Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?

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INTRODUCTION

The fair apportionment of cleanup costs among potentially responsible parties ("PRPs") poses perhaps the most difficult problem in the administration of hazardous waste laws in the United States. In 1980, Congress enacted CERCLA in response to a series of major environmental disasters and increasing concern re-
garding hazardous waste sites. From its inception, CERCLA was recognized as an imprecise tool for addressing the environmental threat posed by the multitude of hazardous waste sites throughout the United States. Corporations, investors, and individual litigants soon learned that through CERCLA, the federal government sought to remove this threat to "human health and the environment" without delay, and with little regard for the costs private parties would incur.

Through CERCLA, Congress intended to facilitate the cleanup of locations contaminated by hazardous substances, to place the ulti-

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6. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988) ("Whenever... any hazardous substance is released... into the environment... the President is authorized... take any other response measure... which the President deems necessary to protect the public health or welfare or the environment.").

7. The estimated cost of hazardous waste cleanup nationwide may be greater than the cost of bailing out the nation's savings and loan institutions. See Healy, supra note 4, at 67. When first enacted in 1980, CERCLA provided a mechanism for shifting cleanup responsibility from the government to private sector parties, but failed to explain how to allocate the expenses among the numerous private parties who bore some statutory relationship to the hazardous substance problem. See Ferrey, supra note 2, at 38.

mate financial burden on those responsible for the danger created by such sites, and to promote voluntary cleanup efforts. The CERCLA program "substantially changed the legal machinery used to enforce environmental cleanup efforts and was enacted to fill gaps left in ... the Resource Conservation and Recovery Act of 1976 ("RCRA") ... ."11

CERCLA's statutory scheme includes four fundamental elements: (1) a system for information gathering and analysis allowing the EPA to monitor levels of hazardous waste at sites throughout the nation;12 (2) federal authority to respond to hazardous substance specific wastes that are either "acutely hazardous or possess high levels of toxic constituents." Chemical Waste Management, Inc. v. United States EPA, 976 F.2d 2, 8 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1961 (1993). A substance may be considered hazardous if it contains one of four properties: corrosivity, ignitability, reactivity, or toxicity. 40 C.F.R. §§ 261.20-.24 (1994). See Roslyn K. Meyers, Note, Advanced Chemical Fingerprinting In Hazardous Waste Liability Under CERCLA, 6 FORDHAM ENVTL. L.J. 253, 265 (1995) (discussing the application of advanced chemical fingerprinting for identifying hazardous wastes).

9. O'Neill v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) ("It has not gone unnoticed that holding defendants jointly and severally liable ... may often result in defendants paying for more of their share. ... Nevertheless, courts have continued to impose joint and several liability ... reasoning that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty.")., cert. denied, 493 U.S. 1071 (1990).

10. See infra notes 262-83 and accompanying text.

11. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) ("The RCRA left inactive sites largely unmonitored by the EPA unless they posed an imminent hazard. ... CERCLA addressed this problem 'by establishing a means of controlling and financing both governmental and private responses to hazardous releases at abandoned and inactive waste disposal sites.'") (quoting Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984)).

12. CERCLA §§ 102-103, 42 U.S.C. §§ 9602-9603 (1988). The system requires the owners of hazardous waste sites to notify EPA of the nature of the hazardous substances stored at those sites, thus enabling EPA to compile a list of problem sites, assess their relative danger to the public, and develop response plans. Id. The reporting requirements pursuant to CERCLA, contained in section 102(b), provide in relevant part:

Unless and until superseded by regulations establishing a reportable quantity ["RQ"] under subsection (a) of this section for any hazardous substance as defined in section 9601(14) of this title, (1) a quantity of one pound, or (2) for those hazardous substances for which reportable quantities have been established.
release\textsuperscript{13} and to compel responsible parties to undertake cleanup efforts;\textsuperscript{14} (3) the Superfund, a taxation provision to finance EPA activity, and to some extent, the cleanup of orphan toxic waste sites;\textsuperscript{15} and (4) provisions governing liability.\textsuperscript{16}

When Congress reauthorized CERCLA with the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),\textsuperscript{17} it sought to refine this powerful but imprecise instrument for removing hazardous substances from the environment.\textsuperscript{18} The issue of

pursuant to section 1321(b)(4) of Title 33, such reportable quantity, shall be deemed that quantity, the release of which requires notification pursuant to section 9603(a) or (b) of this title.

42 U.S.C. § 9602(b) (1988). Section 103(a) requires the person in charge of a facility to notify EPA immediately following any release of a hazardous substance in a quantity equal to or exceeding the RQ for that substance. 42 U.S.C. § 9603(a) (1988); see Ferrey, supra note 2, at 41.

13. CERCLA § 104, 42 U.S.C. § 9604 (1988); see Ferrey, supra note 2, at 41.


15. The popular name "Superfund" is derived from the "Hazardous Substance Response Trust Fund" that initially allocated $1.6 billion to finance the implementation of CERCLA. 42 U.S.C. § 9611 (1988).

16. See infra parts II and III; Ferrey, supra note 2, at 41.


18. See Velsicol Chem. Corp. v. ENENCO, Inc., 9 F.3d 524, 528 n.3 (6th Cir. 1993) ("By passing SARA, 'Congress sought to better define cleanup standards, to expand resources available to EPA for investigations and cleanups, to clarify EPA's authority under Superfund law, and to expand and clarify the states' role
apportioning liability among PRPs under CERCLA remains unresolved, however, primarily because jurisprudence on the issue is still in its infancy. The absence of definitive guidance from Congress has resulted in discord among recent court decisions and has propelled the issue of apportioning liability to the forefront of CERCLA litigation.

The difficulty in apportioning liability often occurs after the government has targeted a site for cleanup. The EPA has several overlapping statutory avenues for approaching a hazardous waste site. The EPA may, pursuant to CERCLA § 104, undertake emergency removal and remediation measures after determining that a

in any remedial action undertaken, or ordered by EPA." (quoting United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1417 (6th Cir. 1991)). SARA also delegated more responsibility to EPA and allotted more time and money for cleanup to compensate for Congress's extreme underestimation of cleanup costs. William A. White, Reauthorization Overview: EPA's Perspective, 5 FORDHAM ENVTL. L.J. 299, 300 (1994). Congress again reauthorized CERCLA in 1990 by adding an extension of the operating authority for the Superfund to a revenue bill, I.R.C. § 9507(a) (1988), adding $11.5 billion to fund the program through 1994, and adding taxing authority through 1995. Id. 19. Ferrey, supra note 2, at 40. See Jerome M. Organ, Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency, 62 GEO. WASH. L. REV. 1043, 1053-54 (1994) (analyzing the economic consequences of judicial decisions on the theory that PRPs are more likely to settle with EPA if the alternative is more expensive than settling).


21. See generally United States v. Ottati & Goss, Inc., 900 F.2d 429, 432 (1st Cir. 1990) (outlining various approaches EPA may implement in responding to hazardous waste release).


23. "Removal" measures are generally those measures intended as short-term efforts to remove hazardous substances from a site. 42 U.S.C. § 9601(23) (1988); see Barr, supra note 5, at 973.

24. "Remediation" measures are long-term or permanent measures intended to remedy the damaged environment. 42 U.S.C. § 9601(24) (1988). The remedial process includes the investigation and selection of the remedy in a "Remedial Investigation/Feasibility Study", a "Work Plan", and the "Record of Decision",
hazardous waste site threatens human health and the environment. The EPA may also issue a § 106 administrative order compelling a party to perform its own cleanup, or seek an injunction whereby a court "may grant such relief as the public interest and the equities of the case require." In all cases, § 107 provides for recovery of the EPA's response costs from PRPs. The broad CERCLA liability scheme imposes strict, retroactive, and joint and several liability. The policies and practical aspects of CERCLA permit the government to focus on a few financially viable PRPs who may have contributed a substantial share of the waste. PRPs targeted by the government or who volun-

along with the design, contracting, construction, operation, and maintenance phases at a site. See Barr, supra note 5, at 973-76.


27. Id.; see Barr, supra note 5, at 933.


29. "Response costs" include the cost of investigating, monitoring, testing, and evaluating a toxic waste site, as well as the costs of actual removal of the hazardous waste. 42 U.S.C. § 9607(a)(4); see Barr, supra note 5, at 968-72; United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983).

30. For a full discussion of strict liability under CERCLA, see infra notes 53-60 and accompanying text.

31. Courts agree that CERCLA imposes liability retroactively for acts committed prior to the statute's effective date. United States v. Northeastern Pharmaceutical and Chem. Co., 801 F.2d 726, 732-34 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) ("Although CERCLA does not expressly provide for retroactive liability[,] it is manifestly clear that Congress intended CERCLA to have retroactive effect . . . [because the] liability provision . . . refers to actions and conditions in the past tense."); see Organ, supra note 19, at 1042 n.19; Barr, supra note 5, at 982-83.

