

# **UNITED STATES V. ATLANTIC RESEARCH CORP.: WHO SHOULD PAY TO CLEAN UP INACTIVE HAZARDOUS WASTE SITES?**

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It has been almost thirty years since Congress passed the Comprehensive Environmental Response Compensation and Liability Act<sup>1</sup> (CERCLA, Superfund, or the Superfund Law), and the Supreme Court is now engaged in a major reexamination of the basics of Superfund liability. This reexamination began with *Cooper Industries, Inc. v. Aviall Services, Inc.*(*Aviall*),<sup>2</sup> in which the Supreme Court held that a potentially responsible party at a Superfund site who voluntarily cleaned up the site did not have a contribution claim against the person who caused the contamination.<sup>3</sup> This decision surprised most experts because encouraging remediation and requiring those who caused the contamination to pay for the cleanup were among the major underpinnings of Superfund liability.<sup>4</sup> The decision also created a significant amount of confusion regarding the

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1. 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 to 9657 (2000)).

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

3. See *infra* notes 32–48 and accompanying text. *Aviall* was responding to a demand by a regulatory agency and was a “volunteer” only in the sense that it was not acting pursuant to a written agreement with a regulatory agency or in response to litigation. *Id.*

4. See, e.g., *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733–34 (8th Cir. 1986) (discussing the legislative history and concluding that Congress intended to impose the cost on “those parties who created and profited from the sites”); *United States v. Ottati Goss, Inc.*, 630 F. Supp. 1361, 1398–99 (D.N.H. 1985) (observing that the retroactive nature of CERCLA belies Congress’ intent to make responsible parties pay cleanup costs); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 221–22 (W.D. Mo. 1985) (discussing CERCLA’s imposition of liability on responsible parties), *superseded by statute*, 42 U.S.C. § 113(f)(1) (2000), *as recognized in* *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 98 (2d Cir. 2005); see also Keith M. Lyons, Jr., Comment, *Everyone Pays to Clean Up America: A Discussion of CERCLA Section 107(a)(3) and the Term “Arranged for Disposal”*, 28 WILLAMETTE L. REV. 589, 596–98 (1992) (discussing the goals of CERCLA and its legislative history).

relationship between Superfund's contribution provision (§ 113)<sup>5</sup> and its primary liability provision (§ 107).<sup>6</sup>

Federal courts quickly developed a number of responses to the *Aviall* decision, and within three years there was a split in the federal circuits regarding whether, in light of *Aviall*, § 107(a) should be interpreted to provide a cause of action for claims by potentially responsible parties who voluntarily remediate Superfund sites.<sup>7</sup> In *United States v. Atlantic Research Corp. (Atlantic Research)*,<sup>8</sup> the Supreme Court resolved the split in the circuits and approved the volunteer's right to bring a cost recovery action against a person who caused the contamination.

This article will analyze the *Atlantic Research* decision and argue that, while on its face the *Atlantic Research* decision appears to correct the problems created by *Aviall*, *Atlantic Research* is really a logical consequence of *Aviall*, and together the two decisions suggest a fundamental change in how liability at inactive hazardous waste sites should be addressed. This article will then examine the likely consequences of that change in direction.

## I. BACKGROUND

Congress passed the Superfund Law to address the problem of "chemical poisons" in the environment.<sup>9</sup> The Resource Conservation and Recovery Act (RCRA),<sup>10</sup> passed by Congress in 1976, regulated the generation and disposal of hazardous wastes. It did not, however, address liability for hazardous wastes that were released or disposed of prior to the passage of RCRA. These "inactive" hazardous waste sites were seen as a major public health risk, and Congress created a liability scheme for the remediation of these sites with the Superfund Law.<sup>11</sup>

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5. 42 U.S.C. § 9613.

6. *Id.* § 9607.

7. *See Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824, 829–37 (7th Cir. 2007) (allowing recovery for potentially responsible parties (PRPs) under § 107 and discussing the circuit split); *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 531–43 (3d Cir. 2006) (rejecting PRP's right of recovery under § 107); *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 99–100 (2d Cir. 2005) (allowing PRP to recover).

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

9. *See Robert T. Stafford, Why Superfund Was Needed*, EPA J., June 1981, available at <http://www.epa.gov/history/topics/cercla/04.htm>.

10. Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992K (2000)).

11. For a discussion of the history of Superfund and the reasons for its passage, see ALAN

### A. Section 107(a)

Section 107(a), the primary Superfund liability provision, begins by listing four parties who may be held liable: (1) the current owner or operator of the facility; (2) the owner or operator of the facility at the time of the disposal of hazardous substances; (3) a person who arranged for disposal of hazardous substances “owned or possessed by such person;”<sup>12</sup> and (4) a person who transported waste to the facility, if that person chose the facility.<sup>13</sup> These four parties are commonly referred to as potentially responsible parties, or PRPs. Courts have interpreted § 107(a) broadly in accordance with two main policy goals: (1) to facilitate prompt cleanup of inactive hazardous waste sites, and (2) to impose liability for the costs of cleanup on those who contributed to the presence of the waste.<sup>14</sup>

In addition to listing the liable parties, § 107(a) defines what costs these parties may be liable for, and to whom. Section 107(a)(4)(A) provides that the above listed parties “shall be liable for all costs of removal or remedial action incurred by the United States Government or a State.” Section 107(a)(4)(B) provides that the same parties shall be liable for “any other necessary costs of response incurred by any other person.” Because “response” is defined in the statute to include “remove, removal, remedy and remedial action,”<sup>15</sup> the “costs of response” that a private party can recover under §

J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 1:1 (2008–2009 ed.). See also H.R. REP. NO. 1016(II), at 5 (1980), as reprinted in 1980 U.S.C.C.A.N. 6120, 6153.

12. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(3).

13. The text of § 9607(a) defines who may be liable under CERCLA:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (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 . . . .

*Id.* § 9607(a)(1)–(4).

14. TOPOL & SNOW, *supra* note 11, § 1:1 n.16 (citing numerous cases).

15. 42 U.S.C. § 9601(25) (“The terms ‘respond’ or ‘response’ mean remove, removal, remedy, and remedial action.”).

107(a)(4)(B) are the same as the “costs of removal or remedial action” the government can recover under § 107(a)(4)(A).

Courts have interpreted § 107(a) to provide for strict joint and several liability.<sup>16</sup> This can create particularly harsh results.<sup>17</sup> For example, one party can be required to fund the entire remediation of a site even though that party contributed only a small portion of the waste at the site, and a person who purchased a contaminated site without knowledge of the contamination can be required to remediate the site even though the purchaser did not contribute to the contamination.

The Superfund Law as originally passed did not address the issue of suits between liable parties. Nevertheless, most courts held that one liable party could bring a claim against other liable parties.<sup>18</sup> Recognizing such a claim, which some saw as a contribution claim, relieved some of the unfairness of imposing strict joint and several liability on one party or a small group of parties when others may also have § 107(a) liability at the same site.

## B. SARA and § 113

In 1986, Congress passed the Superfund Amendment and Reauthorization Act (commonly referred to as SARA).<sup>19</sup> SARA included the explicit contribution provisions contained in § 113. Section 113(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable . . . during or following any civil action.”<sup>20</sup> Section 113(f)(3) provides a separate

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16. See TOPOL & SNOW, *supra* note 11, § 4:11. The authors summed up a section on joint and several liability by stating that “in a very short period of time, so many courts had adopted the *Chem-Dyne* position [holding that Superfund defendants are jointly and severally liable] that there was no longer a reasonable basis for disagreement concerning the application of joint and several liability.” *Id.*; see also *United States v. Atl. Research*, 127 S. Ct. 2331, 2339 n.7 (2007) (“We assume without deciding that § 107(a) provides for joint and several liability.”).

17. See, e.g., *O’Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir. 1989) (noting that joint and several liability “often result[s] in defendants paying for more than their share”); *United States v. Mottolo*, 695 F. Supp. 615, 629 n.15 (D.N.H. 1988) (stating that the right of contribution is necessary to reduce the “harsh results” that can be associated with joint and several liability).

18. See, e.g., *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 264 (E.D.N.Y. 1986) (allowing a third party complaint to go forward); *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986) (discussing private party suits and the right to contribution), *superseded by statute*, 42 U.S.C. § 113(f)(1) (2000), as recognized in *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 98 (2d Cir. 2005).

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

20. 42 U.S.C. § 9613(f)(1).

right of contribution for persons who have resolved their liability to the government.<sup>21</sup> The legislative history of § 113 indicates that Congress was confirming the existence of the right of contribution, not necessarily adding a new right of contribution.<sup>22</sup>

After SARA added § 113, many courts held that a contribution claim could not be brought under § 107(a).<sup>23</sup> Additionally, because a defendant in an action pursuant to § 107(a) is subject to joint and several liability, and a claim between responsible parties was necessarily a claim for apportionment of liability like a contribution claim, most courts held that liable parties could not bring actions pursuant to § 107(a), or if they could, such claims would be treated as claims for contribution, not cost recovery.<sup>24</sup>

The relationship between a private party's § 107(a) claim and such party's § 113 contribution claim was addressed by the Supreme Court in dicta in *Key Tronic Corp. v. United States*.<sup>25</sup> In *Key Tronic*, a private party brought a § 107(a)(4)(B) cost recovery action against another responsible party. The issue before the court was whether attorneys' fees were within the definition of "response costs,"<sup>26</sup> and the Court noted that after SARA, "the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107."<sup>27</sup>

To understand how §§ 107 and 113 relate to each other, one needs to understand the relationship between §§ 107(a)(4)(A) and 107(a)(4)(B). The simplest way to view the relationship between §§ 107(a)(4)(A) and 107(a)(4)(B) is that subsection (A) is for

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21. *Id.* § 9613(f)(3).

22. See S. REP. NO. 99-11, at 44 (1985), reprinted in 3 SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 LEGISLATIVE HISTORY (1993); see also 131 CONG. REC. S11998-01 (daily ed. Sept. 24, 1985) (statements of Sen. Stafford).

23. See *United States v. Atl. Research*, 127 S. Ct. 2331, 2334 (2007) (stating that after SARA, "many Courts of Appeals held that § 113(f) was the exclusive remedy for PRPs"). The Court said this was based on the need to "direct traffic" between § 107(a) and § 113. *Id.* (quoting *Atl. Research v. United States*, 459 F.3d 827, 832 (8th Cir. 2006)).

