TOMORROW'S NEWS TODAY: The Future of Superfund Litigation

Christopher D. Thomas*

INTRODUCTION

Few statutes bedevil experienced litigators as often as the federal Superfund act, the Comprehensive Environment Response, Compensation, and Liability Act ("CERCLA"). Although CERCLA practice is now into its third decade, the statute's chronic drafting flaws and the absence of definitive judicial resolution of numerous fundamental issues continue to create uncertainty. This uncertainty offers the opportunity for both creative lawyering and spectacular failure.[1] Many Superfund cases end badly because the lawyers spend their time preparing to fight the last war. In an attempt to mitigate the unease, this article will—after a rapid review of history—address the crucial legal issues we can expect to be front and center of hazardous substance litigation in the next several years.

I. CERCLA BACKGROUND

It is no secret that CERCLA was hastily and sloppily drafted[2] in late 1980 in the waning days of the Carter administration, in response to the serious environmental and health risks posed by property contaminated by hazardous substances.[3] Substantially amended in 1986,[4] the federal

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*. Chris Thomas is an environmental litigator at Squire Patton Boggs, and a resident of Phoenix. His CERCLA practice has included matters in a variety of federal courts, including the United States Supreme Court, the U.S. Courts of Appeals for the Ninth and Eleventh Circuits, and district courts in Alabama, Arizona, California, Connecticut, Michigan, New Mexico, New York, South Carolina, and Tennessee.

1. For one example of the author's occasional spectacular failure, see ASARCO, Inc. v. Union Pac. R.R. Co., No. CV 04-02144-PHX-SRB, 2006 U.S. Dist. LEXIS 2626, at *12 n.3 (D. Ariz. Jan. 24, 2006) (Docket No. 68); Order Granting Defendant Union Pacific Railroad Company's Motion for Partial Dismissal, ASARCO, Inc. v. Union Pac. R.R. Co., No. CV 04-02144-PHX-SRB (April 15, 2005) (Docket No. 15) (together, ruling that plaintiff had neither a § 107 claim nor a § 113 claim, albeit on grounds later rejected by the U.S. Supreme Court, and castigating its counsel for advancing a "dubious" argument).

2. *See, e.g.*, Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001) ("Clearly, neither a logician nor a grammarian will find comfort in the world of CERCLA.").

3. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 55 (1998) (Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution.").

Superfund law now is codified at 42 U.S.C. §§ 9601–9675. CERCLA establishes both a liability scheme that generates government and private-party litigation and provides for an administrative enforcement program for remediation of hazardous substance contamination.[5] That program is largely detailed in the National Contingency Plan ("NCP").[6] Under CERCLA, the U.S. Environmental Protection Agency ("EPA")[7] may either spend government funds to remediate contaminated sites and then seek reimbursement from responsible parties, or administratively or judicially compel site investigation and/or remediation. States can conduct many of the same enforcement activities. Independent of any agency action, private parties can employ CERCLA to recover their own investigative and remedial expenses in a civil suit against statutorily defined liable parties.[8]

The parties defined as liable include certain current owners and operators of contaminated sites; those who previously owned or operated a site when the contamination occurred; those whose hazardous substances (broadly defined) were disposed there (referred to as "arrangers for disposal" or "generators"); and those who transported hazardous substances to the site, if they selected the disposal site.[9] Historically, CERCLA liability has been held to be retroactive, strict, joint and several, and without regard to causation—unless the defendant is able to demonstrate that its actions caused harm divisible from the harm to the entire site.[10] As discussed further below, the U.S. Supreme Court recently breathed some life back into defendants' divisibility and apportionment arguments, by holding that joint

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

5. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989) (citation omitted). *See also* H.R. REP. NO. 99-253 pt. 3, at 15 (1985) ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

6. 40 C.F.R. § 300. The NCP, CERCLA's cleanup blueprint, details the criteria for developing a protective remedy.

7. While CERCLA initially provides the "President" with the relevant authorities, they have been generally delegated to the EPA. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987) (pursuant to the President's authority under 3 U.S.C. § 301 (1988)).

8. 42 U.S.C. § 9607 (a)(1)–(4) (2012).

