 258 F.3d 292 (4th Cir. 2001).

168. A*viall* II, 263 F.3d at 152 (Wiener, J., dissenting).

169. A*viall* III, 312 F.3d at 689 n.22 (citing P*inal Creek Group*, 118 F.3d at 1305).

170. S*ee id*.

pretation of the statutory language is consistent with the concept, agreed upon by many courts, that the section 113(f)(1) cause of action is linked to and dependent upon section 107(a).[171] Also, it is consistent with the overall purpose of CERCLA to encourage remediation and assign costs to the responsible parties.[172]

Similarly, in *Coastline Terminals of Connecticut, Inc. v.* USX *Corp.*, the court held that a "section 113(f)(1) claim is not barred merely because the PRP has not been threatened with liability."[173] The court cited the Second Circuit decision in *Bedford Affiliates v. Sills*[174] as binding precedent.[175] In *Bedford*, the plaintiff incurred no prior liability under section 106 or section 107(a), but had voluntarily undertaken cleanup pursuant to a state consent order.[176] The court properly reasoned that the plaintiff could not bring suit pursuant to section 107(a), because as a PRP, he could not impose joint and several liability on another PRP.[177] Instead, the plaintiff had to bring suit, if at all, under section 113(f)(1), which calls for apportionment of cleanup costs between joint tortfeasors.[178] Since a PRP plaintiff could not bring suit under section 107(a), requiring the plaintiff to incur prior liability before bringing a section 113(f)(1) action would effectively bar recovery, a result clearly contrary to the purpose and legislative intent of CERCLA and SARA.

V. The Relationship Between Section 107(a) and Section 113(f)(1)

A. Justice Ginsburg's Dissent

What is so unsettling about the *Cooper Industries* decision is not just the excessively narrow reading of section 113(f)(1), but the fact that the Court also calls into question long-standing judicial interpretations of CERCLA. Notably, writing for the dissent, Justice Ginsburg did not address the majority's textual analysis of section 113(f)(1), but focused entirely on the bigger picture—the relationship between section 107(a) and section 113(f)(1).[179] Although Aviall argued that it should be able to recover costs under section 107(a) in the alternative to a section 113(f)(1) claim, Justice Thomas, writing for the majority, "decline[d] to address the issue," because "[n]either the [d]istrict [c]ourt nor the Fifth Circuit panel, nor the Fifth Circuit [en banc] considered Aviall's section 107 claim."[180] Furthermore, Justice Thomas declined to rule on whether Aviall could pursue a section 107(a) cost recovery claim as a matter of law.[181]

Justice Ginsberg took issue with this conclusion and argued that Aviall had a valid claim under section 107(a).[182] First, Justice Ginsburg called attention to the Court's decision in *Key Tronic Corp. v. United States*. In that case, the Court recognized the existence of an implied cause of action for PRPs under section 107(a),[183] consistent with case law dating back to the early 1980's.[184] Writ-

171. *See supra* note 56 and accompanying text.

172. *See supra* notes 132–134 and accompanying text.

173. *Aviall* II, 263 F.3d at 153 (Wiener, J., dissenting) (citing *Coastline Terminals of Conn. Inc. v.* USX *Corp.*, 156 F. Supp. 2d 203, 206 (D. Conn. 2001)).

174. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

175. *Coastline Terminals*, 156 F. Supp. 2d at 208.

176. *Bedford*, 156 F.3d at 421.

177. *Id.* at 424.

178. *Id.*

179. *Cooper Industries*, 125 S. Ct. at 586–588 (Ginsburg, J., dissenting).

180. *Id.* at 584 (majority opinion).

181. *Id.*

182. *Id.* at 586–588 (Ginsburg, J., dissenting).

183. *Id.* at 587 (citing *Key Tronic*, 511 U.S. at 818).

184. *See supra* notes 49–52 and accompanying text.

ing for the majority in *Key Tronic*, Justice Stevens found that SARA "appeared to endorse the judicial decisions recognizing a cause of action under section 107 by presupposing that such an action existed"[185] and concluded that "the statute now expressly authorizes a cause of action for contribution in section 113 and impliedly authorizes a similar and somewhat overlapping remedy in section 107."[186] Justice Ginsburg noted that the majority and the dissent in that case differed as to the source of the right to sue under section 107(a), the former holding that section 107(a) gave PRPs an implied right to sue for contribution, and the latter arguing that section 107(a) gave an express right.[187] Nevertheless, she emphasized that "no Justice expressed the slightest doubt that section 107 indeed did enable a PRP to sue other covered persons for reimbursement . . . of cleanup costs."[188] She concludes that the section 107(a) implied cause of action and the section 113(f)(1) cause of action are so similar as to be interchangeable,[189] and as a result, Aviall should have a valid claim under section 107(a) as a matter of law.