24. See, e.g., *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (distinguishing between joint tortfeasors and innocent parties); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997) (characterizing the action as one of contribution), overruled by *Kotrous v. Goss-Jewett Co.*, 523 F.3d 924, 927 (9th Cir. 2008) (recognizing a conflict with *Atlantic Research*).

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

26. *Id.* at 814-15 (noting that attorneys' fees are generally not recoverable, but that CERCLA includes costs of enforcement in the definition of response costs).

27. *Id.* at 816.

governmental suits for response costs and subsection (B) is for suits for response costs by other parties.<sup>28</sup>

A second view of how the two subsections relate to each other focused on who the nongovernmental plaintiff may be. On its face, “any other person” seems very broad, and prior to SARA, PRPs were permitted to bring § 107(a)(4)(B) actions against other PRPs. After SARA, with the addition of the contribution provisions of § 113, courts “direct[ing] traffic between” §§ 107 and 113 reinterpreted § 107(a)(4)(B), concluding that “any other party” was limited to parties who were not potentially responsible parties.<sup>29</sup>

Where did this limitation come from? Courts read the phrase “incurred by any other person” to mean “incurred by persons other than potentially responsible parties” by reading § 107(a) as one long sentence, the subject of which is the list of potentially responsible parties. Section 107(a)(1)–(4) states that PRPs “shall be liable for –” and the “for” is followed by two relevant clauses—“(A) all costs of removal or remedial action incurred by the Government[,]” and “(B) any other necessary costs of response incurred by any other person.” The “other person,” in this understanding of subsection B means other than the people listed in (a)(1)–(4), meaning other than a potentially responsible party.<sup>30</sup>

This reading is consistent with the way most courts understood § 107(a) prior to *Aviall*. That is, before *Aviall*, most courts held that § 113 was the sole remedy for a PRP and § 107(a) provided a remedy for the government and for others who were neither the government nor PRPs.<sup>31</sup> This conclusion was based in part on fear that if PRPs could use § 107(a), then § 113 would be superfluous. The *Aviall* Court created a situation in which there could be a §107(a) PRP versus PRP claim without rendering § 113 superfluous.

### C. The *Aviall* Decision

The *Aviall* Court held that a volunteer could not bring a § 113(f)(1) contribution claim because the claim was not “during or

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28. See *Atl. Research*, 127 S. Ct. at 2334–35 (noting that this was the common reading of the provisions prior to the enactment of SARA).

29. See *id.* at 2334; see also *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004) (stating that “the parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs”).

30. *Atl. Research*, 127 S. Ct. at 2335–37.

31. See *id.* at 2334; see also *Aviall*, 543 U.S. at 169.

following” a civil action.<sup>32</sup> Aviall had purchased contaminated sites from Cooper Industries and operated the sites for several years before discovering the contamination.<sup>33</sup> Aviall notified the State regulatory agency, and the State threatened to initiate an enforcement action against Aviall if Aviall did not remediate the sites.<sup>34</sup> Aviall remediated the sites and initiated a contribution action against Cooper Industries, alleging that Cooper Industries was responsible for all or part of the remedial costs.<sup>35</sup>

The *Aviall* case presented the Court with a conflict between the language of CERCLA and the policies underlying it. Section 113(f)(1) provides a contribution action “during or following” a civil action.<sup>36</sup> The language “during or following” appears to exclude contribution prior to a civil action.<sup>37</sup> Thus, the language of the statute, on its face, favored dismissal of the volunteer’s suit.<sup>38</sup> On the other hand, the policies underlying Superfund—to encourage cleanup of hazardous sites and to require those responsible for creating the sites to pay the costs of cleanup—argued that a volunteer should have a right of contribution and that the party who had caused the contamination should not be able to avoid liability.<sup>39</sup>

On a deeper level, the issue was less how to read § 113(f)(1) than how to read the Superfund Law in its totality. Prior to SARA, which added § 113, most courts read § 107(a) to include an implied right for PRPs to bring suit against other PRPs.<sup>40</sup> Once there was an explicit

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32. *Aviall*, 543 U.S. at 165–66 (emphasizing that Aviall’s failure to satisfy the “during or following” condition precluded it from seeking contribution under § 113(f)(1)).

33. *Id.* at 163–64.

34. *Id.* at 164.

35. *See id.* (indicating that Aviall originally asserted a cost recovery claim under CERCLA § 107(a) and a separate claim for contribution under § 113(f)(1) before amending the complaint).

36. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(f)(1) (2000).

37. *See* E.I. DuPont de Nemours & Co. v. United States, 508 F.3d 126, 134–35 (3d Cir. 2007), *abrogated by* United States v. Atl. Research Corp., 127 S. Ct. 2331, 2335 (2007).

38. *See Aviall*, 543 U.S. at 165–66.

39. *See supra* notes 4 and 11 and accompanying text; *see also* Eve L. Pouliot, *Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund)*, 47 SMU L. REV. 607, 618 (1994) (reiterating the problem of CERCLA’s contribution provision(s) in practical effect).

40. *See, e.g.,* United States v. Monsanto Co., 858 F.2d 160, 171–72 (4th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 889, 891–92 (9th Cir. 1986) (upholding the private party claim under § 107(a)); Walls v. Waste Res. Corp., 761 F.2d 311, 317–18 (6th Cir. 1985) (upholding the private party claim under § 107(a)); United States v. New Castle County, 642 F. Supp. 1258, 1267–69 (D. Del. 1986) (noting that new § 113(f) ratifies the existing caselaw that

right of contribution, however, courts reinterpreted § 107(a) to exclude PRP suits because no statute should be read to contain two provisions that perform the same function.<sup>41</sup>

Based on this, Aviall argued that a broad reading of the right of contribution was consistent with the way other provisions of CERCLA were being interpreted and a narrow reading of § 113(f) could have a ripple effect, requiring a reexamination of other provisions.<sup>42</sup> For example, a reinterpretation of § 113 to limit contribution could suggest a reexamination of § 107(a) because there would no longer be two provisions providing the same function.<sup>43</sup> Additionally, most courts have concluded that defendants in § 107(a) actions are subject to joint and several liability, but a PRP should not be able to collect all of its costs.<sup>44</sup> Thus, a reexamination of whether a PRP can bring a § 107(a) action may require a reexamination of whether all § 107(a) defendants face joint and several liability.<sup>45</sup> If a PRP can collect all of its costs pursuant to § 107(a) and only an equitable share of costs pursuant to § 113, why would a PRP ever choose to bring a § 113 action? These questions permitted Aviall to argue that holding that Aviall does not have a right of contribution

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permits private parties to bring contribution actions under § 107(a)), *superseded by statute*, 42 U.S.C. § 113(f)(1), *as recognized in* *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 98 (2d Cir. 2005); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1489–91 (D. Colo. 1985) (a potentially responsible party may bring a contribution action under § 107(a)); *United States v. S.C. Recycling & Disposal, Inc.*, 653 F. Supp. 984, 994–95 (D.S.C. 1984) (discussing the right of contribution), *vacated in part on other grounds sub nom. Monsanto*, 858 F.2d at 176; *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142–43 (E.D. Pa. 1982) (stating that a responsible party may bring a § 107(a) action against another responsible party).

41. *See, e.g.*, *Bedford Affiliates v. Sills*, 156 F.3d 416, 423–24 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349–56 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301–06 (9th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996); *United States v. Colo. & E. R.R.*, 50 F.3d 1530, 1535–36 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101–03 (1st Cir. 1994); *Azko Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

42. Brief of Respondent at 20–22, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 768554.

43. *See Aviall*, 543 U.S. at 159.

44. *E.g.*, *United Techs.*, 33 F.3d at 100; *see also* Renee M. Collier & Timothy J. Evans, *Department of Defense Affirmative Cost Recovery Against Private Third Parties*, 58 A.F. L. REV. 125, 134–35 (2006) (noting that courts have refused to allow a PRP to recover all response costs based on its status as a joint tortfeasor and not as an innocent party).

45. *See United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2338 (2007) (distinguishing when a PRP can bring a § 113(f) contribution claim as opposed to a § 107(a) claim to recover response costs).

could disrupt the Superfund status quo and could lead to other significant changes in Superfund liability.

The Court's decision in *Aviall* recognized the conflict between the language and the policy, and concluded that the Court must interpret the statute as written—§ 113(f) provides for contribution claims “during or following” a civil action, but not for a volunteer.<sup>46</sup> The Court also recognized the potential “ripple” effect on other parts of the Superfund Law<sup>47</sup> and expressed no opinion on the issue that would be addressed in *Atlantic Research*.<sup>48</sup>

## II. THE *ATLANTIC RESEARCH* DECISION

Atlantic Research voluntarily remediated a site at which it was a potentially responsible party as an operator, and brought a claim against the U.S. Government, the owner of the site.<sup>49</sup> After the *Aviall* decision prevented its § 113 claim from going forward, Atlantic Research amended its complaint to allege a § 107(a) claim.<sup>50</sup> The United States moved to dismiss, arguing that § 107(a) does not allow claims by PRPs.<sup>51</sup> The District Court dismissed the action and the Eighth Circuit reversed,<sup>52</sup> joining the Second<sup>53</sup> and Seventh Circuits<sup>54</sup> in finding that a PRP who did not have a contribution claim because of *Aviall* had a cause of action under § 107(a). The Third Circuit had taken the opposite view in *E.I. DuPont de Nemours & Co. v. United States*.<sup>55</sup>

The Supreme Court affirmed, concluding that a PRP acting as a volunteer can incur costs that are recoverable under § 107(a)(4)(B).<sup>56</sup> The Court's reasoning was based largely on an analysis of §§ 107(a)(4)(A) and (a)(4)(B) of the statute and the conclusion that to read the statute any other way would render subsection (a)(4)(B)

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46. See *Aviall*, 543 U.S. at 165–68.

47. *Id.* at 169–70.

48. See *id.* (stating that it was “prudent to withhold judgment” on that issue because it had not been briefed).

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

50. *Id.*

51. *Id.*

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

53. *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90 (2d Cir. 2005).