32. For a full discussion of joint and several liability under CERCLA see infra notes 61-70 and accompanying text.

33. The combination of EPA's lack of resources and its ability to utilize joint and several liability militate against EPA compilation of more comprehensive PRP lists at each site. See Organ, supra note 19, at 1042, 1054; Karen L. Demeo, Note, Is CERCLA working? An Analysis of the Settlement and Contribution Provisions, 68 St. John's L. Rev. 493, 503 (1994) ("[I]t is not unusual for the EPA to identify the minimum number of parties to commence an action."). As a result the burden of remediation falls on those whom EPA has identified. Id. EPA has recognized this problem, but has been unsuccessful in providing a solution. Organ, supra note 19, at 1042. Although the scheme receives criticism for the high
ly clean up, then face the precarious task of attempting to apportion their costs among other liable parties.\textsuperscript{34}

CERCLA authorizes two types of legal actions which allow parties to recover cleanup expenses: cost recovery actions under § 107(a),\textsuperscript{35} which impose joint and several liability, and contribution actions under § 113(f),\textsuperscript{36} which impose only several liability.\textsuperscript{37} The section under which a plaintiff proceeds significantly affects parties’ rights concerning the scope of the defendant’s liability, the plaintiff’s burden of proof, the applicable statute of limitations, and the availability of defenses.\textsuperscript{38} Under the § 107 cost recovery action, a plaintiff may shift virtually all of its CERCLA liability to the defendant with a relatively light burden of proof.\textsuperscript{39} In contrast, the § 113(f) contribution action only permits plaintiffs to recover the defendant’s equitable share of the response costs, and imposes a more stringent burden of proof.\textsuperscript{40}

Courts are split over whether or not a PRP may bring a § 107 cost recovery action. The Courts of Appeals for the Sixth and Eighth Circuits,\textsuperscript{41} along with a number of district courts,\textsuperscript{42} have

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\bibitem{} Demeo, \textit{supra} note 33, at 503.
\bibitem{} CERCLA § 107(a), 42 U.S.C. § 9607(a). For a full discussion of the cost recovery action see \textit{infra} part I.
\bibitem{} CERCLA § 113(f), 42 U.S.C. § 9613(f) (1988). For a full discussion of contribution see \textit{infra} part II.
\bibitem{} \textit{Id.}
\bibitem{} See \textit{infra} parts I, II.
\bibitem{} See \textit{infra} notes 53-69 and accompanying text.
\bibitem{} See \textit{infra} notes 70-90 and accompanying text.
\end{thebibliography}
allowed PRPs to sue other PRPs for cost recovery, while the Courts of Appeals for the First, Seventh, and Tenth Circuits, and a number of district courts permit only the government and “innocent parties” to seek cost recovery, relegating PRPs to §113(f) contribution claims. This contradictory jurisprudence has introduced significant unpredictability into the CERCLA liability allocation process.

This Note examines the division among the courts of appeals and district courts with respect to the availability of the §107(a) cost recovery action to PRPs. Part I analyzes the expansive §107(a) cost recovery action. Part II discusses the more limited §113(f) contribution action. Part III examines the situations in which courts


45. In addition, the Fifth and Ninth Circuits have indirectly ruled against PRP cost recovery. The weight afforded to these decisions is questionable at best. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989); In re Dant & Russell, Inc., 951 F.2d 246 (9th Cir. 1991). See also Daniel D. Barnhizer, Recent Development, Joint and Several Liability and Contribution Under CERCLA Sections 107(A)(4)(B) and 113(f), 18 HARV. ENVTL. L. REV. 563, 576 (1994) ("Neither of these courts . . . appears to have closely examined the issue. Instead, the courts simply stated a cursory conclusion.").

46. Ferrey, supra note 2, at 66.
have limited the option of bringing cost recovery actions to "innocent parties" and the government, forcing PRPs to sue under the more restrictive contribution action. Part IV surveys the courts that have allowed PRP cost recovery actions and analyzes the courts' reasoning. Finally, Part V concludes that allowing PRPs to bring cost recovery actions under § 107 better serves the congressional goals embodied in CERCLA by encouraging rapid voluntary clean-up of hazardous waste sites.

I. COST RECOVERY UNDER SECTION 107(A)

The first liability provision listed in CERCLA, § 107, provides a broad means for the government and some private parties to sue PRPs to recover the costs incurred from hazardous waste cleanup. The liability provision of § 107(a) provides in relevant part:

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 facility;


48. To establish a defense to liability, a defendant must prove by a preponderance of the evidence that the release of a hazardous substance and the resulting damages "were caused solely by (1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party . . . ." 42 U.S.C. § 9607(b) (1988).

49. CERCLA defines a "facility" as "any building, structure, installation, equipment, pipe, or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." 42 U.S.C. § 9601(9) (1988). See Barr, supra note 5, at 960-61.
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all cost of the removal or remedial action incurred by the United States Government or a State ... not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan ... 50

Bringing suit under this section provides the best available means for recovering the costs incurred from cleanup because the provision imposes strict, retroactive, and joint and several liability on the defendant, subject to only limited defenses. 51 Nevertheless, recent court decisions have failed to set a predictable standard for determining if non-governmental parties may utilize § 107 cost recovery. 52

A. Strict Liability

An “overwhelming body of precedent ... has interpreted § 107(a) as establishing a strict liability scheme.” 53 In addition

50. 42 U.S.C. § 9607(a). The National Contingency Plan (“NCP”) consists of a lengthy set of regulations promulgated by EPA which generally contain (1) methods for discovering and investigating facilities at which hazardous substances are found, (2) methods for evaluating and responding to releases and threatened releases of hazardous substances, (3) criteria for determining the appropriate extent of removal or remediation, and (4) criteria for determining remediation priorities among the releases or threatened releases throughout the nation. 42 U.S.C. § 9605(a)(1)-(3), (8) (1988). See Barr, supra note 5, at 972-76.
51. See infra notes 53-70 and accompanying text.
52. See infra parts III, IV, V.
to the judicial sentiment that Congress intended § 107 liability to be strict, the statute itself provides that the standard of liability in CERCLA actions shall be that which governs actions under § 311 of the Clean Water Act,\(^54\) to which courts have applied strict liability.\(^55\) Under this standard there is no scienter requirement.\(^56\) To establish a prima facie case, a plaintiff need only prove that it has incurred response costs resulting from a release\(^57\) or threatened release of a hazardous substance from a


\(^{56}\) See Healy, supra note 4, at 86; Barr, supra note 5, at 976.

\(^{57}\) “Release” means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . .” 42 U.S.C. § 9601(22) (1988). The statute fails to provide any quantitative requirement on the term “release,” however, courts generally construe this term broadly “to avoid frustrat[ing] the beneficial legislative purposes.” Amoco Oil Co. v. Borden, Inc. 889 F.2d 664, 669 (5th Cir. 1989) (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)) (citations omitted); Barr, supra note 5, at 966-68; Shore Realty, 759 F.2d at 1038-39 (including leaking tanks and pipelines); Vermont v. Staco, Inc., 684 F. Supp. 822, 832-33 (D. Vt. 1988) (defining the migration of hazardous chemicals to public and private sewer systems as a “release,” and defining potential leaching of mercury from septic systems into ground water as “threatened release”); United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1149 (D. Ariz. 1984) (including “transport” asbestos blown by the wind). See also Amoco, 889 F.2d at 667 (discussing CERCLA’s liability provisions and ruling that a plaintiff need not demonstrate that radioactive emissions exceeded a quantitative threshold to establish a release under CERCLA §9607(a)(4)).
facility, and that the defendant is a person defined in § 107(a). A plaintiff need not show that the defendant's acts directly caused the plaintiff to incur response costs. Thus, the defendant will be liable regardless of fault, and "regardless of negligence by owners, operators, transporters, or generators.”

B. Joint and Several Liability

CERCLA does not explicitly allocate liability among multiple parties. The courts, however, with subsequent congressional approval, have interpreted § 107(a) to allow plaintiff recovery of all response costs jointly and severally from any PRP named in the suit. The theory of joint and several liability provides that


59. Numerous courts have ruled that Congress specifically rejected any causation requirement for CERCLA liability. See, e.g., Shore Realty, 759 F.2d at 1044 (discussing existence of a causation requirement that Congress deleted from an early House version of the CERCLA bill); Violet v. Picillo, 648 F. Supp. 1283, 1291-93 (D. R.I. 1986) (rejecting plaintiff's causation arguments); United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983) (holding that the federal government can recover cleanup costs by demonstrating that a defendant at one time disposed waste at the site and the same type of hazardous substances are present at the site).

60. See County Line Inv. Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991); Ferrey, supra note 2, at 47.

61. During SARA's passage, Congress referred to United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), as the seminal case which imposes joint and several liability. In Chem-Dyne, the court reviewed the legislative history of CERCLA and concluded that although Congress deleted reference to joint and several liability from the Act, this would not preclude courts from using it as the standard of liability. Id. at 808. The court further noted that rather than imposing a mandatory standard, Congress chose to permit the exercise of judiciary discretion in necessary instances. Id.; see also, R. Lisle Baker and Michael J. Markoff, Note, By-Products Liability: Using Common Law Private Actions To Clean Up Hazardous Waste Sites, 10 HARV. ENVTL. L. REV. 99 (1986).

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if two or more individuals cause a single and indivisible harm, each is subject to liability for the entire harm.° Consequently, under this theory a single PRP may bear the total burden of CERCLA liability unless that PRP establishes a basis for divisibility.° Utilizing joint and several liability under the § 107(a) cost recovery action significantly increases a plaintiff’s chances for recouping the large sums of money spent on cleanup. The extent to which parties other than the government may sue for cost recovery, however, remains unresolved.