9. *Id.*

10. *See, e.g.*, *In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 901–02 (5th Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3d Cir. 1992); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 171–73 (4th Cir. 1988); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316–17 (9th Cir. 1986); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805–08 (S.D. Ohio 1983).

liability also is not appropriate if a defendant can demonstrate a reasonable basis for apportionment.[11]

The other elements of a prima facie CERCLA case—that there has been a release or threatened release of a hazardous substance causing the incurrence of response costs—are so broadly defined that they offer defendants few opportunities for meaningful litigation.[12] The definition of "hazardous substance," for instance, covers a vast number of chemicals and metals save naturally refined petroleum, which is expressly excluded.[13]

The original available defenses, likewise, were of little benefit. Liability to the government for persons who fall under CERCLA § 107(a) generally is subject only to the enumerated defenses of § 107(b).[14] Section 107(b) of CERCLA[15] provides that a covered party is not liable if it can prove by a preponderance of the evidence that the release or threat of release was caused *solely* by an act of God, an act of war, or the unknown and not reasonably discoverable act of an unrelated third party.[16] Needless to say, no court has ever declared God to be solely responsible for an act of contamination, and no major decision has endorsed the act of war defense. In its original incarnation,[17] the third-party defense was likewise largely

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11. Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 614 (2009).

12. *See* 42 U.S.C. §§ 9601(9), (14), (20)–(22), (26) and (29). *See also* Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152–53 (9th Cir. 1989); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989).

13. While petroleum is specifically excluded, a slew of chemicals and many metals fall within the CERCLA hazardous substance definition. At 42 U.S.C. § 9601(14), CERCLA defines "hazardous substances" to include: (a) substances listed at 40 C.F.R. Table 302.4; (b) substances designated at 40 C.F.R. Table 116.4 as "hazardous substances" under § 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A); (c) substances regulated as listed or characteristic "hazardous wastes" under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992(k), meaning substances which are either listed as "hazardous wastes" at 40 C.F.R. §§ 261.30–41, or substances are ignitable, corrosive, reactive, or toxic pursuant to 40 C.F.R. §§ 261.20–24; (d) substances listed at 40 C.F.R. § 401.15 as "toxic pollutants" under § 307(a) of the Clean Water Act, 33 U.S.C. § 1317(a); (e) substances listed at 40 C.F.R. pt. 62 as "hazardous air pollutants" under § 112 of the Clean Air Act, 42 U.S.C. § 7412; and (f) any substance the EPA has sought enforcement against as an "imminently hazardous chemical substance" under § 7 of the Toxic Substances Control Act (primarily, polychlorinated biphenyls ("PCBs")).

14. *See, e.g.*, 42 U.S.C. § 9607(a) (2012) (liability is "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section"); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316–17 (9th Cir. 1986).

15. 42 U.S.C. § 9607(b).

16. *Id.*

17. Defendant is not liable for "[a]n act of a third party with whom the defendant had no agency or contractual relationship, if the defendant also establishes that he exercised due care with regard to the hazardous substances, and took precautions against foreseeable acts and the consequences of them."

worthless, as the current owner could be liable even if it did not cause, allow, or even know about the contamination.[18] Congress added an additional defense in 2002 to "bona fide prospective purchasers" of previously impaired property acquired after January 11, 2002.[19] That defense allows parties to knowingly acquire previously contaminated property, provided they first conduct "all appropriate inquiry" into the site condition and thereafter exercise "appropriate care" and take "reasonable steps" to stop continuing hazardous substance releases, prevent future ones, and "prevent or limit" exposure of people and the environment to the contamination. As discussed further below, the breadth of this defense will be the source of litigation in the coming years.

II. COMING ATTRACTIONS

Given the high stakes at many Superfund sites[20] and the frequent paucity of parties to share the misery, one can confidently predict continued aggressive CERCLA litigation in several areas. The first pertains to the litigation rights of parties who are conducting work pursuant to government compulsion or settlement. That is a huge universe of parties, and the U.S. Supreme Court raised but failed to resolve the issue. A second and related issue is what parties must demonstrate in practice to avoid imposition of joint and several liability. Here, the Supreme Court has clearly articulated the standards for making this demonstration, but many lower courts seem unable or unwilling to properly follow them. Third, we can expect more claims against current owners of previously contaminated property, based

18. New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) ("[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility . . . without regard to causation.").