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

55. *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 543 (3d Cir. 2006).

56. *Atl. Research*, 127 S. Ct. at 2338.

meaningless.<sup>57</sup> Once the court concluded that PRPs could bring actions under both §§ 107(a) and 113(f)(1), the Court needed to explain how the various liability sections of Superfund fit together and what role each plays.<sup>58</sup>

#### A. The Relationship Between §§ 107 and 113

The Court began its analysis by noting that the Superfund Law contains two main liability provisions: (1) § 107(a), which permits claims to recover remedial costs; and (2) § 113, which permits claims for contribution.<sup>59</sup> The pre-*Aviall* law assigned a role to each, providing that PRPs could only bring § 113 actions and non-PRPs could bring § 107(a) actions.<sup>60</sup> The flaw in that arrangement, the Court explained, was that § 107(a) really contains two distinct liability provisions, and each needs to have a role.<sup>61</sup> While § 107(a)(4)(A) explicitly authorizes actions by the United States or a State, § 107(a)(4)(B) authorizes suits “by any other person.”<sup>62</sup> If § 107(a)(4)(B) did not include PRP claims, the Court explained, then the phrase “by any other person” would be rendered meaningless<sup>63</sup> because everyone who can make a claim for response costs is either the U.S. or a State government (a § 107 (a)(4)(A) plaintiff) or a PRP (a § 113 plaintiff).<sup>64</sup> Therefore, the Court needed to find a role for § 107(a)(4)(B).<sup>65</sup>

The government had argued, as many pre-*Aviall* courts had held, that § 107(a)(4)(B) was intended to provide a claim for “innocent” parties who are not government entities, and did not provide a claim for non-innocent PRPs.<sup>66</sup> The Court rejected that argument because § 107(a) defines PRP “so broadly as to sweep in virtually all persons likely to incur cleanup costs.”<sup>67</sup> Moreover, the “by any other person”

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57. *Id.* at 2336–37.

58. *Id.* at 2338.

59. *Id.* at 2337.

60. *Id.* at 2337–38.

61. *Id.* at 2336.

62. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(A)–(B) (2000).

63. *Atl. Research*, 127 S. Ct. at 2336–37.

64. *Id.* at 2335–37.

65. *See id.* at 2338 n.6.

66. *Id.* at 2336–37.

67. *Id.* at 2336.

language of § 107(a)(4)(B) does not support a distinction between private parties based on whether they are PRPs and non-PRPs.<sup>68</sup>

After holding that § 107(a)(4)(B) provides a cause of action for PRPs, the Court needed to address when a PRP may bring a § 107(a) claim and when it may (or must) bring a § 113 claim.<sup>69</sup> Or, put another way, if private parties can proceed under § 107(a), why do we need § 113?

The Court answered this question by explaining that the two sections serve distinct purposes.<sup>70</sup> Section 107(a)(4)(B) permits the recovery of “necessary costs of response incurred by any other person.”<sup>71</sup> The prerequisite to an action under this provision is incurring response costs,<sup>72</sup> which the Court said limits § 107(a) to claims for costs “‘incurred’ in cleaning up the site.”<sup>73</sup> The Court explained that “when a party pays to satisfy a settlement agreement, it does not incur its own costs of response.”<sup>74</sup> Thus, a § 107(a) action is available to a volunteer who has incurred response costs (i.e., has cleaned up the property), but not to one who has “paid to satisfy a settlement agreement or a court judgment” because the party who “reimburses other parties for costs” has not incurred its own response costs.<sup>75</sup>

Section 113 contribution, on the other hand, is the “tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share.”<sup>76</sup> A prerequisite to a contribution action is “inequitable distribution of common liability,” which cannot occur without a finding of liability.<sup>77</sup> Therefore, § 113 is available only to the person who has been a defendant in litigation or has otherwise reimbursed someone for response costs.<sup>78</sup>

The Court recognized that the dividing line it was drawing between § 107(a)(4)(B) and § 113(f) claims was far from clear, and

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68. *Id.*

69. *Id.* at 2337–38.

70. *Id.* at 2337.

71. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(B) (2000).

72. *See Atl. Research*, 127 S. Ct. at 2338.

73. *Id.* (quoting 42 U.S.C. § 9607(a)(4)(B)).

74. *Id.*

75. *Id.*

76. *Id.* at 2338 (quoting BLACK’S LAW DICTIONARY 353 (8th ed. 1999)).

77. *Id.*

78. *See id.*

stated in a footnote that “[w]e do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all.”<sup>79</sup> Specifically, the Court noted that a PRP could incur expenses “following a suit” that are neither voluntary nor reimbursement of the costs of another party.<sup>80</sup> The Court did not express an opinion regarding “whether these compelled costs of response are recoverable under § 113(f), § 107(a) or both.”<sup>81</sup> The Court cited *United Technologies Corp. v. Browning-Ferris Industries, Inc.*<sup>82</sup> as a case which illustrates the potential overlap.

B. *United Technologies Corp. v. Browning-Ferris Industries, Inc.*

An analysis of the *United Technologies* case will provide a better understanding of the distinction drawn by the Court in *Atlantic Research* because the First Circuit’s opinion in *United Technologies* rejected this distinction after a thorough analysis, and the *Atlantic Research* Court responded point by point to the arguments made in *United Technologies*. *United Technologies* settled an Environmental Protection Agency (EPA) cost recovery action by agreeing to reimburse EPA for costs EPA had incurred and by agreeing to perform remediation.<sup>83</sup> It then brought an action against Browning-Ferris, asserting claims under both §§ 107(a)(4)(B) and 113(f).<sup>84</sup> Defendants moved for summary judgment, alleging that the claims were barred by the three-year statute of limitations for contribution claims.<sup>85</sup> *United Technologies* argued that the claim was not time barred because it was instituted within the six-year limitations period for cost recovery claims.<sup>86</sup> The court, thus, needed to determine whether the claim was a cost recovery claim under § 107(a)(4)(B) or a contribution claim under § 113(f).<sup>87</sup>

The court began its analysis by noting that § 113(g)(2) provides a six-year limitations period for § 107(a) cost recovery actions while § 113(g)(3) provides a three-year limitations period for § 113 contribution claims, demonstrating Congress’ intent that §§

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79. *Id.* at 2338 n.6.

80. *Id.*

81. *Id.*

82. *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994).

83. *Id.* at 97.

84. *Id.* at 97–98.

85. *Id.* at 98. The defendants argued that the federal claims were time barred, and that upon finding this, the court would lack jurisdiction over the state claims. *Id.*

86. *See id.* at 101.

87. *See id.* at 98.

107(a)(4)(B) and 113(f) create distinct causes of action.<sup>88</sup> If they are distinct causes of action, the court reasoned, they must arise in different circumstances. The court rejected the idea that a plaintiff could proceed under both sections as “untenable,”<sup>89</sup> because if a plaintiff could proceed under both sections, no one would choose § 113, and that would “completely swallow section [113(g)(3)’s] three-year statute of limitations.”<sup>90</sup>

United Technologies argued that the dividing line between the two provisions was similar to the dividing line later described by the Court in *Atlantic Research*.<sup>91</sup> It argued that § 107(a)(4)(B) was for the recovery of what it termed “first instance” costs, meaning costs incurred in remediating the site.<sup>92</sup> Section 113(f) would then be limited to the costs of reimbursing someone else for money spent remediating the site.<sup>93</sup> The First Circuit rejected this distinction, reasoning that such a distinction would unreasonably limit the scope of the phrase “any other necessary costs” in § 107(a)(4)(B).<sup>94</sup> The court explained that such a distinction would treat the phrase “any other necessary costs” as if it stated “any other necessary costs . . . except for monies paid to reimburse government entities’ cleanup costs,”<sup>95</sup> and that there is “simply no rhyme or reason for reading that condition into what appears on its face to be a straightforward statutory directive.”<sup>96</sup>

The First Circuit made two additional arguments against the distinction between “first instance” costs and reimbursement costs. First, the distinction relies on “an unusually cramped reading of the term contribution.”<sup>97</sup> Second, the distinction would “emasculate[] the contribution protection element of CERCLA’s settlement framework.”<sup>98</sup>

The court explained that the traditional meaning of contribution is a right of “one who has discharged a common liability to recover of

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88. *Id.*

89. *Id.* at 101.

90. *Id.*

91. *See id.*; *see also* United States v. Atl. Research Corp., 127 S. Ct. 2331, 2338 (2007).

92. *United Techs.*, 33 F.3d at 101.

93. *See id.*

94. *Id.* at 102 (quoting Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a) (2000)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

another also liable, the aliquot portion.”<sup>99</sup> The court explained that regardless of whether a party has remediated a site at which several parties are liable or reimbursed the government for its remediation, such person has discharged a common duty and is seeking to recover the aliquot portion.<sup>100</sup> The court further noted that the legislative history of SARA indicates Congress’ intent to apply the common law definition of contribution.<sup>101</sup> Thus, treating “contribution” as something that occurs only to reimburse someone after litigation limits the term more than Congress intended.

The First Circuit’s reasoning regarding contribution protection is based on § 113(f)(2), which provides that one who settles with the government “shall not be liable for claims for contribution regarding matters addressed in the settlement.”<sup>102</sup> This provision encourages settlement by allowing one to settle and buy total peace because no other party could sue the settler for contribution claiming the settler had not paid its fair share.<sup>103</sup> The ability to buy contribution protection, however, is not worth much if other responsible parties can bring a § 107(a)(4)(B) cost recovery action after settlement.<sup>104</sup> Thus, the First Circuit concluded that allowing § 107(a) claims by PRPs would defeat the purpose of the contribution protection provision of SARA.<sup>105</sup>

Based on the above, the First Circuit rejected the plaintiff’s arguments that the difference between §§ 107(a)(4)(B) and 113 centers on the subject matter of the claims (i.e., whether the plaintiff is seeking to recover remediation costs it incurred or sums that it paid to reimburse another party), and concluded that the essential difference is in the identity of the plaintiff—§ 113(f) is for PRPs and § 107(a)(4)(B) is for persons who are not PRPs.<sup>106</sup>

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99. *Id.* at 99 (quoting BLACK’S LAW DICTIONARY 399 (6th ed. 1990)).

100. *Id.* at 101.