The cost recovery action allows a plaintiff to compel PRPs to share equally in the cleanup costs without proving each PRP’s proportional share because, under joint and several liability, all PRPs are liable for the entire costs of removal and remediation.° A cost recovery plaintiff may spread the cost among all identified PRPs, thus reducing its own burden to pay for the orphan share — the unfunded response costs attributable to any judgment-proof PRPs.° Under CERCLA’s liability scheme, a § 107 defendant may then seek contribution under


64. See Ferrey, supra note 2, at 47.

65. See O'Neill v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) (“[D]amages should be apportioned only if the defendant can demonstrate that the harm is divisible.”), cert. denied, 493 U.S. 1071 (1990). PRPs rarely escape joint and several liability where they bear the burden of proving the divisibility of harm defense. Id. at 178-79. See generally David Montgomery Moore, The Divisibility of Harm Defense to Joint and Several Liability Under CERCLA, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10529 (arguing that no defendant has ever successfully invoked this defense in a reported decision).

66. See supra notes 57-60 and accompanying text.

67. Ferrey, supra note 2, at 48 (“Plaintiffs . . . are not required to link their response costs with specific releases of particular defendant PRPs.”).

§ 113(f) if it has paid over its equitable share, but only to the extent that other PRPs have not paid their own equitable shares. Nevertheless, all PRPs involved in a § 107 cost recovery action will absorb the orphan share of the response costs, significantly reducing the plaintiff's total liability.

II. THE CONTOURS OF CONTRIBUTION UNDER SECTION 113(f)

Before the enactment of SARA, courts determined the existence of an implied right of contribution under § 107. Section 113(f) of SARA codified this federal common law principle of contribution. Section 113(f) permits a party held jointly and severally liable to seek contribution from other PRPs if it has assumed a disproportionate share of the cleanup costs.

69. See infra part II for a full discussion of contribution under CERCLA.
72. See United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994) ("A principle goal of the new section 9613 was to 'clarify and confirm' the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.") (quoting S. REP. No. 11, 99th Cong., 1st Sess. 44 (1985) (citation omitted)), cert. denied, 115 S. Ct. 1176 (1995).
73. 42 U.S.C. § 9613(f)(1) provides:
Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 . . . or section 9607 of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil
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ly, EPA will focus their efforts on a limited number of PRPs at a particular site and hold them liable for response costs. Due to financial constraints and other impracticalities, the EPA only focuses on a few financially viable PRPs to shoulder the entire cost of the EPA's remediation or removal measures under § 107(a). The PRPs singled out by the EPA must then attempt to recover from the PRPs that the EPA failed to identify.

Since § 113(f) divides liability among PRPs severally, a plaintiff PRP seeking contribution under § 113(f) will remain liable for all costs less the equitable share of any defendants named in the action. The burden of proof in seeking apportionment remains on the plaintiff PRP. A contribution plaintiff may seek relief from another PRP only to the extent that it can establish both the defendant's and its own share of the harm, and that, as a defendant, it has paid more than its equitable share. Moreover, the right of contribution, although enacted to promote fairness in apportioning liability, does not mitigate the severity of CERCLA liability if the plaintiff PRP can not locate a sufficient number of additional solvent PRPs to shift the costs in excess of the plaintiff's own equitable share. Since contribution only pro-

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74. See supra note 33 and accompanying text.
75. Id.
77. See RESTATEMENT (SECOND) OF TORTS § 886A (2) (1977) (stating that no tortfeasor can be required to make a contribution above its own equitable share of the liability); BLACK'S LAW DICTIONARY 328 (6th ed. 1990) (defining "contribution" as the right of "one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.").
80. See, e.g., Steven B. Russo, Note, Contribution Under CERCLA: Judicial Treatment After SARA, 14 COLUM. J. ENVTL. L. 267 (1989) (proposing that courts should make contribution liability joint and several to better apportion
vides recovery on a several basis, the plaintiff may bear the burden of paying for this "orphan share." 81

In contrast to cost recovery, contribution defendants may utilize a broader array of defenses. 82 Specifically, § 113(f)(2), in order to encourage settlement and reduce litigation costs, protects settling parties from the contribution claims of other PRPs. 83 A PRP may settle with the EPA and then pursue claims against non-settling PRPs to recover response costs. 84 The ability to assert this settlement protection turns on whether the opposing party's contribution claim relates to "matters addressed in the settlement" as provided in § 113(f)(2). 85 It should be noted, however, that the statute does not specify the manner in which a court should determine the particular matters addressed by a consent decree. 86

The language of § 113(f)(1) allows courts to consider equitable factors in apportioning liability. 87 Courts have interpreted this provision as encouraging a flexible approach for resolving contribution claims. 88 Consequently, courts have offered varying defi-

83. CERCLA § 113(f)(2) provides:
A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.
88. Akzo Coatings, 30 F.3d at 765; Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994) ("In determining the relative contribution of the parties, courts must look to the 'totality of the circumstances.'") (quoting Environmental Transp. Sys., Inc. v. Ensco, Inc. 969 F.2d 503, 509 (7th
nitions of "matters addressed." For the most part, courts have suggested that "matters addressed" by a consent decree be determined with reference to the particular location, time frame, hazardous substances, and clean up costs covered in the agreement.

As the preceding discussion suggests, notwithstanding settlement protection, contribution actions offer few remedies for PRPs who have expended millions of dollars on cleanup costs for which they were only partially responsible. Thus, it is strategically advantageous for PRPs to proceed under the § 107(a) cost recovery action rather than the § 113(f) contribution action.

III. LIMITING PRP COST RECOVERY

By limiting the § 107(a) cost recovery claim to the government and "innocent parties," some courts have characterized PRP response cost claims as claims for contribution and not cost recovery, regardless of whether the claim was initially pleaded under § 107(a) or § 113(f). These courts base their decisions on three arguments: (1) PRPs are necessarily jointly and severally liable parties, thus, any claim to reapportion costs among PRPs is a "quintessential claim for contribution;" (2) allowing PRPs to recover from other PRPs under § 107(a) would render part of § 113 meaningless; and (3) PRP cost recovery claims introduce uncertainty into the settlement process by forcing PRPs who have already settled under § 113 to defend against cost recovery ac-

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89. See Akzo Coatings, 30 F.3d at 765.
92. See Colorado & E. R.R., 50 F.3d at 1536; Akzo coatings, 30 F.3d at 764.
93. See United Technologies, 33 F.3d at 102-03; Colorado & E. R.R., 50 F.3d at 1536.
tions, even though the contribution bar in § 113 purports to protect them from future lawsuits.\textsuperscript{94}

In \textit{United States v. Colorado & Eastern R.R.},\textsuperscript{95} the Court of Appeals for the Tenth Circuit sought to "clarify the relationship between cost recovery and contribution actions," and determine the types of parties that could who could utilize each provision.\textsuperscript{96} The case involved a pesticide formulation facility in Colorado.\textsuperscript{97} The EPA initiated a CERCLA action against a number of PRPs, including the Colorado & Eastern Railroad Company ("Colorado Railroad") and Farmland Industries, for injunctive relief and cost recovery.\textsuperscript{98} Farmland entered into a partial consent decree, agreeing to finance and perform all remediation and to pay the EPA $700,000 for prior response costs, while Colorado Railroad entered into its own consent decree agreeing to pay $100,000.\textsuperscript{99} The defendants in the EPA action filed cross claims against each other, all of which were settled or dismissed before trial, except for Farmland's claim against Colorado Railroad which pled for cost recovery, or in the alternative, contribution.\textsuperscript{100}

The district court awarded Farmland cost recovery under § 107's strict liability theory and denied Colorado Railroad contribution protection under § 113(f)(2).\textsuperscript{101} The Tenth Circuit reversed, ruling that Farmland's claim against Colorado Railroad could only be classified as a claim for contribution.\textsuperscript{102} The court stated, "[t]here is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore any claim that would reapportion costs between these parties is the quintessential claim for contribution."\textsuperscript{103} The court also noted, without explanation, that permitting PRPs to recover under

\begin{footnotesize}
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\item United Technologies, 33 F.3d at 102-03.
\item 50 F.3d 1530 (10th Cir. 1995).
\item Id. at 1535.
\item Id. at 1532.
\item Id. at 1533.
\item Colorado & E. R.R., 50 F.3d at 1533.
\item Id.
\item Id. at 1533-34.
\item Id. at 1536.
\item Id.
\end{enumerate}
\end{footnotesize}
§ 107's strict liability scheme would render § 113(f) meaningless.\textsuperscript{104}

After reserving decision, the United States District Court for Utah followed the Tenth Circuit in \textit{Ekotek Site PRP Committee v. Self},\textsuperscript{105} disallowing the plaintiff PRPs' cost recovery claim and characterizing the claim as one for contribution.\textsuperscript{106} The action arose from the operation of an oil refinery in Salt Lake City, Utah.\textsuperscript{107} The EPA assumed control of the site, began an emergency removal to abate the release of hazardous substances, and listed the Ekotek site on the National Priorities List ("NPL")\textsuperscript{108} pursuant to CERCLA § 105.\textsuperscript{109} The plaintiffs, numerous corporations connected to the site, formed a committee to respond to the EPA orders and to negotiate with the EPA to undertake investigations and response activities at the site.\textsuperscript{110} The Committee filed suit against a group of defendants alleged to have contributed to the site's contamination.\textsuperscript{111}

At the summary judgment stage, the court disallowed the Committee's cost recovery claim, restricting it to a claim for contribution under § 113(f).\textsuperscript{112} The Committee attempted to distinguish \textit{Colorado & Eastern} on the grounds that the responsible parties in those cases had not "voluntarily" incurred response costs by assisting in cleanup operations.\textsuperscript{113} Nevertheless, the court ruled that the broad language of the Tenth Circuit's opinion

\textsuperscript{104} \textit{Id.} The court also barred Farmland's contribution claim as being a matter addressed in the settlement for which Colorado Railroad's consent decree provided contribution protection. \textit{Id.} at 1538.