Second, Justice Ginsburg argued that Aviall could not have waived its right to sue under section 107(a). In the majority opinion, Justice Thomas remanded the cases to the lower courts to determine whether Aviall, in dropping its section 107(a) claim from its first complaint, had waived its right to recover under that statute.[190] However, Justice Ginsburg noted that Aviall had dropped the section 107(a) claim solely in order to conform to circuit precedent, which said that section 113(f)(1) was the mechanism by which a PRP must seek substantive recovery made available through section 107(a).[191] She wrote, "[a] party obliged by circuit precedent to plead in a certain way can hardly be deemed to have waived a plea that a party could have maintained had the law of the Circuit permitted him to do so."[192]

Third, Justice Ginsburg noted that the Fifth Circuit held that section 113(f)(1) "governs and regulates" the cause of action under section 107(a) and that the adoption of section 113(f)(1) did not therefore eliminate the ability of a PRP to seek cost recovery under section 107(a).[193] Accordingly, in compliance with that precedent, Aviall had asked the Fifth Circuit to adjudicate the claim under section 107(a) if it rejected the section 113(f)(1) claim.[194] Thus, Justice Ginsburg wrote, "I see no cause for protracting this litigation by requiring the Fifth Circuit to revisit a determination it has essentially made already."[195]

B. The Scope of Section 113(f)(1)

Justice Ginsburg's dissent calls attention to how *Cooper Industries* effects the holding of *Key Tronic*, where, as noted, the Court held that section 107(a) and Section 113(f)(1) provide "similar and somewhat overlapping" causes of action.[196] Justice

185. *Key Tronic*, 511 U.S. at 816 (noting the fact that section 107(a)(4)(D), which Congress adopted as part of SARA in 1986, refers to "amounts recoverable in an action under this section." The new contribution section also contains a reference to a "civil action . . . under section 9607(a).").

186. *Id.*

187. *Cooper Industries*, 125 S. Ct. at 587 (Ginsburg, J., dissenting).

188. *Id.*

189. *Id.* (citing *Aviall III.*, 312 F.3d at 683, 683 n.10 and *Geraghty & Miller*, 234 F.3d at 924).

190. *Id.* at 585 (majority opinion).

191. *Id.* at 587 (Ginsburg, J., dissenting).

192. *Id.*

193. *Geraghty & Miller*, 234 F.3d at 924.

194. *Cooper Industries*, 125 S. Ct. at 587 (Ginsburg, J., dissenting).

195. *Id.* at 588.

196. *Key Tronic*, 511 U.S. at 816.

Thomas actually refers to the two causes of action as distinct.[197] However, as noted, federal courts have been nearly unanimous in holding that section 113(f)(1) is not a separate cause of action from section 107(a), but functions as part of section 107(a).[198] Section 113 relies on the language of section 107(a), because the latter specifies who may be sued and what costs may be recovered. Without a link to section 107(a), section 113(f)(1) loses grounding in the parameters that CERCLA sets forth for all claims of cost recovery. If section 113(f)(1) and section 107(a) create truly distinct causes of action, then the scope of section 113(f)(1) is thrown wide open.

The unclear relationship between section 107(a) and section 113(f)(1) raises the issue of the meaning of section 113(f)(1)'s saving clause. That is, does the saving clause of section 113(f)(1) preserve a section 107(a) cause of action for PRPs?

As noted, the Fifth Circuit panel read the saving clause as preserving only a party's ability to bring contribution actions under state law, not under CERCLA.[199] However, this premise fails for several reasons. First, as Judge Wiener pointed out, "if . . . Congress meant for the savings clause merely to acknowledge that a party . . . may bring a state action in response to state orders or judgments . . . surely Congress would have made that distinction explicit, as it did in CERCLA's general savings clause."[200] Second, Judge Weiner said "short of making CERCLA preemptive," Congress cannot prohibit state causes of action.[201] CERCLA, in fact, co-exits with state remediation law, rather than preempting it. Thus, because section 113(f)(1) posed no preemptive threat to state causes of action, Congress had no need to write statutory language with the intent of preserving those causes of action. The purpose of section 113(f)(1) could not have been to preserve causes of action under state law.