101. *Id.* at 100.

102. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(f)(2).

103. *See United Techs.*, 33 F.3d at 103.

104. *See id.*

105. *Id.*

106. *Id.* at 101–02.

### C. The *Atlantic Research* Court's Response to *United Technologies*

The Supreme Court in *Atlantic Research* rejected the distinction suggested by the First Circuit in *United Technologies* and responded to each element of the First Circuit's reasoning.

#### 1. § 107(a) Will Swallow Up § 113(f)

In *United Technologies* the First Circuit concluded that a PRP could not bring a § 107(a) action because if a PRP could, then no one would ever bring a claim under §113(f).<sup>107</sup> The reason no one would bring a § 113(f) claim is that § 107(a) has both substantive and procedural advantages.<sup>108</sup> Most courts impose joint and several liability under § 107(a).<sup>109</sup> Section 113, on the other hand, only permits recovery of the defendant's fair share.<sup>110</sup> The different statutes of limitations also provide a reason for a plaintiff to choose § 107(a).<sup>111</sup> Note that in *United Technologies*, the plaintiff needed the longer limitations period applicable to § 107(a) claims.<sup>112</sup>

The *Atlantic Research* Court addressed this issue by creating a dividing line between § 107(a) and § 113(f) claims that means that very few plaintiffs will have the opportunity to allege a cause of action under both sections.<sup>113</sup> The Court noted that because costs incurred voluntarily will be recoverable only under § 107(a)(4)(B), and costs of reimbursement of another person pursuant to a judgment or settlement will be recoverable only under § 113(f), "neither remedy swallows the other."<sup>114</sup>

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107. *Id.* at 103.

108. See Hope Whitney, *Cities and Superfund: Encouraging Brownfield Development*, 30 *ECOLOGY L.Q.* 59, 74 (2003) (stating the purported advantages of § 107 to recover costs).

109. See, e.g., *United States v. Burlington N. & Santa Fe Ry.*, 502 F.3d 781, 794 (9th Cir. 2007); *Chem-Nuclear Sys. v. Bush*, 292 F.3d 254, 259–60 (D.C. Cir. 2002); *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001); *United States v. Twp. of Brighton*, 153 F.3d 307, 317 (6th Cir. 1998); *Env'tl. Prot. Agency v. Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d 889, 895–96 (5th Cir. 1993); *United States v. Alcan Aluminum Corp. (Alcan-PAS)*, 990 F.2d 711, 721 (2d Cir. 1993); *United States v. Alcan Aluminum Corp. (Alcan-Butler)*, 964 F.2d 252, 269 (3d Cir. 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

110. See *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2338 (2007).

111. See *United Techs.*, 33 F.3d at 98 (noting the six-year statute of limitations for cost recovery actions and the three-year statute of limitations for contribution claims).

112. See *id.* at 103.

113. See *Atl. Research*, 127 S. Ct. at 2338 (demonstrating instances where a PRP may recover under § 113(f)(1), but not under § 107(a)).

114. *Id.* at 2338 n.6.

The Court also explained that the advantages of using § 107(a) may not be so significant because a PRP may not be able to avoid the equitable distribution among PRPs required by § 113(f) by choosing to impose joint and several liability under § 107(a). Even for those who may have a cause of action under both sections, a defendant in a § 107(a) action could reduce the inequity of joint and several liability by counterclaiming for contribution.<sup>115</sup> Whether this reduces the inequitable distribution or eliminates it needs to be examined. The Court cited *Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc. (Con Ed)*<sup>116</sup> as listing cases in which the plaintiff and defendant had brought both § 107(a) and § 113(f) claims and counterclaims.<sup>117</sup> It is possible that in such a case, a court would be required to make an equitable allocation.<sup>118</sup>

## 2. Any Other Costs

The First Circuit, in *United Technologies*, concluded that limiting § 107(a)(4)(B) to claims by persons who have incurred “first instance” cleanup costs limits the phrase “any other costs” without any language in the statute to suggest such a limitation.<sup>119</sup> The *Atlantic Research* Court’s response to this argument is that the statute does contain this limitation.<sup>120</sup> The complete phrase in the statute is “any other necessary costs of response *incurred* by any other person.”<sup>121</sup> The *Atlantic Research* Court stated that § 107(a) “permits a PRP to recover only the costs it has *incurred* in cleaning up a site . . . . When a party pays to satisfy a settlement agreement or a court judgment, it does not *incur* its own costs of response.”<sup>122</sup> Thus, § 107(a)(4)(B) is limited to claims by persons who have remediated the site (“first instance” claims) because only these parties have “incurred” response costs.<sup>123</sup>

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115. *Id.* at 2339.

116. *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90 (2d Cir. 2005).

117. *See Atl. Research*, 127 S. Ct. at 2339; *see also Consol. Edison*, 423 F.3d at 100 n.9 (citing *Blasland, Bouck & Lee v. City of N. Miami*, 283 F.3d 1286, 1292 (11th Cir. 2002)); *Dent v. Beazer Materials & Servs.*, 156 F.3d 523, 527 (4th Cir. 1998); *Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489, 1495 (11th Cir. 1996)).

118. *See Atl. Research*, 127 S. Ct. at 2339.

119. *See United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 102 (1st Cir. 1994).

120. *See Atl. Research*, 127 S. Ct. at 2338.

121. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(B) (2000) (emphasis added).

122. *Atl. Research*, 127 S. Ct. at 2338 (emphasis added).

123. *Id.*

This limitation is slightly different from the limitation suggested by the Second Circuit in *Con Ed*.<sup>124</sup> The Second Circuit reached essentially the same conclusion as *Atlantic Research*, that a person who has not paid for the cleanup has not incurred response costs.<sup>125</sup> However, unlike the *Atlantic Research* Court, which concluded that such persons have not “incurred” the costs (they have merely reimbursed the person who incurred them),<sup>126</sup> the *Con Ed* court suggested that such persons have not incurred “necessary costs of response.”<sup>127</sup> The court cited *United States v. Taylor*<sup>128</sup> for the proposition that “when a party ‘does not conduct its own cleanup, it has not incurred recovery costs[,]’”<sup>129</sup> noting that the reimbursement costs incurred by Taylor were “not costs of response.”<sup>130</sup>

By focusing on who *incurred* the response costs rather than whether the costs were *costs of response*, the *Atlantic Research* Court limited the impact of the case.<sup>131</sup> The term “response costs” has long been viewed as including many costs that were not strictly speaking cleanup costs.<sup>132</sup> In *Key Tronic*, for example, the issue was whether certain litigation costs were “response costs” and the Court held that fees incurred in searching for additional PRPs were response costs, but certain attorneys’ fees were not.<sup>133</sup> The emphasis on who has *incurred* the recoverable costs avoids redefining “response costs.”

### 3. Definition of Contribution

The *United Technologies* court rejected the distinction between “first instance” costs (which do not give rise to contribution claims) and costs of reimbursement (which are the subject of contribution claims) because such a distinction relies on “an unusually cramped reading” of the term contribution.<sup>134</sup> The *Atlantic Research* Court disagreed. The crux of the disagreement regarding the meaning of “contribution” concerns whether a judgment against the person

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124. *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90 (2d Cir. 2005).

125. *See id.* at 100.

126. *See Atl. Research*, 127 S. Ct. at 2338.

127. *Consol. Edison*, 423 F.3d at 101.

128. *United States v. Taylor*, 909 F. Supp. 355 (M.D.N.C. 1995).

129. *Consol. Edison*, 423 F.3d at 101 (quoting *Taylor*, 909 F. Supp. at 365).

130. *Id.* at 101 n.13.

131. *See Atl. Research*, 127 S. Ct. at 2338.

132. *See, e.g., Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989) (suggesting that recovery under CERCLA is not limited to cleanup costs).

133. *Key Tronic Corp. v. United States*, 511 U.S. 809, 811, 820 (1994).

134. *United Techs. Corp. v. Browing-Ferris Indus.*, 33 F.3d 96, 102 (1st Cir. 1994).

claiming contribution is a prerequisite to a contribution claim.<sup>135</sup> Both courts agreed that contribution is a common law doctrine aimed at preventing or reducing the unfairness inherent in joint and several liability.<sup>136</sup> It is a claim between jointly and severally liable parties for “an appropriate division of the payment one of them has been compelled to make.”<sup>137</sup> Both courts also agreed that in passing CERCLA, Congress intended terms such as “contribution,” that have a common law meaning, to include that evolving common law meaning.<sup>138</sup> Thus, the Restatement (Second) of Torts’ discussion of contribution is relevant to interpreting the term contribution in CERCLA.<sup>139</sup>

The *Atlantic Research* Court disagreed with the *United Technologies* court regarding whether potentially responsible parties are joint tortfeasors. Joint tortfeasors are subject to joint and several liability.<sup>140</sup> A potentially responsible party who is a § 107(a)(4)(B) plaintiff may not be subject to joint and several liability.<sup>141</sup> More importantly, the *Atlantic Research* Court cited *Aviall* for the proposition that §§ 107(a) and 113(f) are “clearly distinct” remedies.<sup>142</sup> If they are distinct remedies, then treating all actions between PRPs (which necessarily require apportionment among

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135. Compare *Atl. Research*, 127 S. Ct. at 2338, with *United Techs.*, 33 F.3d at 102.

136. See Alan S. Ritchie, Note, *The Proposed “Securities Private Enforcement Reform Act”: The Introduction of Proportionate Liability Into Rule 10b-5 Litigation*, 42 CLEV. ST. L. REV. 339, 360 (1994) (emphasizing the policy objective of fairness behind the doctrine of contribution).

137. *United Techs.*, 33 F.3d at 99 (quoting *Azko Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)).

138. See Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 352 n.96 (2004) (discussing the way the common law sense of “contribution” was modified by Congress).

139. See H. French Brown, IV, *Rebirth of CERCLA § 107 Contribution Actions: New Life for PRPs That Conduct Voluntary Cleanups after Aviall*, 14 BUFF. ENVTL. L.J. 211, 218 (2007) (noting that many courts found the Restatement (Second) of Torts to govern actions where PRPs incurred more than their fair share of cleanup costs).