\textsuperscript{105} 881 F. Supp. 1516 (D. Utah 1995).

\textsuperscript{106} \textit{Id.} at 1521.

\textsuperscript{107} \textit{Id.} at 1518.

\textsuperscript{108} 40 C.F.R. § 300.425(b) (1994). The National Priorities List sets out, in rank order, the sites of "priority releases for long term remedial evaluation and response." \textit{Id.}


\textsuperscript{110} \textit{Ekotek}, 881 F. Supp. at 1519.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} at 1521. The court also ruled, however, that the Committee's contribution action was not barred by the three-year statute of limitations, because the criteria necessary for the statute of limitations to begin running were never met. \textit{Id.} at 1522.
clearly indicated that the decisive factor was the plaintiff's status as a PRP and not whether the party voluntarily incurred response costs.\textsuperscript{114} Essentially, the court adopted the reasoning of \textit{Colorado & Eastern} in disallowing PRP cost recovery.

In \textit{United Technologies Corp. v. Browning-Ferris Industries, Inc.},\textsuperscript{115} the Court of Appeals for the First Circuit explicitly attempted to define the relationship between cost recovery actions and contribution actions under CERCLA.\textsuperscript{116} Pursuant to a consent decree, the plaintiff, United Technologies, had agreed to undertake and complete remediation of a landfill in Winthrop, Maine, and to reimburse the federal and state governments for their response costs.\textsuperscript{117} United Technologies then filed suit against Browning-Ferris and other defendants alleging that they shared responsibility for the site's contamination and seeking three types of relief: (1) recovery of cleanup costs;\textsuperscript{118} (2) recovery of moneys paid to the EPA and the State of Maine for response costs;\textsuperscript{119} and (3) a declaration of rights with respect to liability for future response costs.\textsuperscript{120} The defendants moved for summary judgment, arguing that the statute of limitations had run on the plaintiff's claim.\textsuperscript{121} The case turned on whether the plaintiff's action was one for cost recovery, subject to a six-year statute of limitations, or one for contribution, subject to the three-year statute of limitations.\textsuperscript{122} The First Circuit surveyed the text and structure of the statute and the plain meaning of contribution, finding that "it [was] sensible to assume that Congress intended

\textsuperscript{114} Id. Parties often assert this "voluntariness" argument as a rationale for allowing PRP cost recovery claims. \textit{See}, e.g., Companies For Fair Alloc'n v. Axil Corp. 853 F. Supp. 575, 579 (D. Conn. 1994). For a full discussion of the voluntariness argument see \textit{infra} notes 262-83 and accompanying text.

\textsuperscript{115} 33 F.3d 96 (1st Cir. 1994), \textit{cert. denied}, 115 S. Ct. 1176 (1995).

\textsuperscript{116} Id. at 97.

\textsuperscript{117} Id.

\textsuperscript{118} The court referred to these costs as "reimbursed costs." Id. at 97.

\textsuperscript{119} The court referred to these costs as "first instance costs." Id.

\textsuperscript{120} Id. at 97-98.

\textsuperscript{121} Id. at 98.

\textsuperscript{122} \textit{See} 42 U.S.C. § 9613(g)(2) (providing a six-year statute of limitations for cost recovery actions); 42 U.S.C. § 9613(g)(3) (providing a three-year statute of limitations for contribution actions).
only innocent parties — not parties who were themselves liable — to be permitted to recoup the whole of their expenditures."\(^{123}\)

The court further noted that “the statutory language . . . suggests that cost recovery and contribution actions are distinct and do not overlap”\(^{124}\) and it allows a PRP “only to seek recoupment of that portion of his expenditures which exceeds his pro rata share of the overall liability — in other words, to seek contribution rather than complete indemnity.”\(^{125}\) United Technologies argued that “the broad, unqualified language to the effect that responsible parties shall be liable to ‘any other person’ . . . provides an alternative avenue for the maintenance of their suit.”\(^{126}\) In rejecting this argument, the court reasoned that allowing the PRP plaintiffs to utilize the cost recovery provision and the accompanying six-year statute of limitations would, in effect, nullify the three-year statute of limitations in § 113(g) because all PRPs would file suit under § 107 to take advantage of the longer statute of limitations.\(^{127}\)

United Technologies, alternatively, argued that the phrase “incurred by” in § 107(a) only applies to actions to recoup cleanup costs paid directly by the responsible party.\(^{128}\) The court rejected this argument as well, finding that:

[If a party’s direct, first instance payments are not grist for the contribution mill, but, instead, are to be treated as recovery costs [only] within the purview of . . . [§ 107(a)], a nonsettling or later-settling PRP would be entitled to bring an action against a responsible party who settled at the earliest practicable moment, but paid less than his ratable share of the aggregate first-instance payments. Exposing early settlers who make first instance payment to later contribution actions not only would create a needless asymmetry

\(^{123}\) United Technologies, 33 F.3d at 100.

\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id. at 101.

\(^{127}\) Id. The court voiced its concern against a broad interpretation of the cost recovery provision, stating, “[a]t face value, this expansive reading of . . . [section 107] is untenable; carried to its logical extreme, such a reading would completely swallow section 9613(g)(3)’s three-year statute of limitations associated with actions for contribution. . . . [W]e refuse to follow a course that ineluctably produces judicial nullification of an entire . . . subsection.” Id.

\(^{128}\) United Technologies, 33 F.3d at 101.
in the treatment of first-instance costs as opposed to reimbursed costs, but also would greatly diminish the incentive for parties to reach early settlements with the government, thereby thwarting Congress's discernible intent. Nevertheless, the court recognized in a footnote that "a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under . . . [§ 107(a)]." Courts ruling against PRP cost recovery axiomatically rely on this First Circuit ruling.

In *Akzo Coatings, Inc. v. Aigner Corp.*, the Court of Appeals for the Seventh Circuit also refused to allow the plaintiff PRP ("Akzo") to characterize its action to recover response costs as one for cost recovery, ruling that Akzo's claim was the "quintessential claim for contribution." Akzo and numerous other PRPs had initiated efforts to quantify the nature and extent of their liability for a toxic waste site in Kingsbury, Indiana, pursuant to a § 106 EPA cleanup order. Most of the parties, including defendant Aigner, entered into a consent decree with the EPA. Akzo, however, withdrew from the group before signing a consent decree, concluding that it was not liable for contaminating the portion of the site targeted by the EPA. Akzo then filed suit against Aigner for the costs it incurred while participating in the initial stages of the cleanup. The district court granted Aigner's motion to dismiss on the grounds that Akzo's claim was for contribution, not cost recovery. The court also ruled that the claim was for "matters addressed" in the

129. *Id.* at 103.
130. *Id.* at 99 n.8.
132. 30 F.3d 761 (7th Cir. 1994).
133. *Id.* at 764.
134. *Id.* at 763.
135. *Id.*
136. *Akzo Coatings*, 30 F.3d at 763.
137. *Id.*
138. *Id.*
consent decree and therefore barred by contribution protection.\textsuperscript{139}

On appeal, Akzo argued: (1) the claim was for cost recovery, not contribution; and (2) the costs they sought to recover were not related to matters addressed in the consent decree.\textsuperscript{140} The Seventh Circuit agreed with the latter claim, but not the former.\textsuperscript{141} The court stated, "[w]hatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. . . ."\textsuperscript{142} Thus the court concluded that the claim was properly governed by § 113(f).

The court declined to rule on whether Akzo's voluntary response action with other PRPs, in anticipation of subsequent EPA claims, would suffice to maintain a cost recovery action.\textsuperscript{143} The court simply concluded that these concerted efforts, which focused on the long term remediation of the site, were "a matter addressed in the settlement."\textsuperscript{144} The court did, however, state that other aspects of Akzo's work stood "apart in kind, context, and time" from the work covered by the consent decree, and thus, were not matters addressed.\textsuperscript{145} Accordingly, the court allowed Akzo to recover for work completed to abate the immediate threat posed by the substances at the site, however, the court ruled that the consent decree precluded Akzo from recovering for

\begin{footnotes}
\item[139] Id.
\item[140] Id. at 764.
\item[141] Akzo Coatings, 30 F.3d at 764-68.
\item[142] Id. at 764. The court pointed out that it declined to follow the cases that suggested otherwise. Id. at 764-65. However, the court did provide an example of a situation that would give rise to a direct claim under § 107(a): "a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands." Id. at 764.