19. The Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002), is now codified at 42 U.S.C. § 9607(o)–(r) (2012).

20. As of December 2003, EPA had concluded that 456 National Priorities List ("NPL") sites would require future remedial action, at a cost ranging from $15.5 billion to $23.2 billion. EPA further estimated that it would add between twenty-three and forty-nine sites to the NPL per year, requiring remedial action costs between $8.3 billion and $26.7 billion. Pretty soon you're talking real money. U.S. ENVTL. PROT. AGENCY, EPA 542-R-04-015, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS 3–14, Ex. 3-9 (2004), *available at* http://www.clu-in.org/download/market/2004market.pdf. That total did not include any current or future non-NPL sites; EPA estimated that between 350,000 and 700,000 non-NPL sites might require some remediation. *Id.* at Ex. 9-1. Nor did it include the estimated costs of cleaning up 177 federal facilities. EPA estimated that the average cost to cleanup up the 456 non-federal sites in its study was (in 2003 dollars) $2.8 million for study and design, $11.9 million for remedial action, and, where required, $10.3 for long-term treatment, operation, and maintenance. *Id.* at 1–7.

on the argument that the current owners' negligence voids their statutory bona fide prospective purchaser defense.

A. More Litigation About, Well, Litigation Rights.

One might assume that since CERCLA was initially passed in 1980, Congress and the courts have at least fully sorted out by now what sort of litigation rights liable private parties have against each other. One would be wrong. Congress whiffed on doing that in its major revision of CERCLA in 1986, and the U.S. Supreme Court has consistently delayed or avoided deciding the most basic issues. Most glaringly, the Court has yet to clarify whether parties compelled to conduct cleanups can sue others under a provision of the statute that arguably shifts the burden of proving equitable allocation to the defendants, or are limited to seeking only contribution and bearing that burden themselves. This is of particular importance to working parties at sites where proof of culpability is difficult or where substantial contamination was caused by parties that are defunct or unidentifiable (so-called "orphan shares").[21] The Court has likewise failed to clarify whether, by invoking their "cost recovery" rights, such parties can seek additional recovery from those who previously settled with the government and thought they had bought peace. Thousands of parties have settled with the United States or a State with the expectation that doing so would relieve them of the burden of further litigation with non-settling parties.

1. How We Got to This Miserable Point

The initial confusion about private-party litigation rights arose immediately after CERCLA's passage in late 1980. Section 107(a)(4)(A) of CERCLA specifically provides that the United States, individual States, and Indian tribes can recover from liable parties "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan."[22] Section 107(a)(4)(B) of CERCLA similarly provides that persons "other" than the United States, an individual State, or an Indian

21. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) (contribution not a panacea because of difficulty in locating solvent liable parties), *cert. denied*, 493 U.S. 1071 (1990). EPA has itself acknowledged that "[a]t almost every Superfund site, some parties responsible for contamination cannot be found, have gone out of business, or are no longer financially able to contribute to cleanup efforts." U.S. ENVTL. PROT. AGENCY, SUPERFUND ENFORCEMENT: SUCCESS IN ENHANCING FAIRNESS AND EXPEDITING SETTLEMENTS, *available at* http://www.epa.gov/superfund/accomp/17yrrept/report3.htm.

22. 42 U.S.C. § 9607(a)(1)–(4)(A) (2012).

tribe may recover "any other necessary costs of response" that are incurred "consistent with the national contingency plan."[23]

Section 107(a) clearly enough provided a cause of action to either governments or private parties who had incurred their own, out-of-pocket cleanup costs. But the original statute was silent about whether a luckless party sued by the government to recover its costs could drag others into the fun via an "implied" right of contribution.[24] That silence was particularly unfortunate since the courts were generally ruling at the same time that CERCLA liability was joint and several[25] and further that the government "need not round up every available defendant."[26]

To Congress' partial credit, it amended CERCLA to expressly provide a claim for contribution to liable parties in the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[27] CERCLA § 113(f)(1), added by SARA, authorizes "[a]ny person" to "seek contribution" from any PRP "during or following any civil action under § [1]06 . . . or under § [1]07."[28] Section 113(f)(3)(B) separately provides a right of contribution to "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement."[29] Those who resolve their CERCLA liability in such a fashion with either the United States or a State, in the form of either an administrative agreement or a judicial consent decree, are immune from further claims for contribution.