140. See RESTATEMENT (SECOND) OF TORTS: APPORTIONMENT OF HARM TO CAUSES § 433A.

141. If they are entitled to joint and several liability as the Court implied, then they cannot be subject to more than a contribution claim. See William D. Auxer, Comment, *Orphan Shares: Should They Be Borne Solely by Settling PRP Conducting the Remedial Cleanup or Should They Be Allocated Among All Viable PRPs Relative to Their Equitable Share of CERCLA Liability?*, 16 TEMP. ENVTL. L. & TECH. J. 267, 267 (1997–1998) (stating that defendant PRPs were responsible for all cleanup costs incurred by a plaintiff PRP under the theory of joint and several liability).

142. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2337 (2007).

PRPs) as contribution claims “confuses the complementary yet distinct nature of the rights”<sup>143</sup> provided by the sections.

If the rights and remedies are distinct, then the difference between a § 107(a)(4)(B) plaintiff and a § 113(f) plaintiff is not merely procedural. The Eighth Circuit, in *Atlantic Research Corp. v. United States*, had concluded that the only difference between a § 107(a)(4)(B) plaintiff and a § 113(f) plaintiff is the parties’ “different procedural circumstances.”<sup>144</sup> What the court meant is that the rights and remedies were essentially the same. The only difference is that the person who had been sued could only bring a § 113(f) claim, while those who had not been sued could bring a § 107(a) claim (but not a § 113(f) claim).<sup>145</sup>

The *Atlantic Research* Court disagreed with that conclusion because the two provisions provide distinct rights and remedies.<sup>146</sup> The § 107(a)(4)(B) plaintiff has incurred response costs.<sup>147</sup> The § 113(f) plaintiff has not incurred response costs.<sup>148</sup> The statute treats those who have incurred response costs differently (as a matter of substantive rights) than the person who has not incurred response costs and has merely reimbursed someone else for costs.<sup>149</sup> Such a person is entitled to joint and several liability and has a longer statute of limitations. Thus, the conclusion that not all claims between PRPs are contribution claims is based on the conclusion that not all PRPs are joint tortfeasors.<sup>150</sup> The § 107(a)(4)(B) plaintiff is a joint tortfeasor with the other PRPs only after there has been a judgment or settlement. Thus, the *Atlantic Research* Court concluded that a determination of liability is a requirement to a contribution claim.

This may explain why the *Con Ed* court refused to use the term PRP. While courts and practitioners have used the term PRP for

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143. *Id.*

144. *Atl. Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006) (quoting *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 99 (2d Cir. 2005)).

145. *See id.* at 836–37 (explaining the vitality of §§ 107 and 113 as available remedies).

146. *See Atl. Research*, 127 S. Ct. at 2337.

147. *See id.* at 2338; *see also* Lewis A. Fleak, Case Note, *Contribution to Inaction: Interpreting CERCLA to Encourage, Rather than Discourage, Hazardous Waste Clean-Up*, 11 MO. ENVTL. L. & POL’Y REV. 294, 300 (2004) (affirming that § 107(a) refers to persons who incurred cleanup costs).

148. *See Atl. Research*, 127 S. Ct. at 2338.

149. *Id.*

150. *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, 130 (1997) (pointing out that not all claims by PRPs are for contribution).

many years, the Second Circuit took the position that after *Aviall*, it may not be appropriate to use the term PRP because it “may be read to confer on a party that has not been held liable a legal status that it should not bear.”<sup>151</sup> The Second Circuit’s point was that even though two parties may, if sued, have Superfund liability, the “volunteer” who sues under § 107(a)(4)(B) has a different legal status from other PRPs and it may be confusing to use the same designation.<sup>152</sup>

#### 4. Contribution Protection

The *United Technologies* court refused to permit PRPs to bring actions under § 107(a)(4)(B) in part because that would interfere with the contribution protection provided in § 113(f)(2).<sup>153</sup> The court’s reasoning was that the government’s ability to promote settlements by offering contribution protection was an important part of SARA.<sup>154</sup> Contribution protection means protection against contribution claims and not protection against cost recovery claims.<sup>155</sup> Thus, recognizing a cost recovery claim for PRPs means the government cannot protect the settling parties against all future suits, which will, in turn, hinder the ability of the government to settle cases.<sup>156</sup>

The *Atlantic Research* Court provided three responses to this problem. First, because a § 107(a)(4)(B) defendant can trigger apportionment by bringing a § 113(f) counterclaim and a court of equity will always take prior settlements into account, there is little risk to the settling party that a court will require it to pay more than its equitable share.<sup>157</sup> Second, contribution protection “continues to provide significant protection”<sup>158</sup>—it protects against all contribution claims and very few parties (i.e., only those who performed the cleanup) will have the ability to bring a § 107 claim.<sup>159</sup> Third, “settlement carries the inherent benefit of finally resolving liability as to the United States or a State.”<sup>160</sup> Thus, the Court believed that even

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151. See *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005).

152. See *id.* at 100 n.9 (recognizing that voluntary cleanup may depend on how § 107(a) is read).

153. See *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101–03 (1st Cir. 1994).

154. *Id.* at 102.

155. *Id.* at 103.

156. See *id.* at 102–03 (suggesting that the CERCLA settlement framework would be undermined if a cost recovery claim is recognized).

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

158. *Id.*

159. See *id.*

160. *Id.*

though contribution protection would no longer provide absolute protection, it will provide enough protection to continue to encourage settlement.<sup>161</sup>

### III. THE NEW CERCLA FRAMEWORK

Pre-*Aviall*: (1) § 107(a)(4)(B) was only for suits by non-government parties who were not PRPs;<sup>162</sup> (2) all PRPs were viewed as joint tortfeasors so that a PRP who performed remediation was not treated significantly differently from a PRP who reimbursed someone else for performing remediation;<sup>163</sup> (3) all PRP versus PRP claims were § 113 claims,<sup>164</sup> which are subject to equitable apportionment;<sup>165</sup> and (4) the EPA, in a settlement, could provide protection against all future claims arising out of the site.<sup>166</sup> Now, each of those statements is either not true or subject to significant question.

#### A. Performing Remediation Versus Reimbursing

Chief among the changes made by the Court in *Atlantic Research*, and the catalyst for some of the other changes, is the distinction between *performing remediation* and *reimbursing others*.<sup>167</sup> Section 107 is only available to the person who has performed remediation because only that person has “incurred” response costs.<sup>168</sup> Why did the Court read this distinction into the statute when most prior courts had not?

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161. See *id.* (“[P]ermitting PRPs to seek recovery under § 107(a) will not eviscerate the settlement bar set forth in § 113(f)(2).”).

162. See *supra* notes 29–31 and accompanying text.

163. See *supra* notes 99–106, 119–23 and accompanying text; see also Hernandez, *supra* note 150, at 105–06 (noting that the two types of PRPs—remediation and reimbursement—were not treated differently).

164. See *supra* notes 66–78 and accompanying text; see also, e.g., *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101 (1st Cir. 1994) (finding that a claim of liable parties “must be classified as an action for contribution”).

165. See Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 *ECOLOGY L.Q.* 1, 29 (2006) (“[A] claim by one PRP against another PRP necessarily is for contribution.”).

166. See *supra* notes 153–61 and accompanying text; see also Craig N. Johnston, *United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA*, 22 *J. ENVTL. L. & LITIG.* 313, 325 (2007) (“[T]he settlement bar continues to provide significant protection from contribution suits by PRPs.” (quoting *Atl. Research*, 127 S. Ct. at 2339)).

167. See *Atl. Research*, 127 S. Ct. at 2338.

168. *Id.*

The Court rejected the pre-*Aviall* reading of § 107(a)(4)(B) for two reasons. First, courts had read into § 107(a)(4)(B) a distinction between PRPs and others that cannot be found in the language of the statute.<sup>169</sup> Second, by distinguishing between PRPs and others who were not PRPs, courts had interpreted § 107(a)(4)(B) in a manner that rendered it useless.<sup>170</sup>

The Court, however, went beyond simply reasoning that § 107(a)(4)(B) needs to be reinterpreted because the meaning that prior courts attributed to it rendered it useless. The Court made the affirmative decision that just as the simple meaning of the section rejects the distinction made by so many earlier courts, the simple meaning of the section requires the distinction it was drawing—section 107(a)(4)(B) provides a cause of action only for persons who have “incurred response costs,” and not for persons who have reimbursed others for response costs.<sup>171</sup>

The *Con Ed* court read the section similarly, interpreting § 107(a)(4)(B) as applying only to those who “incurred response costs,” not to those who reimburse others.<sup>172</sup> The *Con Ed* decision, however, had a slightly different emphasis and this difference goes to the heart of understanding the distinction between the § 107(a)(4)(B) plaintiff and the person who merely reimbursed others. According to the *Con Ed* court, the difference between the remediator and the reimbursor is whether the costs they incurred were “response costs,”<sup>173</sup> while the *Atlantic Research* Court concluded that the difference is *who* has “incurred” the response costs.<sup>174</sup> The position taken by the *Atlantic Research* Court maintained the broad definition of “response costs” used by prior courts, and thus maintained an expansive reading of what the § 107(a)(4)(B) plaintiff may recover once we decide who may be a § 107(a)(4)(B) plaintiff.<sup>175</sup>

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169. *See id.* at 2336 (dismissing the interpretation of § 107(a)(4)(B) as distinguishing between PRPs and non-PRPs); *see also* *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 99–100 (2d Cir. 2005); *United Techs.*, 33 F.3d at 100.

170. *See Atl. Research*, 127 S. Ct. at 2337 (stating that acceptance of the distinction between PRPs and non-PRPs would render § 107(a)(4)(B) useless because there are no non-PRPs which would incur response costs); Brown, *supra* note 139, at 232–33 (referencing cases that found no basis for the distinction).

171. *Atl. Research*, 127 S. Ct. at 2334, 2338.

172. *See Consol. Edison*, 423 F.3d at 100 (“Section 107(a) makes its cost recovery remedy available . . . to *any* person that has incurred necessary costs of response . . .”).

173. *See id.* at 96 n.6 (discussing the meaning of “response” as used in the statute).

174. *See Atl. Research*, 127 S. Ct. at 2338 (“[Section] 107(a) permits cost recovery (as distinct from contribution) by a private party that *has itself* incurred cleanup costs” (emphasis added)).