Akzo seems to contradict a previous Seventh Circuit case that allowed a PRP to seek cost recovery. See Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 748 (7th Cir. 1993), cert. denied, 114 S. Ct. 691 (1994) ("The statute is clear that whoever . . . incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person. . . .").
\item[143] Akzo, 30 F.3d at 765 n.6.
\item[144] Id. at 764.
\item[145] Id. at 767.
\end{footnotes}
the remedial work performed to accomplish a comprehensive cleanup of the site.\textsuperscript{146}

In this case, the Seventh Circuit assumed that once the EPA issued a § 106 cleanup order, Akzo was jointly and severally liable even though the trial court had made no such a finding.\textsuperscript{147} This court and others ruling against PRP cost recovery base this conclusion solely on the party's status as a PRP, without requiring a finding of joint and several liability at the trial court level.\textsuperscript{148}

In \textit{Kaufman \& Broad-South Bay v. Unisys Corp.},\textsuperscript{149} the Northern District of California ruled on the viability of PRP cost recovery claims. Noting that "liability is joint and several for cost recovery actions but merely several for contribution actions," the court held that any and all responsible parties were confined to bringing contribution actions under § 113.\textsuperscript{150} The significance of this decision lies in the court's rejection of the plaintiff's "voluntariness argument."\textsuperscript{151} The case involved a 100 acre residential development located in Milpitas, California.\textsuperscript{152} The California Regional Water Quality Control Board, after finding hundreds of barrels of toxic waste on the development site, issued an abatement order. The order required plaintiffs, Kaufman and Broad-South Bay ("K \& B"), to investigate and remediate the property and protect the water under and around the site.\textsuperscript{153} K \& B filed a CERCLA action to recover a portion of the cleanup costs from defendant Unisys, the successor in interest to the alleged originator of the waste.\textsuperscript{154}

In an attempt to distinguish \textit{United Technologies},\textsuperscript{155} K \& B

\textsuperscript{146.} \textit{Id.}
\textsuperscript{147.} \textit{Id.}
\textsuperscript{148.} \textit{See discussion infra notes 234-46 and accompanying text.}
\textsuperscript{149.} 868 F. Supp. 1212 (N.D. Cal. 1994).
\textsuperscript{150.} \textit{Id.} at 1214-15.
\textsuperscript{151.} \textit{See infra} notes 262-83 and accompanying text for a discussion of the voluntariness argument as a means for PRPs to seek cost recovery.
\textsuperscript{152.} \textit{Kaufman}, 868 F. Supp. at 1214.
\textsuperscript{153.} \textit{Id.}
\textsuperscript{154.} \textit{Id.}
\textsuperscript{155.} \textit{See supra} notes 115-31 and accompanying text for a full discussion of \textit{United Technologies}. The court noted that \textit{United Technologies} was persuasive...
argued that a private PRP may bring a cost recovery action if it has initiated a cleanup voluntarily and not as a result of civil actions brought by the United States or a state. Nevertheless, the court followed the non-binding but persuasive reasoning of United Technologies, ruling:

[w]hile it is true that the plaintiff in United Technologies had been sued by the EPA, nothing in that case suggests that responsible parties which have not been subject to a government action are entitled to bring actions under § 9607(a) . . . Thus, any and all responsible parties, even those who have expended response costs voluntarily, are confined to bringing contribution actions under § 9613(f). 

The court noted, however, that if K & B could establish its non-liability by invoking the “innocent landowner exception” it would be entitled to bring a cost recovery action.

Similarly, in Gould, Inc. v. A & M Battery and Tire Service, the Middle District of Pennsylvania disallowed PRP cost recovery actions. The plaintiff-owner, Gould, had ceased operations of an automobile battery-breaking site in 1981, and the Pennsylvania Department of Environmental Resources advised him that no remediation or enforcement actions would result as
long as the site ceased operations.\textsuperscript{161} The EPA began investigating the site in 1987, however, and concluded that the site posed "an imminent and substantial endangerment to the public health, welfare or the environment." \textsuperscript{162} Gould entered into two consent agreements with the EPA and asserted both a cost recovery action and a contribution action.\textsuperscript{163} Upon defendants' motion for partial summary judgment, the court ruled:

[b]ased on the numerous circuit holdings as well as the implicit findings in the Third Circuit,\textsuperscript{164} when a [PRP] sues another [PRP] to reapportion costs, that action will be a "contribution" action pursuant to § 113. . . . In a factual situation . . . like the present action, where a responsible party initiates a site cleanup pursuant to governmental pressure, and then sues another responsible party to allocate the costs, the action falls under the provisions of section 113.\textsuperscript{165}

Gould also raised the issue of the orphan share, arguing that it would be inequitable to hold it alone liable for this unaccounted-

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\textsuperscript{161} Id. at 908.
\textsuperscript{162} Id. at 909.
\textsuperscript{163} Id.
\textsuperscript{164} The Court analyzed two Third Circuit cases and determined that it had implicitly ruled against PRP cost recovery. The court looked at \textit{Smith Land & Improvement Corp. v. Celotex Corp.}, 851 F.2d 86 (3d Cir. 1988) (allowing equitable defenses where a PRP filed suit under § 107) \textit{cert. denied}, 488 U.S. 1029 (1989), and \textit{Witco Corp. v. Beekhuis}, 38 F.3d 682 (3d Cir. 1994) (noting that the action brought by PRP was for contribution).
\textsuperscript{165} Gould, 901 F. Supp. at 913. The court distinguished the holding of \textit{Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.}, 891 F. Supp. 221 (E.D. Pa. 1995), discussed fully \textit{infra} notes 190-99 and accompanying text. The Gould Court stated:
This Court is of the opinion that the Bethlehem court allowed a § 107 action by focusing on CERCLA's goals of having responsible parties initiate cleanup actions voluntarily and promptly. Once again, in the instant action, Plaintiff Gould did not voluntarily initiate cleanup of the . . . site. Gould's cleanup actions were the direct result of the EPA Consent Order of April, 1988. Thus, we reiterate our support for the holding in Transtech Industries v. A & Z Septic Clean, 798 F. Supp. 1079 (D. N.J. 1992) . . ., that when a party agrees to cleanup a site pursuant to a settlement agreement, and sues another liable party, it is a claim for contribution and must be distinguished from cases in which a plaintiff incurred expenses upon its own initiated. Gould, 901 F. Supp. at 911-12.
\end{flushright}
for-portion of the remediation costs while the defendants who bore responsibility for the same site would emerge without shouldering any extra burden. The court dismissed this argument, reasoning that since Gould prepared a list indicating each defendants' contribution of waste to the site, "it would be inequitable for us to hold the defendants liable for any harm related to the 'orphan shares' when this harm was clearly caused by entities other than the defendants." The court did not provide a detailed explanation as to why Gould should bear more of the burden then the other PRPs. As the first party to settle with the EPA, Gould bore the extra burden of the "orphan share."

The court then considered the applicable statute of limitations for the present action, and whether it barred the plaintiffs remaining contribution claim. After characterizing the claim as one for contribution, the court applied the corresponding statute of limitations provided in § 113(g)(3). The defendants argued that Gould's § 106 consent order in 1988 triggered this three-year statute of limitations, barring the present action filed in 1991. The court listed the four types of events that cause the statute to run: "(1) the entry of a judgment; (2) a section 9622(g) de minimis settlement; (3) a section 9622(h) cost recovery settlement; and (4) a judicially approved settlement." Finding that the consent order fit none of these four categories, the court allowed Gould to proceed with the contribution claim.

The preceding cases illustrate the substantial authority disallowing PRP cost recovery claims and limiting PRPs to claims for contribution. The circuit and district court rulings analyzed above suggest that PRPs may be totally precluded from the advantages of joint and several liability. Such preclusion based on PRP status will significantly affect the evolution of CERCLA litigation. Practically speaking, the outcome of these cases may discourage

166. Id. at 908.
167. Id.
168. Id. at 913-15.
169. 42 U.S.C. § 9613(g)(3) (3 year limitations period).
171. Id.; 42 U.S.C. § 9613(g)(3).
173. See discussion infra part IV.
PRP voluntary cleanup and precipitate considerable practical and financial difficulty in cleaning up hazardous waste sites. 174

IV. THE DECISIONS FOR PRP COST RECOVERY CLAIMS

Courts allowing PRP cost recovery claims under § 107(a) generally recognize a three factor analysis utilizing joint and several liability. 175 These factors include: (1) the applicability of the Supreme Court's analysis in Key Tronic v. United States 176 in which a PRP successfully sought cost recovery without having its claim invalidated; 177 (2) the language and structure of § 107, permitting the government and "any other person" to sue for cost recovery, and suggesting that no "innocent parties" limitation is mandated; 178 and (3) the incentive for voluntary cleanup that cost recovery provides by giving PRPs a powerful means for recovering expenses. 179 Most of the cases explicitly ruling in favor of PRP cost recovery have come from district courts which have received no guidance from their binding circuit courts. Nevertheless, at least two circuits have allowed cost recovery for PRPs. 180

In Velsicol Chemical Corp. v. ENENCO, Inc., 181 the Court of Appeals for the Sixth Circuit permitted a PRP cost recovery claim. The plaintiff, a PRP for a seventy-acre landfill together

174. Id.
177. See Bethlehem, 891 F. Supp. at 225.
178. Id. at 224-25; Chesapeake & Potomac, 814 F. Supp. at 1277-78.
180. Velsicol Chem Corp. v. ENENCO, Inc., 9 F.3d 524 (6th Cir. 1993); Litton, 920 F.2d 1415.
181. 9 F.3d 524 (6th Cir. 1993).
with the city of Memphis, Tennessee, agreed to cooperate with the EPA's cleanup plans. The district court granted the defendant's motion for summary judgment on the grounds that the statute of limitations and the doctrine of laches barred the Velsicol's claim. The Sixth Circuit reversed the lower court decision, noting the plaintiffs' PRP status, but characterizing their claim as one for cost recovery, and allowed the plaintiff PRPs to maintain both a § 107(a) cost recovery claim and a § 113(f) contribution claim against the defendant PRPs. The court also ruled that § 107 barred the laches defense, and that the action was timely under the § 113(g)(2) statute of limitations. In barring the defendant's laches defense as mandated by § 107, the court recognized that all claims among PRPs are not necessarily for contribution.