The SARA amendments eliminated some confusion and invited some more. Over time, voluntarily working but liable parties began to treat the § 113(f)(1) right of contribution as a general federal right of contribution, ignoring the plain statutory language that allowed such claims to be asserted only "during or following" a civil action.[30] The second bit of confusion—

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23. 42 U.S.C. § 9607(a)(1)–(4)(B).

24. A variety of courts held that there was an implied right of contribution under § 107, a conclusion that the U.S. Supreme Court later called "debatable." *See* Cooper Indus. v. Aviall Servs. Inc., 543 U.S. 157, 161–62 (2004). While it continues to throw cold water on the claim that § 107 contains an implied right of contribution, the Court has yet to formally rule on the issue. United States v. Atl. Research Corp., 551 U.S. 128, 140 (2007).

25. *See, e.g.*, United States v. Conservation Chem. Co., 589 F. Supp. 59, 63 (W.D. Mo. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983).

26. *See, e.g.*, United States v. Dickerson, 640 F. Supp. 448, 450 (D. Md. 1986) (striking defense that government had failed to join indispensable parties).

27. Pub. L. No. 99-499, § 113, 100 Stat. 1647 (1986).

28. 42 U.S.C. § 9613(f) (2012).

29. *Id.* § 9613(f)(2).

30. *Cf.* Brief for the United States as Amicus Curiae at 17–18, Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192) ("CERCLA does not create free-ranging federal cause of action under which responsible parties may sue each other at any time for damages they jointly caused.").

which lingers today—can be blamed on Congress, which failed to clarify whether those to whom it had given the § 113 contribution remedy were limited to using it, or whether they could opt instead to assert a claim for cost recovery under § 107. Moreover, Congress failed to clarify whether plaintiffs who could successfully label their claims as "cost recovery" claims under § 107 could thereby circumvent the contribution protection, or immunity from further civil liability, obtained by third parties who had previously settled with the government.

The casual assertion of contribution claims came to a screeching halt after the U.S. Supreme Court, in *Cooper Industries, Inc. v. Aviall Services, Inc.*,[31] held parties may seek contribution under § 113(f)(1) of CERCLA only "during or following" a "civil action" against them under § 107.[32] This ruling was a boon for third-party defendants and a setback for working parties.[33] The ruling left many liable volunteers without any CERCLA claim. At the time the Supreme Court decided *Aviall*, most of the courts of appeal had held that working but liable parties—that is, parties who had incurred out-of-pocket response costs—were not eligible to assert a claim for cost recovery under § 107.[34] This particularly troubled Justices Ginsberg and Stevens, who urged in dissent that the majority immediately supplement its holding to clarify that the § 107 cost recovery remedy was available to those who had no contribution claim under § 113.[35] The dissent noted that in 1994, the Court itself had stated in *Key Tronic Corp. v. United States*[36] that CERCLA "expressly authorizes a cause of action for contribution in § 113

31. 543 U.S. 157 (2004).

32. *Id.* at 166–68.

33. A separate right of contribution is available under 42 U.S.C. § 9613(f)(3)(B) to parties that have formally resolved their liability to the government via a judicial consent decree or administrative consent order. At least in the Third Circuit, and with the support of the United States, that settlement need not expressly reference CERCLA, so long as it is clear that it resolves liability for a "response action" within the meaning of § 113(f)(3)(B). *See* Trinity Indus. v. Chi. Bridge & Iron Co., 735 F.3d 131 (3d Cir. 2013).

34. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 423–25 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776 (4th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998); Pinal Creek Grp. v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); New Castle Cnty. v. Halliburton NUS Corp., 111 F.3d 1116, 1121–23 (3d Cir. 1997); Redwing Carriers, Inc.,v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996); Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir. 1995); United States v. Colo. & E. R. Co., 50 F.3d 1530, 1534–36 (10th Cir. 1995); United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100–03 (1st Cir. 1994), *cert denied*, 513 U.S. 1183 (1995)*;* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994).