In contrast to the Fifth Circuit panel, the Fifth Circuit en banc argued that the purpose of the saving clause was to preserve the ability of a PRP to sue under section 107(a), such that a PRP may bring a cause of action under *both* section 107(a) and section 113(f)(1).[202] The Fifth Circuit en banc said that Congress wrote the saving clause in 1986 for the purpose of affirming earlier court decisions allowing a PRP to seek contribution from another PRP under section 107(a).[203] This is essentially the same argument put forth by Justice Ginsburg in her dissent to *Cooper Industries*, citing the precedent of *Key Tronic*.[204] The problem with this interpretation is that it makes section 113(f)(1) indistinguishable from section 107(a), a result that is inconsistent with legislative history and judicial interpretation.

As noted, prior to the passage of SARA, courts generally agreed that section 107(a) created joint and several liability between joint tortfeasors.[205] Congress explicitly endorsed that approach to section 107(a) when it adopted SARA in 1986,[206] but Congress

197. *Cooper Industries*, 125 S. Ct. at 582 n.3.

198. *See supra* note 56 and accompanying text.

199. *Aviall* II, 263 F.3d at 139–40.

200. *Id.* at 147 (Wiener, J., dissenting).

201. *Id.*

202. *Aviall* III, 312 F.3d at 687 (citing *Key Tronic*, 511 U.S. at 816).

203. *Id.*

204. *See supra* notes 182–189 and accompanying text.

205. *See supra* notes 41–48 and accompanying text.

206. H.R. ENERGY AND COMMERCE COMMITTEE REP. NO. 99-253, Pt. 1, 74 (Aug. 1, 1985) ("The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corporation*, which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases . . . . 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 this uniform rule.

also passed section 113(f)(1) "to allow [PRPs] a cause of action to mitigate the harsh effects of joint and several liability."[207] That is, where one PRP sues another, Congress intended for the PRP to sue under section 113(f)(1), which calls for apportionment of costs in proportion to liability. Several circuits have, in fact, reached the conclusion that PRPs can sue another PRP only under section 113(f)(1).[208] In contrast, the majority opinion of *Cooper Industries* erroneously forces voluntary PRPs to sue, if at all, under section 107(a), where they can impose joint and several liability on other PRPs.

The question remains: if the saving clause was intended to preserve neither a state law cause of action nor a section 107(a) cause of action, what was it intended to preserve? The only remaining plausible interpretation of the saving clause is that it does not preserve a separate cause of action at all, but simply preserves the ability of a PRP to sue under section 113(f)(1) absent a prerequisite "civil action." That is, the saving clause suggests that PRPs may sue under section 113(f)(1) not only after being sued under Section 106 or section 107(a), but also in the case of voluntary remediation or a section 106 administrative order.[209]

In *Cooper Industries*, Justice Thomas suggested that a section 106 administrative order may not constitute an adequate basis for a section 113(f)(1) claim.[210] However, that holding would force a PRP to refuse to comply with a federal order for the sole purpose of forcing the EPA to file suit—an absurd result. Congress could hardly have intended to enact a scheme that discourages compliance with an EPA order. It makes more sense that Congress would have intended to allow a PRP to bring a section 113(f)(1) cause of action after becoming subject to an administrative order. As Judge Wiener noted, "an administrative order is not a 'civil action,'"[211] and the only way that a PRP could sue under section 113(f)(1) after being subject to an administrative order is through the saving clause. Historically courts have recognized actions brought under section 113(f)(1) by PRPs who have become subject to an administrative order.[212]

In summary, section 113(f)(1) does not create a separate cause of action from section 107(a), but for PRPs, section 113(f)(1) provides the sole mechanism for seeking contribution of Section 107(a) costs. The enabling clause allows a PRP to sue another PRP after incurring cleanup costs under section 106 or section 107(a). The saving clause clarifies that a PRP need not have been sub-

Thus, nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court.").

207. OHM, 116 F.3d at 1581 (citing S. REP. NO. 99-11, 44 (1985)).

208. *Centerior*, 153 F.3d at 349. The First, Third, Sixth, Seventh, Ninth and Tenth Circuit Courts of Appeals have so held. *Id.* at 349, 356.

209. *See, e.g.*, *Sun Co.*, 124 F.3d at 1187. The Tenth Circuit held that an EPA administrative order is a sufficient basis for bringing suit under section 113(f)(1). *Id.* at 1190. The court said, "[t]he fact that Plaintiffs incurred cleanup costs by complying with a unilateral administrative order, without forcing the government to take them to court, does not change their status as jointly and severally liable parties. They concede that they generated wastes containing hazardous substances that were transported to the Site. Thus, Plaintiffs' claim is still by and between jointly and severally liable parties, seeking the equitable apportionment of a payment which Plaintiffs have been compelled to make, and is still a claim for contribution." *Id.*

210. *Cooper Industries*, 125 S. Ct. at 584 n.5.