Similarly, in General Electric Co. v. Litton Industrial Automation Systems, Inc., the Court of Appeals for the Eighth Circuit recognized the ability of a PRP to institute a cost recovery action. The defendant contended that General Electric ("GE"), the plaintiff PRP, could not bring suit under § 107(a) because GE only incurred response costs after learning of its probable liability. The court rejected this argument and upheld GE's cost recovery claim, noting that "the purpose of allowing a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites."

182. Id. at 526-27.
183. Under § 107, there are only three available defenses: act of god, act of war, or act or omission of a third party. 42 U.S.C. § 9607(b). Thus the equitable defense of laches did not apply. Id. at 530. Section 113, however, allows equitable defenses. See Town of Munster v. Sherwin-Williams Co., 27 F.3d 1268, 1270 (7th Cir. 1994).
184. Velsicol, 9 F.3d at 527.
185. Id. at 530-31.
186. Id. at 529-30.
188. Id. at 1417.
189. Id. at 1418.

[T]he motives of the private party attempting to recoup response costs under . . . [section 107](a)(4)(B) are irrelevant. The purpose of allowing a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites. This purpose would be frustrated if a plaintiff's motives were subject to
In *Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*, the plaintiffs sought cost recovery in the Eastern District of Pennsylvania under § 107 before any state or federal government agency had taken action toward the site. In denying the defendant's motion for summary judgment, the court reasoned that the case law and the text of CERCLA permitted the plaintiffs' § 107(a) claims. The court noted that although a split in authority existed, "[s]everal courts, including the Supreme Court, have permitted PRPs to raise section 107(a) claims." The court looked to the Supreme Court's ruling in *Key Tronic Corp. v. United States*.

There, the Supreme Court recognized that the plaintiff, a liable party that disposed of liquid chemicals at a landfill in Washington State, was entitled to recover response costs under "§ 107, which impliedly authorizes private parties to recover cleanup costs from other PRP's [sic]." Since the question presented in *Key Tronic* was "whether attorney's fees [were] 'necessary costs of response' within the meaning of § 107(a)(4)(B)," the Supreme Court did not explicitly address the issue of whether only "innocent parties" may sue under § 107(a). Recognizing the limited significance of the *Key Tronic* holding and the split among the courts which had addressed the issue squarely, the court in *Bethlehem* looked to the statutory language for guidance:

An examination of the text of sections 107 and 113 gives no indication that PRPs are prohibited from bringing claims pursuant to section 107. First, section 107 imposes liability on PRPs for necessary response costs incurred by "any other person ...." While the private right of action is implied [in *Key Tronic*], .... the text question. We will not look to the impetus behind a plaintiff's decision to begin the cleanup process; we will look only to see if there has been a release or threatened release for which the defendant is responsible.

*Id.*

191. *Id.* at 222.
192. *Id.* at 223.
193. *Id.* at 224.
195. *Id.* at 1967.
196. *Id.* at 1963.
provides no indication this implied right is limited to "innocent" private parties. This broadly worded provision in conjunction with the absence of the plaintiff’s PRP status as a defense provided in section 107(b) suggests that Congress intended section 107(a) liability to sweep broadly . . . . Similarly, while the text of section 113(f) provides a right of action for private plaintiffs who voluntarily cleanup, it does not provide that section 113(f) is the exclusive remedy for potentially liable parties.  

Essentially, the court's analysis of the relevant statutory provisions compelled its refusal to read in "innocent parties" where the text read "any other person."

The court also addressed the policy arguments surrounding the issue, noting that "permitting Plaintiffs to raise their section 107(a) claims comports with CERCLA’s goal of encouraging parties to initiate cleanup operations promptly and voluntarily." Furthermore, the court addressed the imposition of joint and several liability on the defendant and reasoned that the defendant's counterclaim for contribution would remedy any unfairness in the liability scheme. Thus, the court recognized that a more equitable apportionment of liability would require permitting PRP cost recovery and allowing a subsequent contribution by the defendant to prevent the plaintiff PRP from passing on all of its liability.

In United States v. SCA Services of Indiana, Inc., the Northern District of Indiana thoroughly surveyed the cases dealing with PRP cost recovery claims and permitted SCA Services ("SCA") to maintain its cost recovery claim. SCA had agreed with the EPA to undertake cleanup of the Fort Wayne Reduction Site and to reimburse the government for oversight response costs. SCA then filed a third party complaint against a number of other PRPs for § 107(a) cost recovery, § 113(f) contribution, and a declaratory judgment. The third parties moved to dismiss on the grounds that the only viable claim by SCA, a PRP

198. Id.
199. Id.
201. Id. at 1267-68.
202. Id. at 1268.
third-party plaintiff, was for contribution, and that the statute of limitations for contribution under § 113(g)(3) barred the claim.\(^\text{203}\) The court, in allowing the PRP cost recovery claim, relied on the plain language of CERCLA and SCA’s Consent Decree. The court refused to “consider[] SCA’s participation in the Consent Decree as a determination or admission of liability . . . [and found] it difficult, if not impossible, to view SCA’s claim against the third-party defendants as a claim for contribution.”\(^\text{204}\)

Upon motion to reconsider, the court analyzed and distinguished three court of appeals cases.\(^\text{205}\) First, the court analyzed \textit{Akzo Coatings} and distinguished the Seventh Circuit’s decision, reasoning that in the case at bar, SCA had neither admitted liability, nor been adjudicated liable, and thus, was not relegated to contribution.\(^\text{206}\) Second, the court discussed \textit{United Technologies},\(^\text{207}\) listing two reasons why that case did not apply: (1) although the plaintiffs in United Technologies were settling parties similar to SCA, the United Technologies plaintiffs had admitted liability, whereas SCA had not;\(^\text{208}\) and (2) SCA receives the

\(^{203}\) \textit{Id.} at 1269.

\(^{204}\) \textit{Id.} at 1283.

\(^{205}\) United States v. SCA Servs. of Ind., 865 F. Supp. 533, 542-43 (N.D. Ind. 1994).

\(^{206}\) \textit{Id.}

\(^{207}\) \textit{See supra} notes 109-124 and accompanying text for a full discussion of \textit{United Technologies}.

\(^{208}\) SCA, 865 F. Supp at 545. Although the First Circuit stated that United Technologies had admitted liability, the plaintiff took exception to that ruling in its Petition for Writ of Certiorari to the Supreme Court. The Writ was subsequently denied. 115 S. Ct. 1176 (1995).
benefit of SARA § 122 which indicates that settlement would not be considered an admission, in contrast to United Technologies where the parties entered into a consent decree before the effective date of § 122. Thus, the plaintiffs in United Technologies did not receive the benefit of § 122, but SCA plaintiffs did receive such a benefit.

Finally, the SCA Court discussed *Town of Munster v. Sherwin-Williams Co.*, found that *Munster* dealt primarily with the question of equitable defenses, and thus it did not undermine the decision to allow SCA's cost recovery action. Thus, the SCA court allowed the PRP cost recovery claim because the plaintiff PRP had voluntarily incurred cleanup costs.

The District of Connecticut adopted and clarified the reasoning of *SCA Services in Companies for Fair Allocation v. Axil Corp.* The plaintiffs in this case sought to recover, under §§ 107 and 113, present and future response costs in connection with a public landfill listed on the NPL. The defendants moved to dismiss under Rule 12(b)(6) on the grounds that the exclusive remedy for the plaintiffs as PRPs is one for contribution, and that the plaintiffs failed to state a claim under § 113(f). The court surveyed the cases on point and concluded:

While CERCLA is silent as to whether "any other person" includes other PRPs, a number of courts have found that allowing PRPs to pursue § 107 actions is consistent with the broad scope of liability that Congress intended. . . . [I]f PRPs were precluded from pursuing claims for joint and several liability under § 107, and limited to contribution claims and several liability, "a PRP who is otherwise amenable to cleanup may be discouraged from doing so if it knows that, where the harm is indivisible, its only

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211. 27 F.3d 1268 (1994).
214. *Id.* at 577.
215. FED. R. CIV. P. 12(b)(6).
recourse for reimbursement is contribution from the solvent PRPs."\(^{217}\)

The court also discussed *SCA Services*:

[T]he [SCA] court reconciled the conflicting authority on this issue by distinguishing between cases where a nonsettling party attempted to recover response costs from a settling party, and cases in which a settlor has sought to recover response costs from nonsettllors. In the former category of cases, a § 107 claim implicates and threatens to undermine the contribution protection provision of § 113(f)(2). Thus, to determine the viability of such a claim, courts must balance the competing goals of protecting settling parties from contribution and encouraging parties to initiate cleanup operations promptly and voluntarily. In the latter category of cases, to which this case belongs, where the defendants are nonsettllors, there are no such competing goals and the majority of courts have permitted the settling plaintiff to proceed with a § 107 action.\(^{218}\)

The court recognized the delicate balance between suits among PRPs and the mandates of contribution protection.\(^{219}\) Nevertheless, the court adopted the reasoning of *SCA Services*, allowed the cost recovery claim, and refused to penalize a voluntary PRP for complying with CERCLA’s mandates.

Other district court decisions stress the equitable value of PRP cost recovery claims, looking beyond the voluntariness argument relied on by the court in *SCA*. In *Chesapeake & Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co.*,\(^{220}\) the Eastern District of Virginia attempted to find an equitable solution by permitting a PRP cost recovery claim. The court granted plaintiffs’ motion for summary judgment and imposed joint and several liability on the defendants for all costs not attributable to the plaintiff.\(^{221}\) Nevertheless, the court retained jurisdiction to

\(^{217}\) *Id.* at 579 (quoting Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1118 (N.D. Ill. 1988)).