35. *Aviall*, 543 U.S. at 173–74.

36. 511 U.S. 809 (1994).

and impliedly authorizes a similar and somewhat overlapping remedy in § 107"—implying that cost recovery was available to liable parties.[37] Justice Thomas' majority opinion steadfastly declined to address whether Aviall was entitled to seek either cost recovery or an implied right of contribution under § 107.[38]

Nevertheless, the rationale for prohibiting liable but voluntarily working parties from suing under § 107 collapsed after the *Aviall* ruling.[39] After ducking the issue in *Aviall*, the Court finally addressed it in *United States v. Atlantic Research Corp.*[40] Writing for a unanimous Court, Justice Thomas held that parties who voluntarily incur Superfund cleanup costs may seek recovery of them directly under § 107 of the statute.[41] The Court stated that "§§ 107(a) and 113(f) provide two clearly distinct remedies" that "complement each other by providing causes of action to persons in different procedural circumstances."[42] However, the plaintiff in *Atlantic Research* had incurred its costs voluntarily. The Supreme Court declined to opine on whether the right to proceed under § 107 extended to a party that had incurred expenses pursuant to a consent decree, administrative order, or other form of compulsion, while suggesting there is a difference between "incurring" one's own costs and "sustaining expenses" on behalf of another:

> [W]e recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107 (a). *See, e.g.*, *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 97 (1st Cir. 1994). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both.[43]

The Court's ruling in *Atlantic Research* served in part as a rebuke of the United States, which had worked tirelessly to establish case law favorable to both the EPA and liable federal agencies.[44] Although the United States'

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37. *Id.* at 816.

38. 543 U.S. at 170–71 & n.6. The Court likewise declined to determine whether Aviall had a right under § 107 to seek some form of liability other than joint and several. *Id.*

39. *See, e.g.*, Atl. Research Corp. v. United States, 459 F.3d 827, 835 (8th Cir. 2006) ("[I]t no longer makes sense to view § 113 as a liable party's exclusive remedy."), *aff'd*, 551 U.S. 128 (2007); Consol. Edison Co. of N.Y. v. UGI Utilities, Inc., 423 F.3d 90, 99–100 (2d Cir. 2005), *cert. denied*, 551 U.S. 1130 (2007); Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc., 473 F. 3d 824 (7th Cir. 2007).

40. 551 U.S. 128 (2007).

41. *Id.* at 141.

42. *Id.* at 138–39 (internal quotation marks omitted).

43. *Id.* at 139 n.6.

44. *See, e.g.*, Brief for the United States as Amicus Curiae in Partial Support of Defendants-Appellants at 23–27, Nat'l R.R. Passenger Corp. v. BPJ Int'l, 117 F.3d 1425 (9th

role in *Atlantic Research* was simply that of a defendant, the federal government had long been filing amicus briefs in appellate cases in which the §§ 107-113 issue had arisen. For instance, the United States filed an amicus brief with the Ninth Circuit in the *Pinal Creek* matter, arguing that the effectiveness of contribution protection would be imperiled if liable working parties were able to seek cost recovery under § 107. The government further argued that if § 107 plaintiffs possessed contribution protection because of their own settlement, the defendants could not ensure an equitable allocation to the liable plaintiff via contribution counterclaim.[45] The United States likewise objected to attempted use of § 107 by liable working plaintiffs even in litigation against non-settlors, where the contribution protection end-run risk was absent.[46] To its credit, the United States appears to have abandoned the overly self-serving position it took in *Atlantic Research*. In a more recent filing as *amicus*, the United States urged the Third Circuit to hold that a party to a state-law consent decree approximating CERCLA relief should be able to seek contribution under § 113 (f)(3)(B).[47] Failing that, urged the government, the court should allow the settling party to bring a claim under § 107 "in the nature of contribution."[48] Otherwise, the government stated, the settlor "would lack a CERCLA remedy, contrary to Congressional intent."[49] That, of course, was