175. *See id.*

The difference between *Con Ed* and *Atlantic Research* in this regard is subtle. When asked *who* may recover under § 107(a)(4)(B) and *what* costs may they recover, the *Con Ed* court answered: (1) any other party, but (2) only for response costs (which excludes reimbursement costs).<sup>176</sup> On the other hand, the *Atlantic Research* Court answered: (1) only persons who incurred response costs (which excludes persons who reimbursed someone who incurred response costs), and (2) they can recover response costs (which retains the original meaning of the phrase response costs).<sup>177</sup>

For the reasons described below, the *Atlantic Research* Court's reading of § 107(a)(4)(B) is more consistent with other CERCLA provisions, shows a better understanding of the practical reality regarding who is a "volunteer," and helps explain how the Court would respond when faced with the overlap case that it left open.

## B. The Overlap

In *Atlantic Research*, the Court noted that the line between the volunteer remediator who has a § 107(a)(4)(B) claim and the reimbursor who has only a § 113 contribution claim is not so clear and there could be an overlap—a person who has performed remediation and therefore should have a § 107(a)(4)(B) claim, but who is not a volunteer and therefore has a § 113 contribution claim.<sup>178</sup> The Court declined to decide how such overlap cases should be treated.<sup>179</sup>

The Court's reasoning suggests that the remediator who is not a volunteer should have a cause of action under both provisions. Nothing in the Court's interpretation of § 107(a) indicates that only volunteers may have a § 107 cause of action; the key is incurring response costs.<sup>180</sup> Indeed, nothing in § 107 or in the Court's interpretation of § 107 indicates that being a volunteer is relevant.<sup>181</sup> The language does, however, limit recovery under § 107 to "costs of

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176. See *Consol. Edison*, 423 F.3d at 99 ("The only questions we must answer are whether Con Ed is a 'person' and whether it has incurred 'costs of response.'").

177. See *Atl. Research*, 127 S. Ct. at 2338.

178. *Id.* at 2338 n.6.

179. *Id.*

180. See *id.* at 2338 (noting that a PRP may be compelled pursuant to a consent decree, which may give rise to a § 113(f) or § 107(a) claim, or both).

181. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607 (2000); see also *Atl. Research*, 127 S. Ct. at 2338 (noting that "costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B)," but disclaiming that voluntary action is necessary).

response incurred by any other person.”<sup>182</sup> Thus, in the overlap case, the plaintiff should have a § 107 claim for the money spent cleaning up the property. The plaintiff should also have a § 113 contribution claim for the money spent reimbursing someone else because the litigation that prevents him from being a volunteer triggers a contribution claim. For example, if one settled litigation by agreeing to spend \$100,000 on remediation costs and reimbursing the government \$500,000 for its costs, the plaintiff should have a § 107 cause of action for the \$100,000 and only a contribution claim for the \$500,000.

The Court’s reasoning so strongly suggests that the overlap plaintiff should have both causes of action that we need to examine why the Court declined to decide this issue. One reason for declining to decide is that the Court’s holding was that a volunteer who remediates has a § 107(a) claim.<sup>183</sup> The Court was not faced with the case in which the plaintiff who remediated was not a volunteer, and that issue had not been briefed.<sup>184</sup>

A second reason could be the Court’s recognition that in reinterpreting § 107(a)(4)(B), the Court was responding to an issue created by the *Aviall* decision, which held that a volunteer did not have a § 113(f)(1) claim.<sup>185</sup> Whether one was a volunteer or a defendant in a civil action is key to determining who has a § 113(f)(1) claim.<sup>186</sup> Thus, there is some ground to suggest that being a volunteer was important in determining who has a § 107(a) claim.<sup>187</sup> Whether being a volunteer is important in interpreting § 107(a)(4)(B) is addressed below in section C.

Another reason for the Court not deciding this issue relates to the contribution counterclaim and the joint and several liability issues

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182. 42 U.S.C. § 9607(a)(4).

183. *Atl. Research*, 127 S. Ct. at 2338 n.6.

184. *Id.*

185. *Id.* at 2334 (noting that the *Aviall* decision had “caused several Courts of Appeals to reconsider whether PRPs have rights under § 107(a)(4)(B)”).

186. The holding in *Aviall* was that, in order to have a § 113(f)(1) claim, one must have been a defendant in a § 106 or § 107 action. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160–61 (2004); see also Jeannette Paull, *Neither Innocent nor Proven Guilty: The Aviall Services v. Cooper Industries Dilemma*, 13 BUFF. ENVTL. L.J. 31, 48 (2005) (recognizing the dilemma between those that can and cannot sue under § 113(f)(1)).

187. See Stanley A. Millan, *Contemporary CERCLA: Reversals of Fortune and Black Holes*, 16 FORDHAM ENVTL. L. REV. 183, 214 (2005) (discussing the application of § 107 on volunteer cleanup participants).

raised by that counterclaim. The joint and several liability issue is discussed below in section D.

### C. Volunteer Versus Forced Remediator

The difference between the way the *Atlantic Research* Court and the *Con Ed* court read the phrase “costs of response incurred by any other person,”<sup>188</sup> shows how the courts differed on the issue of whether being a volunteer is important. According to the *Atlantic Research* Court, the person who has a § 107(a)(4)(B) claim is the person who performed remediation, because only the person who has performed remediation has “incurred” response costs.<sup>189</sup> The Court’s reasoning does not suggest that whether this person was a volunteer has any relevance to whether the person has incurred response costs.

The *Con Ed* court, on the other hand, explained that its understanding of the term “response costs” is based in part on whether the person spending the money is responding to the release of hazardous substances or to a claim.<sup>190</sup> If a person is a volunteer, he or she is responding to the release of hazardous substances.<sup>191</sup> That person has, therefore, incurred *response* costs.<sup>192</sup> On the other hand, a person who merely reimburses someone else due to litigation or threat of litigation has only a contribution claim because that person is responding to the litigation or threat of litigation, not to the release of hazardous substances.<sup>193</sup> According to this reasoning, only a volunteer can incur response costs. Thus, if the *Atlantic Research* Court agreed with this interpretation, it would not have any question about the overlap case. The forced remediator would not have a § 107 claim.

The difference between the courts regarding the importance of being a “volunteer” can also be seen in their policy discussions. The *Con Ed* court quoted extensively from statements in the legislative

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188. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(B) (2000).

189. See *Atl. Research*, 127 S. Ct. at 2338.

190. See *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 100 (2d Cir. 2005) (noting that to recover response costs, the party who performed remediation need not have acted pursuant to a court order or judgment).

191. See *id.* at 99 (finding that Con Ed incurred response costs when remediating the plant sites).

192. See *id.* (adding that the costs Con Ed incurred were not a result of an order or judgment).

193. See *id.* at 100.

history of CERCLA about the importance of being a volunteer.<sup>194</sup> The *Atlantic Research* decision contains none of that policy discussion and does not cite to that discussion in *Con Ed*. The *Atlantic Research* Court, by not discussing the importance of being a volunteer, shows a greater understanding of the practical realities because it recognizes that, to a large extent, there are no volunteers. There are very few parties who will spend significant sums of money to clean up someone else's mess without any compensation.<sup>195</sup> *Aviall*, *Con Ed*, and *Atlantic Research* were all threatened with enforcement actions and "volunteered" rather than engaging in litigation that they could not win. They were, therefore, not responding to the release of hazardous substances as much as they were responding to the threat of enforcement actions.

If the *Con Ed* "volunteer" was not responding to the release, but was, instead, responding to the potential liability, then the *Con Ed* court's reasoning, based on what the person is responding to, does not fit the realities of the case. The volunteer in *Aviall*, and accordingly, in § 113(f)(1), is a person who has not been subject to a civil action.<sup>196</sup> The *Con Ed* volunteer, on the other hand, is responding to the release of hazardous substances because he is not responding to a civil action.<sup>197</sup>

The *Atlantic Research* Court rejected that reasoning. It accepted the *Aviall* definition of volunteer for the purposes of § 113. That definition, however, does not transplant to § 107(a)(4)(B) because, as a practical matter, that person is responding to the threat of liability and not to the release of a hazardous substance, and § 107(a)(4)(B) provides a cause of action for the person who incurred response costs (i.e., the remediator) without any indication that the person's motivation is relevant.<sup>198</sup>

The *Atlantic Research* Court made clear that it believed that there are no true volunteers when it stated that "if PRPs do not

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194. See *id.* at 94 (stating that the goals of CERCLA are to impose liability on responsible parties "and inducing those persons 'voluntarily to pursue appropriate environmental response actions'" (quoting H.R. REP. NO. 96-1016(I), at 17 (1980), as reprinted in 1980 U.S.C.C.A.N. 6119, 6120)).

195. See *Schaefer v. Town of Victor*, 457 F.3d 188, 200 (2d Cir. 2006) (pointing out the disincentive of undertaking a voluntary cleanup without compensation).

196. See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) ("Aviall has never been subject to [a civil] action.").

197. See *Consol. Edison*, 423 F.3d at 94.

198. See *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2338 (2007) (giving no regard to a party's motivation).

qualify as ‘any other person’ for purposes of § 107(a)(4)(B), it is unclear what private party would. . . . [A]ccepting the Government’s interpretation would reduce the number of potential plaintiffs to almost zero. . . .”<sup>199</sup> The government’s interpretation of § 107(a)(4)(B) was dependent on the existence of true volunteers,<sup>200</sup> non-PRPs who remediate a site and seek contribution. The *Atlantic Research* Court took the position that either such people do not exist or there are so few of them that their presence is not sufficient to warrant recognition in interpreting the statute.<sup>201</sup>

Thus, while the *Con Ed* court believed that it was important to encourage voluntary cleanup,<sup>202</sup> the *Atlantic Research* Court recognized that in reality there are no true volunteers and those who the *Con Ed* court viewed as volunteers do not need a cause of action against other PRPs as an economic incentive to remediate because the potential liability faced by such PRPs already gives them sufficient incentive to remediate.