\(^{218}\) *Id.* at 579-80 (discussing United States v. SCA Servs. of Indiana, Inc., 865 F. Supp. 533 (N.D. Ind. 1994)).

\(^{219}\) Since a settling party brought the claim in question against a non-settlor, the question of contribution protection did not arise. *Id.*


\(^{221}\) *Id.* at 1281.
apportion liability “in an equitable fashion.” This judicial maneuver streamlined the litigation and insulated the defendants from the portion of liability attributable to Chesapeake & Potomac. In the court’s interpretation of § 107:

in the absence of a “clearly expressed legislative intention to the contrary,” the language of the statute itself “must ordinarily be regarded as conclusive.” Nothing in the statute indicates that only “innocent” persons fall within the definition of “any other person.” Therefore, the Court interprets the term “person” in Section 107 in accord with the definition of that term provided by the statute itself.

Essentially, the court read the plain meaning of the statute to allow the PRP to sue under § 107, but in fairness the court required the plaintiff to still pay its fair share of the cleanup costs.

The Chesapeake & Potomac court relied heavily on the District of New Jersey’s decision in United States v. Kramer. In Kramer, the United States filed suit against numerous defendants to recover § 107(a) response costs in connection with the Helen Kramer Landfill in Mantua, New Jersey. After the United States moved to strike numerous affirmative defenses under § 107, the defendants argued that their counterclaim against the United States would change the action from cost recovery to contribution since the United States was itself a PRP, and thus equitable defenses would apply. In the course of rejecting this argument and approving PRP cost recovery, the court stated:

Collapsing the distinction between section 107 and section 113 ignores the clear language and structure of the statute.... [S]ections 107 and 113 serve distinct purposes.... Section 107 permits the Government or a private party to go in, clean up the

222. Id. at 1277.
223. Id. at 1277-78. The court also ruled that the harm was indivisible and that the moving defendants failed to establish the innocent landowner defense. Id. at 1280-81.
225. Id.
227. Id. at 404.
228. Id. at 405.
mess, pay the bill, then collect all its costs not inconsistent with the NCP from other responsible parties—even if plaintiff was also responsible for the contamination. Any PRP is entitled under section 113 to bring a contribution action against other PRPs—including the PRP who previously cleaned up the mess and was paid for its trouble through a section 107 proceeding—to apportion costs equitably among all the PRPs. Practically speaking, section 107 permits a PRP, including the government, to collect all its response costs, even those that the same PRP may be required to pay back to other PRPs as its equitable share in a section 113 proceeding.

What might be called a windfall for a plaintiff PRP in a section 107 action serves as an incentive for private PRPs to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been there equitable share. If the courts collapse the distinction between a section 107 and 113 proceeding [converting this section 107 action to a 113 action], there will be less incentive for private parties to initiate clean up, since they would lose the use of that temporary windfall gained in a section 107 action.229

The courts allowing PRP cost recovery claims often rely on the Kramer Court’s detailed analysis of the two causes of action.230 This examination of the relationship between cost recovery and contribution demonstrates that PRP cost recovery protects all parties involved in CERCLA litigation. Cost recovery does not preclude any party from recovering expenses over its own equitable share and serves as an incentive to remedying years of environmentally irresponsible conduct.

IV. PRP COST RECOVERY: A MORE EQUITABLE APPORTIONMENT OF CERCLA LIABILITY

An analysis of the preceding cases ruling explicitly or implicitly on the issue of PRP cost recovery demonstrates the uncertainty in what the future may hold for PRPs who seek to recover the response costs incurred from hazardous waste cleanup. Although

229. Id. at 416-17 (emphasis added).
the majority of recent cases have ruled against PRP cost recovery, the opportunity still remains for PRPs to prevail on this issue. The arguments against PRP cost recovery have gained favor in those circuits, but other persuasive circuits have not directly addressed the issue. PRPs in the difficult position of attempting to recover what often amounts to millions of dollars spent on cleanup must bear the burden of convincing these courts that PRP cost recovery actions serve the goals and spirit of CERCLA.

The courts favoring PRP cost recovery claims rely on two principal arguments: (1) the plain meaning of the statute favors PRP cost recovery; (2) PRP cost recovery serves CERCLA's objective of encouraging rapid voluntary cleanup by responsible parties.

A. The Plain Meaning of the Statute

The plain language of CERCLA strongly supports the viability of PRP cost recovery claims. As one court taking this position has stated, "[t]here is nothing in the language of the statute... that precludes a [liable] party... under CERCLA, to initiate cleanup and sue to recover its costs under section 107."

CERCLA "specifically provides that covered persons shall be liable to both the United States Government, among others, and

231. See Town of Wailkill v. Tesa Tape, Inc., 891 F. Supp. 955 (S.D.N.Y. 1995) (recognizing that the Second Circuit has not ruled on whether cost recovery is limited to only "innocent parties"); United States v. J.M. Taylor, 909 F. Supp. 355, 366 (M.D.N.C. 1995) (allowing PRP cost recovery and predicting that the Fourth Circuit would decline to follow those cases which limit all PRPs to contribution).


‘to any other person who incurs response costs.’” The broad wording of this provision suggests that Congress intended no limitation on who can sue under § 107. Moreover, “while the text of section 113(f) [contribution] provides a right of action for private plaintiffs who voluntarily clean up, it does not provide that § 113(f) contribution is the exclusive remedy for potentially liable parties.”

Normal methods of statutory interpretation counsel against limiting § 107 to “innocent parties” only. Without a clearly expressed legislative intention to the contrary the plain language of the statute should “ordinarily be regarded as conclusive.” An ordinary reading of both sections indicates that § 113 does not abrogate § 107 in the context of PRP cost recovery, “but instead [§ 113] codifies the efforts of federal courts to imply a contribution remedy to assist those held jointly and severally liable.”

By grafting the meaning “innocent parties only” on to § 107, which reads “any other person,” it appears that courts disfavoring PRP cost recovery have engaged in conscious judicial nullification of the statute, “and add[ed] needless confusion to the determination of who may utilize section 107.” Although those courts often state the proposition that allowing PRP cost recovery would render § 113 meaningless, a thorough analysis of the integral CERCLA provisions contradicts this view. For example, the plain language of the § 113(f) contribution action reinforces the argument that the courts disfavoring PRP cost recovery are misinterpreting the state with regard to PRP cost

235. Id. (quoting 42 U.S.C. § 9607(a)) (emphasis added).
239. Id.
Section 113(f) states that "any person may seek contribution" during or after a cost recovery action, thus indicating that the statute is permissive rather than mandatory. The § 113(f)(1) contribution action does not specify its application only to certain types of claimants. Rather, by its terms it applies to "any person." Moreover, the language of § 107, by allowing, but not mandating parties to bring cost recovery before contribution, implies that PRP claims are not always in the nature of contribution.

B. Comparing the Statutes of Limitations

A comparison of the statutes of limitations for cost recovery and contribution actions reinforces the impression that the language of § 107 provides for PRP cost recovery. Although the court in United Technologies ruled that such an expansive reading of § 107 is untenable because carried to its logical extreme, it would render the three-year statute of limitations associated with contribution claims meaningless, the Bethlehem Iron Court has proposed a persuasive counter argument:

The statute of limitations for a contribution claim begins to run on the date of judgment, administrative order, or entry of a judicially approved settlement concerning costs or damages. By contrast, the statute of limitations on a claim to recover removal costs begins to run after completion of the removal, and a claim to recover remedial costs begins to run after initiation of physical on-site construction. If parties that voluntarily cleanup are permitted to raise claims only pursuant to section 113(f), it seems strange that no statute of limitations applies to these parties. Thus, the court believes that the text of sections 107 and 113 suggest that section 107 creates a right of action for potentially responsible parties.

244. See id.
245. Id.
248. United Technologies, 33 F.3d at 101.
Here, the *Bethlehem* court has discarded the argument that PRP cost recovery would negate the statute of limitations provisions associated with contribution, § 113(g)(3). The court recognized that if PRPs who clean up voluntarily can not seek cost recovery, then no statute of limitations would apply to them because the statute of limitations for contribution only begins to run on the date of a judgment, administrative order, or judicially approved settlement. Voluntary PRPs may not be involved in any of these triggering events, thus no statute of limitations would apply to them. The statute of limitations associated with cost recovery actions, however, § 113(g)(2), begins to run when a party initiates remedial action. Therefore, this statute of limitations could apply to voluntary PRPs, whereas § 113(g)(3) could not.

The court in *United States v. SCA Services* also disagreed with the First Circuit’s analysis of the two statutes of limitations in *United Technologies*. In *SCA*, the court found that both statutes of limitations served separate purposes and did not counsel against allowing a PRP cost recovery claim. The court reasoned that Congress provided a shorter statute of limitations for contribution because such claims generally concern liquidated sums. In contrast, Congress provided a longer statute of limitations for cost recovery simply because the extent of such claims might not be identified for several years while mediation among the parties occurred.

A reading of § 107(a) to allow only innocent parties to seek cost recovery contradicts the plain meaning in another way: it disallows virtually all parties other than the government from suing under this section. Courts ruling against PRP cost recovery

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250. *Id.*
256. *Id.*
257. *Id.* at 1283.
258. *Id.*
have dismissed this limiting effect in cursory fashion, merely stating that "in certain circumstances private parties can sue under section 107." Nevertheless, the example that these courts point to, the "innocent landowner" defense, is essentially that of a party who has a defense to liability, and thus, is an "innocent party." Under the reasoning of these courts, only the government may seek cost recovery, thereby eliminating the private right of action that has existed under § 107(a) since the enactment of CERCLA. Such a result wholly contradicts the Supreme Court's finding that "the § 107 provisions outlining the liabilities and defenses of persons against whom the Government may assert claims . . . impliedly authorize[s] such a cause of action."