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Cir. 1997) (No. 95-56734), 1996 WL 33490153 (only an innocent party may seek to impose joint and several liability; liable party is limited to seeking contribution under § 113); Brief for the United States as Amicus Curiae at 11 n.4, Redwing Carriers v. Saraland Apartments, Ltd., 94 F.3d 1489 (11th Cir. 1996) (No. 95-6198), 1996 WL 33663742 (liable party erred by asking for joint and several liability); Brief for the United States as Amicus Curiae in Partial Support of Appellee at 16, New Castle Cnty. v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997) (No. 96-7443), 1996 WL 33420845 (allowing settling party to invoke § 107 would create risk of windfall); Brief of the United States as Amicus Curiae Supporting Appellants in Part and the Appellees in Part and Urging Partial Reversal of the Judgment at 8–9, Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409 (4th Cir. 1999) (No. 99-1041), 1996 WL 33613675 (liable party may not invoke § 107 to evade defendants' contribution protection). Only in the *BPJ* brief did the United States acknowledge that its interests as amicus included both EPA's enforcement priorities and its own liability exposure as a "deep pocket." Brief for the United States as Amicus Curiae at 3–4, *BPJ Int'l*, 117 F.3d 1425 (No. 95-56734).

45. Brief for the United States as Amicus Curiae in Support of Defendants-Appellants at 28–32, Pinal Creek Grp. v. Newmont Min. Corp., 118 F.3d 1298 (9th Cir. 1997) (No. 96-16334), 1996 WL 33414567.

46. *See* Brief for the United States as Amicus Curiae in Partial Support of Appellee at 16, New Castle Cnty. v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997) (No. 96-7443), 1996 WL 33420845.

47. Brief of the United States as Amicus Curiae Supporting Appellant at 12–13, Trinity Indus., Inc. v. Chi. Bridge & Iron Co., 735 F.3d 131 (3d Cir. 2013) (No. 12-2059), 2012 WL 5817286.

48. *Id.*

49. *Id.*

precisely the outcome the United States had urged the Supreme Court to reach as defendant in *Atlantic Research*.[50] Perhaps the EPA perspective has gained more currency within the federal government.[51]

Prior to *Atlantic Research*, denial of certiorari in the *Pinal Creek*[52] case was the highest-profile death knell for use of § 107 cost recovery by working, liable parties. The District of Arizona initially ruled that liable but working parties could seek cost recovery under § 107, subject to the ability of defendants to counterclaim for contribution. To the District Court, this result seemed not only consistent with the plain language of the statute, but also with CERCLA's policies of encouraging settlement and cleanup, as it placed the burden of proving equity on the non-working party.[53] The Ninth Circuit reversed, joining the majority of the courts of appeal that had ruled liable parties ineligible to invoke § 107 under any circumstances.[54] The United States filed an amicus brief supporting this argument.[55]

The Pinal Creek Group sought a writ of certiorari, supported by a coalition of eighteen states and cities who argued that the District Court had both correctly interpreted the statute and honored CERCLA's policies.[56] The Supreme Court invited the Solicitor General to file a brief expressing the view of the United States.[57] The Solicitor General argued that the Court should not grant certiorari because there was no split among the circuits and because the Ninth Circuit opinion had been correct.[58] The Pinal Creek's Supplemental Brief, co-written by then-lawyer-now-current Chief Justice John Roberts, complained that the United States had underplayed the

50. United States v. Atl. Research Corp., 551 U.S. 128, 138 (2007).

51. Of course, at the court of appeals level, the EPA need not obtain the concurrence of the Solicitor General, who has sole authority to present the arguments of the federal government to the Supreme Court. *See* Seth P. Waxman, Presenting the Case of the United States as it Should Be: The Solicitor General in Historical Context, Address to the Supreme Court Historical Society (June 1, 1998), *available at* http://www.justice.gov/osg/aboutosg/historic-context.html.

52. Pinal Creek Grp. v. Newmont Min. Corp., 926 F. Supp. 1400 (D. Ariz. 1996), *rev'd*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 542 U.S. 937 (1998).

53. *Id.* at 1409.