From a policy perspective, the *Atlantic Research* Court’s distinction between reimbursers and remediators upholds a position that EPA had been trumpeting. The government’s brief in *Atlantic Research* argued that CERCLA was never intended to promote “wholly voluntary, unsupervised, *sua sponte*” cleanups.<sup>203</sup> The goal, according to the government, is to promote “government-supervised cleanups and [to encourage] PRPs promptly to settle their liability with the government.”<sup>204</sup> Indeed, the government is critical of the *Con Ed* court’s discussion of encouraging voluntary cleanups because Congress did not intend “to promote unsupervised cleanups at the expense of government-supervised cleanups.”<sup>205</sup>

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199. *Id.* at 2336.

200. *Id.* at 2336–37. The Court noted that Congress had exempted some bona fide purchasers and the government claimed that these parties could be innocent plaintiffs. *Id.* However, even if the exemption did create some potential plaintiffs, the government’s interpretation of the statute required one to accept the proposition that a statute enacted in 1980 was meaningless until the passage of an exemption in 2002. *Id.* at 2337.

201. *See id.* at 2336 (“[I]f PRPs do not qualify as “any other person” for purposes of § 107(a)(4)(B), it is unclear what private party would.”).

202. *See Consol. Edison*, 334 F.3d at 94, 100 (“[W]e would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable . . . from recovering necessary response costs.”).

203. Brief for the United States at 39–43, *Atl. Research*, 127 S. Ct. 2331 (No. 06-562), 2007 WL 669263.

204. *Id.* at 36.

205. *Id.* at 13, 39 (emphasis omitted). The government interprets all of the references to encouraging voluntary cleanups in CERCLA’s legislative history to mean by settlement with the

The *Atlantic Research* Court seems to have accepted the government's position by adopting a distinction between remediators and reimbursers that leaves no room in the Court's plain reading of the statute for the volunteer. That is, § 107(a) contains advantages not provided by § 113. Once it is given that some PRPs are to have these advantages and others are not, the Court needed to explain which PRPs are to have those advantages—volunteers or all remediators. The Court's explanation of § 107(a)(4)(B) indicated that the statute gave those advantages to all remediators.

Two additional CERCLA provisions provide support for the *Atlantic Research* Court's interpretation of § 107(a)(4)(B)—the statute of limitations triggers and the National Contingency Plan (NCP) requirement. The statute of limitations for a § 107 claim is “3 years after completion of the removal action”<sup>206</sup> or “6 years after initiation of physical on-site construction of the remedial action.”<sup>207</sup> In both cases, the statute of limitations is triggered by remedial activity, not by reimbursing someone. The statute of limitations for a § 113 contribution claim is “3 years after—(A) the date of judgment . . . or (B) the date of an administrative order . . . or entry of a judicially approved settlement with respect to such costs or damages.”<sup>208</sup> The trigger is a judgment or settlement, not remediation. This fits in well with the Court's distinction between the remediator who has a § 107(a) cause of action and the reimburser who has a § 113 claim. It also supports the conclusion that being a volunteer is relevant to whether one has a § 113 claim (because the statute of limitations is only triggered if one reimburses as a result of litigation or settlement, thus excluding the volunteer), but it is not relevant to the § 107(a) claim because the statute of limitations is triggered by remediation without regard to why one remediated.

The different statute of limitations triggers also help explain why the overlap case should provide a cause of action under both provisions. For the non-volunteer remediator, there has been litigation or a settlement triggering a § 113(f)(1) claim, and the non-

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government “rather than a wholly voluntary, unsupervised, *sua sponte* cleanup.” *Id.* at 41 (quoting *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 537 (2006), *abrogated by Atl. Research*, 127 S. Ct. 2331).

206. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(g)(2)(A) (2000).

207. *Id.* § 9613(g)(2)(B).

208. *Id.* § 9613(g)(3).

volunteer remediator has also performed remedial activity that triggers a § 107 claim.

The Court could have also used the NCP requirement to support its conclusion that the key to identifying who may sue under § 107 is the performance of remediation. In both §§ 107(a)(4)(A) and (B), response costs are recoverable only if they are incurred in a manner that “is consistent with” (or “not inconsistent with”) the NCP.<sup>209</sup> The NCP is EPA’s codification of “procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants.”<sup>210</sup> The only costs that it makes any sense to refer to as consistent with the NCP are remediation costs. Therefore, only remediation costs are recoverable under § 107(a)(4)(B), and conversely, anyone who merely reimburses another party has not incurred costs in a manner that is consistent with the NCP and has no claim under § 107.

#### D. Contribution, Joint Tortfeasor Status, and Joint and Several Liability

The Court’s uncertainty regarding the overlap case could also relate to uncertainty regarding whether a PRP who has a § 107(a) claim is entitled to joint and several liability. The Court stated that it assumes, without deciding, that a § 107(a) plaintiff is entitled to joint and several liability.<sup>211</sup> However, in the overlap case, where the forced remediator has a cause of action under both provisions and there is a contribution counterclaim, the Court was uncertain whether the contribution counterclaim would turn everything into a contribution claim in which each party pays its fair share, or whether the § 107(a) claim with joint and several liability would still provide some advantage for the remediator.

Let’s examine a simple example. Assume there are four parties, each of whom contributed equal quantities of the same waste to the site. Equitable apportionment is likely to assign twenty-five percent shares to each party. However, where one party has remediated the site and therefore has a § 107(a) claim, that party may be entitled to

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209. *Id.* § 9607(a). A difference between subsections (a)(4)(A) and (a)(4)(B) is that in (a)(4)(A), the government may collect costs that are incurred in a manner that is “not inconsistent with” the NCP, while in (a)(4)(B), the private party can collect only if the costs are incurred in a manner that is “consistent with” the NCP. *Id.*

210. *Id.* § 9605(a).

211. *United States v. Atl. Research*, 127 S. Ct. 2331, 2339 n.7 (2007) (“We assume without deciding that § 107(a) provides for joint and several liability.”).

joint and several liability, in which case the other three parties would all pay one-third and the remediator will recover all of its costs.

A number of courts have suggested that it is unfair to permit a PRP to recover all of its costs. The PRP is, after all, responsible for part of the problem. For example, in *Raytheon Aircraft Co. v. United States*,<sup>212</sup> the court addressed the issue of whether a PRP who has a cause of action under § 107(a) should be able to collect all of its costs.<sup>213</sup> The court concluded, based on *Atlantic Research*, that a PRP who is a § 107(a) plaintiff should be entitled to joint and several liability.<sup>214</sup> The court then addressed the contribution counterclaim. The court reasoned that such a counterclaim is not precluded and a court may apply equitable considerations to impose some burden on the plaintiff.<sup>215</sup> A New York court reached the same conclusion in *In Re Dana Corp.*<sup>216</sup>

Why does the contribution counterclaim not defeat joint and several liability? That is, in the above example, the contribution counterclaim could impose twenty-five percent of the costs on the plaintiff and the plaintiff could be left with none of the benefits of joint and several liability. The answer is twofold. First, the effect of the counterclaim requires the application of equitable factors and a court of equity could treat the twenty-five percent contributor who remediated better than it treats the twenty-five percent contributor who did not remediate. The *Atlantic Research* Court's reasoning suggests that it should. Second, and more importantly, is the orphan share that is present in almost every Superfund case.<sup>217</sup> Most Superfund sites contain contamination that occurred many years ago.<sup>218</sup> There are usually contributors to the contamination who are not before the court because they could not be located or they are out

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212. *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306 (D. Kan. 2007).

213. *See id.* at 1307–08 (highlighting the two issues concerning claims for cost recovery and contribution).

214. *See id.* at 1309–13.

215. *See id.* at 1313–14.

216. *In re Dana Corp.*, 379 B.R. 449, 463 (Bankr. S.D.N.Y. 2007).

217. *See* Thomas W. Church & Robert T. Nakamura, *Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States*, 7 GEO. INT'L ENVTL. L. REV. 15, 26 (1994) (noting the issues typically raised in Superfund cases).

218. *See* Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1480 (2005) (suggesting the need to use forensic techniques and models to estimate “the origin and timing of contaminated release”).

of business.<sup>219</sup> When the other PRPs are subject to joint and several liability, they are forced to pay this orphan share.

Thus, if we take the above case where there are only four PRPs, if only three are before the Court, the remediator PRP that has joint and several liability can shift the entire orphan share to the two defendants. A fair result could thus have the plaintiff paying approximately twenty-five percent based on its equitable share and the other two PRPs sharing the other seventy-five percent. The courts in *Raytheon* and *Dana* concluded that permitting the PRP plaintiff to recover all of its costs and making the defendants pay 100% is unfair.<sup>220</sup> However, by holding that such parties are entitled to joint and several liability, the courts have also concluded that not providing an advantage for the remediator is inconsistent with *Atlantic Research*.

The *Atlantic Research* Court may have left this issue open because there are cases where the application of joint and several liability may be unfair. For example, what if there is a very large orphan share? Let's say there are nine contributing parties, eight of whom each contributed 10% of the contamination and one of whom contributed 20%. The 20% contributor remediates and sues the only PRP he can locate. Should a 10% contributor be stuck with 80% or 100% of the costs when a party who caused more of the problem pays significantly less? The *Atlantic Research* Court did not decide this issue. If we say that such a plaintiff has only a § 113 claim, the parties are on equal footing. On the other hand, if the plaintiff has a § 107 claim and is entitled joint and several liability, the said plaintiff should not be required to pay any of the orphan share.

The *Atlantic Research* Court left open the possibilities that (1) joint and several liability would preclude the contribution counterclaim, permitting 100% recovery; or (2) the contribution counterclaim would wipe out joint and several liability. The approach suggested by the *Raytheon* and *Dana* courts, in which both joint and several liability and the contribution counterclaim have a role, seems to be fairer than either extreme.

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219. See Amy B. Blumenberg, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 670 (1992) (stating that the parties that are no longer in business and engaged in hazardous dumping may be out of the courts' reach).

220. See *Raytheon Aircraft*, 532 F. Supp. 2d at 1310-11 (noticing the potential for PRP plaintiffs to fully recover their costs); *In re Dana*, 379 B.R. at 459.