B. PRP Cost Recovery Actions Comport with the Purpose of CERCLA

Courts generally agree that in enacting CERCLA and SARA, Congress intended to facilitate rapid voluntary removal and remediation of hazardous waste sites. This paramount objective corresponds directly with the readiness of private parties to undertake response actions. As one court remarked:

CERCLA seeks the expeditious and safe cleanup of hazardous waste sites. A blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing PRP from cleaning up on its own. This is especially true where one or more of the parties are insolvent and, thus incapable in sharing the costs of cleanup. . . . A prohibition against joint and several liability would leave the willing PRP holding the bag for the insolvent companies [by requiring them to pay for the orphaned share]. On the other hand, a willing PRP would be encour-

260. See supra note 47 discussing private right of action.
aged to clean up where the law leaves open the possibility that the PRP could recover all costs as against nonwilling, solvent PRPs under a theory of joint and several liability.\textsuperscript{263}

PRP cost recovery claims “serve[] as an incentive for private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action\textsuperscript{264} the PRP will recoup more of its costs than under the restrictive § 113 several liability scheme. In fact, allowing PRP cost recovery claims serves as a settlement incentive. If PRPs can recover on a joint and several basis against other PRPs, those who the EPA target will more readily settle with the government and begin the cleanup process. Rather than litigating against the government and burdening the courts, PRPs can settle with the government, avoid costly litigation, obtain a fixed determination of their liability, and use their resources to clean up the waste and identify the other responsible parties.\textsuperscript{265}

To facilitate private cleanups, Congress added settlement provisions with SARA § 122.\textsuperscript{266} Congress recognized that private response actions may cost less than government cleanups and may allow EPA to focus its efforts and resources more efficiently on the facilities that pose the greatest threat to human health and the environment.\textsuperscript{267} Section 122 and related provisions incorporate a “carrot and stick” approach to promote voluntary involvement in the remediation process.\textsuperscript{268} CERCLA threatens PRPs with the joint and several liability “stick” if they fail to settle with EPA, but also offers the “carrot” of settlement protection for voluntary cleanup.\textsuperscript{269} Disallowing PRP cost recovery contradicts this approach because it shifts the responsibility for virtually all of the response costs to settling PRPs.


\textsuperscript{265} See Barmet Aluminum Corp. v. Doug Brantley & Sons, 915 F. Supp. 159 (W.D. Ky. 1995).

\textsuperscript{266} 42 U.S.C. § 9622 (1988).

\textsuperscript{267} See Healy, supra note 4, at 76.

\textsuperscript{268} See Organ, supra note 19, at 1066.

\textsuperscript{269} Id.
PRPs necessarily "[assess] their chances in a future law suit" when deciding whether to proceed with cleanup efforts. If settling PRPs face the possibility of shouldering the entire burden of the response costs for a particular site, there is less of an incentive to settle and begin cleanup, and more incentive to challenge the EPA in court. Thus, allowing PRP cost recovery claims encourages parties to align with CERCLA's goal of rapid voluntary cleanup, whereas disallowing PRP cost recovery contradicts the discernible carrot and stick approach that Congress has taken.

PRP cost recovery has potential advantages for both the government and private parties by promoting earlier settlement and remediation. It enables the government and private parties to initiate both types of recovery actions against nonsettling parties. This benefits the government because by obtaining an immediate settlement or commitment to remediation, or both, the cleanup process accelerates and the government and the PRP can direct their efforts toward pursuing other PRPs. For PRPs in particular, early settlement eliminates the threat of severe non-compliance penalties, and the costs that accumulate daily when parties do not have a precise determination of their role in the liability for response costs at a particular site. Moreover, permitting PRP cost recovery rewards environmentally conscious PRPs who align themselves with a paramount goal of Congress—the voluntary initiation of response efforts to hazardous substance release.

Courts in favor of PRP cost recovery actions have recognized that voluntary cleanup does not constitute an admission of liability under CERCLA. Since the nature of a contribution action is for joint and severally liable parties to seek reimbursement for

271. See Organ, supra note 19, at 1067-68.
272. See Ferrey, supra note 2, at 94-95.
273. Id. at 95.
275. Id. at 364 ("It is difficult to understand why being the target or victim of such a draconian § 106 order [without an adjudication of guilt] should disqualify one from seeking out others who are also liable.").
what they have paid over and above their equitable share, an action by a voluntary PRP is not necessarily one for contribution. The recent court decisions agree that § 107 and § 113 are separate and distinct actions for recovering response costs. By automatically construing PRP cost recovery actions as solely in the nature of contribution, however, numerous courts fail to recognize the significant difference between the two types of recovery.\textsuperscript{276}

To contrast the two provisions, the cost recovery claim is an original claim to recover money that a private party has spent on its own response measures, while the contribution claim is a derivative claim in which a party adjudged jointly and severally liable seeks to implead a third party to carry its share of the expense.\textsuperscript{277} Therefore, where a PRP incurs response costs, but is not adjudicated liable, a cost recovery action should be available to them because they are bringing an original claim. Where the government has sued a PRP and imposed upon that party liability for EPA response costs, a subsequent PRP claim is then in the nature of a derivative claim or contribution. By failing to make the distinction between a PRP that voluntarily incurs response costs and a PRP that has been adjudicated liable, courts ruling against PRP cost recovery claims have misinterpreted the two sections and bootstrapped all PRP claims into claims for contribution.

Congress added § 122 with SARA to ensure that courts would not consider voluntary cleanup actions by a party as an admission of CERCLA liability.\textsuperscript{278} There seems no other logical purpose for the addition of this provision if not to allow private parties, even those that meet the statutory definition of a PRP, to rightfully bring cost recovery actions. Otherwise, the need for § 122’s no admission provision remains elusive. The more equitable solution to the problem of apportioning CERCLA liability is to allow PRPs who initiate cleanup actions before any judicial determina-

\textsuperscript{276} Id. ("The construction of Section 107 [against use by PRPs] fails to give due deference to one of the major principles underlying it.").

\textsuperscript{277} See id. at 362 (noting that a party must actually incur response costs before seeking cost recovery).

tion of liability to seek cost recovery, while limiting those ad-
judged liable to contribution claims.

The need for an equitable solution to the problem of the orphan share also supports the viability of PRP cost recovery. Allowing voluntary PRPs to bring cost recovery actions will encourage private cleanup actions while spreading the burden to pay for the orphan share. Since CERCLA focuses on closed or aban-
donied sites that contain hazardous substances, many parties who contaminated sites in the past are insolvent and therefore unable to pay for their share of the cleanup costs. The remaining solvent parties found liable face the possibility of paying for this orphan share of the expense. By prohibiting PRP cost recovery, the PRP who voluntarily removes and remediates at a hazardous waste site may have to shoulder the entire burden of the orphan share. This becomes a reality for a PRP which, in its subsequent contribution action against other viable PRPs, can only shift to the contribution defendants their equitable share. Although it seems extremely inequitable to hold a limited number of liable parties responsible for the entire orphan share, courts have ruled in this manner. With this looming obstacle, it seems likely that many parties will refrain from undertaking voluntary

279. The court in Chesapeake & Potomac Telephone Co. of Virginia v. Peck Iron and Metal Co. addressed the need for an equitable allocation of the orphan share, indicating that although the plaintiff could prevail on a section 107 cost recovery claim, during the contribution phase of the case the court would divide the orphan share among all parties in proportion to each party’s final amount of liability for the site’s remediation as determined in the subsequent contribution action. 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992).

280. The 104th Congress recognized the problem of the orphan share. S. 1834, 104th Cong. 1st Sess. § 702 (1995). Congress failed to pass a proposal that would explicitly allocate payment for the orphan shares out of the Superfund. Id.


282. Id.
cleanup. Thus, limiting PRPs to § 113(f) contribution actions frustrates one of Congress’s foremost goals in enacting CERCLA.

CONCLUSION

For PRPs, CERCLA liability often seems like a no-win situation, and the recent cases seem to support this notion. The message set forth in these cases is that forthright private parties who enter settlements, clean up sites, and seek to recover costs from unwilling PRPs will receive no special benefit for their legal and environmental conscientiousness. This message will deter PRPs from taking responsibility for hazardous waste. Nevertheless, PRPs should continue to argue for PRP cost recovery as the more equitable treatment where parties seek to shoulder the responsibility for their fair share of the cleanup. PRPs have a strong argument that the plain language of CERCLA, and congressional intent to promote rapid voluntary cleanup, support PRP use of joint and several liability under § 107 cost recovery. Finally, the courts that will undoubtedly face the issue in the future should reward the environmentally conscious PRPs who voluntarily incur response costs in accordance with the purpose and spirit of CERCLA and the goal of preserving the environment for future generations.

283. See Organ, supra note 19, at 1057 (“The disproportionate burden borne by settling PRPs increases the likelihood of (1) disputes with the EPA concerning the settling PRPs’ performance of the selected remedy (as the settling PRPs seek to minimize their liability) and (2) litigation between settling PRPs and recalcitrant PRPs (as the settling PRPs seek to recover their response costs).”). Essentially, the inequity of holding one PRP liable for the orphan share leaves the PRP with no incentive to settle and begin cleanup, and provides considerable incentive for PRPs to try their luck in court.