54. *Pinal Creek*, 118 F.3d at 1301 (holding that a claim by liable party is necessarily one for contribution).

55. The United States endorsed the uniform conclusion of the courts of appeals on this issue in its response to an order of the Court inviting the United States' views on a petition for writ of certiorari filed in *Pinal Creek*. Brief for the United States as Amicus Curiae at 10, Pinal Creek Grp. v. Newmont Min. Corp., 118 F.3d 1298 (9th Cir. 1997) (No. 97-795), 1998 WL 34103033.

56. Brief for the State of Alabama et al. as Amici Curiae in Support of Petitioners, *Pinal Creek*, 118 F.3d 1298 (No. 97-795), 1998 WL 34103027.

57. *Pinal Creek*, 522 U.S. 1106 (1998).

58. Brief for the United States as Amicus Curiae at 6, 10, *Pinal Creek*, 118 F.3d 1298 (No. 97-795), 1998 WL 34103033.

"bewildering array of competing rationales"[59] and failed to acknowledge that its own pecuniary interests[60] had helped shape its position:

> The Solicitor General suggests that the question presented is not important enough to merit the Court's attention, SG Br. 9, a judgment with which the States, municipalities, and commentators disagree. In announcing this policy judgment, the Solicitor General neglects to alert the Court to the fundamental conflict of interest the United States faces under CERCLA. For while the Federal Government has enforcement responsibilities under CERCLA, it is also by far and away the Nation's worst polluter—more responsible for contamination at CERCLA sites than any other entity—and is itself subject to liability under CERCLA . . . . The Solicitor General's position on the question presented—restricting the right of private parties voluntarily undertaking a cleanup to recover their response costs from other responsible parties—reflects more the Federal Government's position as a likely defendant than its position as an enforcer of CERCLA's provisions or an advocate for the prompt cleanup of contaminated sites.[61]

This tart brief did not persuade the Court to accept certiorari in *Pinal Creek*, but it arguably ensured that the Court would view the United States' statutory interpretations with an extra bit of skepticism when the Court later took up the issue of CERCLA litigation rights.[62]

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59. Supplemental Brief of Respondents at 2, *Pinal Creek*, 118 F.3d 1298 (9th Cir. 1997) (No. 97-795), 1998 WL 34112637.

60. As of December 3, 2004, EPA had concluded that there were 177 federal facilities on the NPL that would require some future remedial action. U.S. ENVTL. PROT. AGENCY, *supra* note 21, at 1–7. Counting both listed and unlisted sites, EPA and its sister agencies estimated that the future cleanup costs would be (in 2003 dollars) approximately $34.2 billion for Department of Defense sites, $35 billion for Department of Energy sites, and between $15–22 billion for other civilian federal sites. *Id.* at 6-1, 7-1, and 8-1. Meanwhile, the U.S. Government Accountability Office has flatly concluded that "EPA has virtually no enforcement tools available to compel agency compliance with the law." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 09-278, GREATER EPA ENFORCEMENT AND REPORTING ARE NEEDED TO ENHANCE CLEANUP AT DOD SITES 18 (March 2009), *available at* http://www.gao.gov/assets/290/287066.pdf. *See also* 132 CONG. REC. 14902-03 (Daily Ed. October 3, 1986) (statement of Sen. Stafford) ("No loophole, it seems, is too small to be found by the Federal Government.").

61. Supplemental Brief of Respondents at 5–6, *Pinal Creek*, 118 F.3d 1298 (9th Cir. 1997) (No. 97-795), 1998 WL 34112637.

62. United States v. Atl. Research Corp., 551 U.S. 128, 136–37 (2007) ("The Government's reading of the text logically precludes all PRPs, innocent or not, from recovering cleanup costs. Accordingly, accepting the Government's interpretation would reduce the number of plaintiffs to almost zero, rendering § 107(a)(4)(B) a dead letter.").