### What if there is no Joint and Several Liability?

To the extent that the *Atlantic Research* Court questioned whether a PRP plaintiff should have joint and several liability, it permits the expansion of a divisibility argument that has been rejected by most courts deciding Superfund actions. The Superfund Law makes no reference to joint and several liability. Indeed, both the House and Senate versions of the bill that became the Superfund Law contained language authorizing joint and several liability which was removed shortly before passage.<sup>221</sup> Nevertheless, courts have consistently applied joint and several liability. One of the earliest decisions to apply joint and several liability in a Superfund action was *United States v. Chem-Dyne Corp.*<sup>222</sup> The court reasoned that the removal of the joint and several language from the bill was not a rejection of joint and several liability, but was merely intended to provide courts with flexibility in determining whether to apply joint and several liability.<sup>223</sup> The court further reasoned that where a mixture of chemicals creates one problem, it is difficult to determine what part of the problem is attributable to what part of the combination.<sup>224</sup> Therefore, joint and several liability is appropriate.

Courts have generally applied joint and several liability in Superfund actions based on the common law of joint tortfeasors.<sup>225</sup>

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221. The Senate amendments eliminating joint and several liability were passed on November 24, 1980. 126 CONG. REC. 30,987 (1980). The House amendments eliminating joint and several liability were passed on December 3, 1980. *Id.* at 31,981. These amendments are discussed by the *Chem-Dyne* court, quoting extensively from Senator Helms' speech. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806 (S.D. Ohio 1983). Senator Helms explained the deletion of joint and several liability as follows: "Retention of joint and several liability in S. 1480 received intense and well deserved criticism." 126 CONG. REC. 30,972.

222. *Chem-Dyne*, 572 F. Supp. 802.

223. *Id.* at 808. To determine whether joint and several liability should be applied, the *Chem-Dyne* court relied on statements in the legislative history that indicate congressional intent to rely on common law principles. *Id.* at 806-07 (quoting Senator Randolph: "[W]e have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable," and Representative Florio: "Issues of joint and several liability not resolved by this [amendment] shall be governed by . . . common law").

224. *Id.* at 811.

225. Among the early Superfund decisions that analyze the meaning of the statute's failure to address whether liability is joint and several are *Colorado v. Asarco, Inc.*, 608 F. Supp 1484, 1486 (D. Colo. 1985); *United States v. Argent Corp.*, Civ No. 83-0523 BB, 1984 U.S. Dist. LEXIS 16976, at \*3-4 (D.N.M. May 4, 1984); and *Chem-Dyne*, 572 F. Supp. at 806. One commentator summed up a section on joint and several liability by stating that "in a very short period of time, so many courts had adopted the *Chem-Dyne* position [holding that Superfund defendants are jointly and severally liable] that there was no longer a reasonable basis for disagreement concerning the application of joint and several liability." TOPOL & SNOW, *supra* note 11, § 4:11 (citing *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo.

Numerous courts have used § 433A of the Restatement (Second) of Torts to determine when to apply joint and several liability and when liability is divisible.<sup>226</sup> The comments to the Restatement indicate that joint and several liability is appropriate where the actions causing the harm interact so that there is one harm that results from the combination of the events and each cause is necessary, but not sufficient, to cause the result.<sup>227</sup> On the other hand, when the harms occur in sequence, each adding to the cumulative effect of the other, then the causes do not interact; each cause is sufficient to cause the problem or some identifiable part of the problem and joint and several liability is not appropriate.

A definition of joint tortfeasor that depends on the interaction of the acts of the defendants does not explain why many PRPs have joint and several liability. How can an owner and one who contaminated the site be jointly and severally liable? Their actions did not interact, particularly if the owner purchased after the contamination. They are not joint tortfeasors as that term is used in the common law. Similarly, parties who sent waste to a landfill that is a Superfund site and the remedy is to simply place a cap over the contamination, may be another example of where the resulting problem is not caused by interaction. In that case, there are so many contributors that none is necessary to the result. Does the *Atlantic Research* decision, by questioning the applicability of joint and several liability, open the door to more divisibility claims?

Superfund defendants often raise the issue of divisibility, but courts have found Superfund liability to be divisible only in very limited circumstances. An example is *In re Bell Petroleum Services*,<sup>228</sup> where a single environmental harm was caused by operators of the same plating facility, each of whom operated the facility for a different number of years.<sup>229</sup> The court found that they were not joint

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1984) (citing five other federal decisions for the proposition that there was no ground for difference of opinion on the issue)).

226. See, e.g., *In re Bell Petroleum Servs.*, 3 F.3d 889, 895 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268–70 (3d Cir. 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 172 (4th Cir. 1988); *Chem-Dyne*, 572 F. Supp. at 811; see also Aaron Gershonowitz, *Joint and Several Liability in Superfund Actions: When is Environmental Harm Divisible? PRPs Who Want to be Cows*, 14 FORDHAM ENVTL. L.J. 207, 209–30 (2003) (describing how courts have applied § 433A of the Restatement (Second) of Torts to CERCLA cases).

227. See RESTATEMENT (SECOND) OF TORTS § 433A cmt. d (1965) (discussing divisibility).

228. *In re Bell Petroleum Servs.*, 3 F.3d 889.

229. *Id.* at 892.

tortfeasors because there was a means of dividing the results of their actions, and held that each should be liable for a portion of the costs based on a “volumetric basis.”<sup>230</sup>

The *Atlantic Research* Court’s reasoning, which suggests that a PRP plaintiff and other PRPs may not be joint tortfeasors,<sup>231</sup> could provide a broader role for divisibility. The Court stated that “contribution . . . is contingent upon an inequitable distribution of common liability among liable parties. By contrast, § 107(a) permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under § 107(a) without any establishment of liability to a third party.”<sup>232</sup> If PRPs are not necessarily joint tortfeasors, that is, they do not have common liability, then what is the basis for joint and several liability? Certainly, the PRP plaintiff will not be jointly and severally liable on the contribution counterclaim. However, if the contribution of two PRPs who sent waste to the site is divisible based on one being a remediator and one being a reimbursing party, then other PRPs whose relationship to the contamination is categorically different may also be able to avoid joint and several liability. The *Atlantic Research* Court’s reasoning thus suggests a broader use of divisibility.

#### E. Contribution Protection

The *Atlantic Research* Court noted that granting a PRP a § 107(a) claim may interfere with the contribution protection provisions of CERCLA that are designed to encourage settlement. The Court acknowledged the problem, but took the position that even if PRPs can be § 107(a) plaintiffs and can thus have a cause of action against those who settled (i.e., a claim against those who have contribution protection), the incentive to settle would not be undermined.<sup>233</sup> In other words, the Court concluded that some PRPs could have a cause of action against a PRP who has contribution protection, but that is not a significant concern.

The Court must have known that some courts had used the CERCLA contribution protection provision to defeat claims other than contribution claims. For example, in *United States v. Cannons*

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230. *Id.* at 904.

231. *See supra* notes 150–52 and accompanying text.

232. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2338 (2007).

233. *Id.* at 2339.

*Engineering Corp.*,<sup>234</sup> the court dismissed common law indemnity claims because they were seen as an attempt “to make an end run around the statutory scheme.”<sup>235</sup> Nevertheless, the *Atlantic Research* Court did not express a concern about any “end runs” around the statutory scheme and took the position that a § 107(a)(4)(B) claim would not be prevented.<sup>236</sup>

What About the Governmental Entity that Reimburses Another?

Is a government entity that reimburses another government entity for remediation costs entitled to joint and several liability? This is, in a sense, the reverse of the overlap case the Court was concerned with. The overlap case described by the Court was the person who performs remediation as a result of litigation. This person is not a volunteer and therefore has a § 113 contribution claim, but has also performed remediation, and therefore should have a § 107 claim. The reverse case, the nonremediator that is a volunteer, may not have a claim under either section because it has clearly not “incurred” response costs to have a § 107 claim and, as a volunteer, does not have a contribution claim.

An example of such a case is *Town of Windsor v. Tesa Tuck, Inc.*<sup>237</sup> The Town of Windsor remediated a Superfund site and the State of New York reimbursed the Town for a portion of its costs pursuant to the New York State Environmental Quality Bond Act.<sup>238</sup> The Town and the State brought a § 107(a) action against responsible parties and some of the parties moved to dismiss the State’s claim because the State, as a reimbursing party, did not incur response costs.<sup>239</sup> The court concluded that the costs of reimbursing the Town for its response costs were response costs.<sup>240</sup>

Under *Atlantic Research*, that issue would be decided differently. The *Atlantic Research* Court concluded that only one who performs the remediation has “incurred” response costs. The State did not perform remediation and therefore should not be able to bring a § 107(a) claim.

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234. *United States v. Cannons Eng’r. Corp.*, 899 F.2d 79 (1st Cir. 1990).

235. *Id.* at 92.

236. *See Atl. Research*, 127 S. Ct. at 2339.

237. *Town of Windsor v. Tesa Tuck, Inc.*, 935 F. Supp. 317 (S.D.N.Y. 1996).

238. *Id.* at 319.

239. *Id.* at 319–20.

240. *Id.* at 320.

#### IV. CONCLUSION

The Supreme Court began reexamining who may be a Superfund plaintiff in *Aviall*, holding that a PRP who voluntarily performs remediation does not have a § 113 claim for contribution against the person who caused the contamination.<sup>241</sup> The Court left open the possibility that such a person may have a § 107 claim.

The limitation on who could bring a § 113 claim caused a reexamination of who may bring a § 107 claim, resulting in the *Atlantic Research* decision, which held that a volunteer who remediated the site could be a § 107 plaintiff.<sup>242</sup> In order to explain how the two sections fit together, the Court addressed the different roles the two sections play in the statutory scheme. The result is that, now, a potentially responsible party who remediates a site and thereby incurs response costs has rights that are substantially different from the potentially responsible party who merely reimburses someone else for response costs. This result raises a question about whether such a party would be subject to joint and several liability, and this article explained how the Court's reasoning could lead to a reassessment of joint and several liability in Superfund litigation.

The Court also acknowledged, and left open, the question of whether the non-volunteer who remediates should be treated like a volunteer who remediates. This article has concluded that the two should be treated the same with respect to having a § 107(a)(4)(B) claim. Additionally, this article suggested a procedure for dealing with the complicated cases in which a PRP who is a § 107(a)(4)(B) plaintiff is entitled to joint and several liability and faces contribution counterclaims.

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241. *See supra* notes 32–48 and accompanying text.

242. *See supra* notes 49–82 and accompanying text.