211. *Aviall II*, 263 F.3d at 147 (Wiener, J., dissenting).

212. Such a ruling would reverse established law. For example, in both *Centerior* and *Sun Co.*, the courts allowed a section 113(f)(1) action based solely upon an EPA administrative order. *Centerior*, 153 F.3d at 346; *Sun Co.*, 124 F.3d at 1189.

ject to prior or pending litigation under section 106 or section 107(a), but may seek contribution even after undertaking a voluntary cleanup or becoming subject to an administrative order to compel cleanup.

VI. Conclusion

Because *Cooper Industries* narrows the options for cost recovery and compensation, it will have a chilling effect on voluntary cleanup efforts. Although the decision itself does not foreclose the availability of a section 107(a) cause of action, many circuits have blocked PRPs from suing under section 107(a).[213] Thus, *Cooper Industries* does, in effect, prevent recovery in areas under the jurisdiction of those circuit courts. In the other circuits, *Cooper Industries* leaves PRPs uncertain about their ability to recover, because as noted, the Court questions whether the section 107(a) cause of action survived SARA.[214] This uncertainty means that PRPs will refuse to engage in voluntary cleanup efforts, which will delay or prevent the remediation of contaminated sites. Also, the EPA and the court system will experience a greater administrative burden, as PRPs await civil action before engaging in cleanup activity. What is even worse, some PRPs will get away without having to pay for the environmental damage that they left behind, because PRPs who engaged in voluntary cleanup before the *Cooper Industries* decision with the expectation of later seeking contribution, may have now lost the ability to sue. This result completely subverts the purposes and legislative intent of CERCLA.

The potential chilling effect on voluntary cleanup spells trouble for state and federal brownfield programs. The EPA started working with state governments to establish brownfield programs in the early 1990s.[215] Brownfield sites are properties "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[216] Brownfield programs remove a major barrier from investment in potentially contaminated sites by limiting the liability of current landowners and prospective buyers.[217] Prior to 2002, the EPA entered into Memoranda of Agreement with several states, in which the EPA promised to refrain from taking enforcement action against landowners who conducted cleanup pursuant to a state voluntary cleanup program.[218] In 2002, Congress codified and universalized this practice by passing the Small Business Liability Relief and Brownfields Revitalization Act

213. *Centerior*, 153 F.3d at 349. The First, Third, Sixth, Seventh, Ninth and Tenth Circuit Courts of Appeals have so held. *Id.* at 349, 356.

214. *Cooper Industries*, 125 S. Ct. at 586.

215. Simons and Winson, *supra* note 13, at 109. Because of the wide-reaching liability of CERCLA under section 107(a) and the enormous costs associated with both the cleanup and the ensuing litigation, prospective real estate buyers in the 1980's responded to CERCLA by avoiding investment in potentially contaminated sites, for fear of assuming liability for the environmental cleanup. Brownfield programs were intended to correct this problem. *Id.*

216. U.S. Environmental Protection Agency, Brownfield Cleanup and Redevelopment: About Brownfields, *at* http://www.epa.gov/brownfields/about.htm (last visited, Nov. 18, 2005). *See also* Goldsteen, *supra* note 19, at 230 ("Brownfield sites may contain petroleum or petroleum products; controlled substances; mine-scarred land; land slated for a CERCLA removal action; a listed NPL site; a site subject to an order or consent decree; a site subject to a corrective action permit or order; land disposal units with a closure notification, plan, or permit; a site subject to the jurisdiction, custody, or control of federal government; land having PCB contamination subject to remediation under TSCA; or a site which has received assistance for leaking underground storage tank.").

217. Wagner, *supra* note 21, at 25–26.

218. *Id.*

("Brownfields Act").[219] After *Cooper Industries*, however, a PRP will not be able to seek contribution for cleanup costs from other liable parties and therefore will have a major disincentive from participating in a brownfield program.

Because of the Supreme Court's erroneous interpretation of section 113(f)(1), and because of the chilling effects that *Cooper Industries* will have on the voluntary cleanup of hazardous waste, Congress should move quickly to amend CERCLA to clarify that PRPs may sue for contribution and cost recovery after performing voluntary cleanup on hazardous waste sites or after receiving an administrative order to compel cleanup from the EPA.

219. Amending CERCLA at 42 U.S.C.S. §§ 9601–9675 (LexisNexis 2005); *see also*, Todd S. Davis, *Brownfields Redevelopment: Creative Solutions to Historical Environmental Liabilities*, *in* ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: FROM BROWNFIELDS TO GREEN BUILDINGS, 330–332 (James B. Witkin ed., 2004).