In any event, deprived of the old argument that liable parties cannot invoke § 107 under any circumstances, defendants switched to arguing that parties who have been "compelled" to spend money on cleanup and hence have a contribution claim under § 113(f) are limited to that as their exclusive remedy.[63] The majority of the circuits have now ruled that parties working under a consent order or consent decree—and hence eligible to seek contribution under § 113—may not choose instead to seek cost recovery under § 107.[64] EPA has supported that view in amicus briefs filed in several cases.[65]

Among other things, that interpretation would give effect to the entire statute. It also would ensure that liable plaintiffs would be obliged to absorb their own fair share of liability, which the Supreme Court assumed was required in *Atlantic Research*:

> For similar reasons, a PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107 (a). The choice of remedies simply does not exist. In any event, a defendant PRP in such a 107(a) suit

63. In the long-running *Solutia* litigation, for instance, the settling foundry defendants initially moved for summary judgment prior to *Atlantic Research*, when prevailing law was that liable party status alone disabled a plaintiff from pursuing a claim under § 107. Settling Defendants' Motion for Summary Judgment, Solutia, Inc. v. McWane, Inc., 726 F. Supp. 2d 1316 (N.D. Ala. 2010) (No. CV 03-PWG-1345-E), 2006 WL 481505. After *Atlantic Research* was decided, the district court invited further briefing. Ultimately, on a motion for reconsideration, the court concluded that Solutia could not seek its "compelled" costs pursuant to § 107, but had to proceed under § 113. Since the foundry defendants unequivocally had contribution protection, they were granted summary judgment. Solutia, Inc. v. McWane, Inc., 726 F. Supp. 2d 1316, 1342 (N.D. Ala. 2010), *aff'd*, 672 F.3d 1230 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 427 (2012).

64. Bernstein v. Bankert, 733 F.3d 190, 204–05 (7th Cir. 2012) (plaintiff is limited to a contribution remedy when one is available); Solutia, Inc. v. McWane, Inc., 672 F.3d 1230 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 427 (2012); Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 603–04 (8th Cir. 2011); Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 227–29 (3d Cir. 2010); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 128 (2d Cir. 2010); ITT Indus. v. BorgWarner, Inc., 506 F.3d 452, 458 (6th Cir. 2007). *See also* AVX Corp. v. United States, 518 F. App'x 130, 135 & n.3 (4th Cir. 2013) (endorsing but not deciding that party with contribution protection and § 113 claim cannot invoke § 107).

65. *See, e.g.*, United States' Amicus Curiae Memorandum Interest of the United States at 20, *Solutia, Inc.*, 672 F.3d 1230 (No. 10-15639) (those who have a contribution claim under § 113 are limited to asserting it); Brief of the United States as Amicus Curiae at 18, *Morrison Enters., LLC*, 638 F.3d 594 (No. 10-1468) ("[T]he 'general language' of § 107(a) 'must give way to the more specific provisions' of §§ 113(f)(1) and 113(f)(3)(B)."); *see also* United States Amicus Curiae Memorandum Responding to Court's May 6, 2010 Order, *Solutia, Inc.*, (CV-03-1345) (N.D. Ala. May 21, 2010), at 1 (Atlantic Research "does nothing to disturb well-settled (and well-reasoned) law that a PRP that has a claim under Section 113(f) must use it.").

> could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.[66]

This reasoning, of course, only works if the settling plaintiff cannot seek joint and several liability under § 107 (a)(4)(B). Any CERCLA settlement with the government confers by statute contribution protection, or immunity from contribution claims (or in this case, contribution counterclaims).[67] In the Court's example, since the defendants could not assert a contribution counterclaim to blunt any assignment of joint and several liability, there would be no way to guarantee an equitable distribution of costs unless either (a) the plaintiff is limited to asserting a contribution claim under § 113(f) at the outset or (b) the plaintiff is allowed to recover only an equitable amount, even if its claim carried the § 107(a)(4)(B) label. The § 113 contribution claim, by its express terms, limits the plaintiff's recovery to whatever it can affirmatively prove to the court would be equitable, with the Court instructed to employ "equitable factors as the court determines are appropriate."[68] The second option, limiting the compelled party's claim under § 107(a)(4)(B) to recovery of an equitable amount, faces no statutory impediment, although the Court assumed in its discussion that § 107(a) provides for joint and several liability.[69]

The most notable recent attempt to persuade the Court to opine on what has become a consensus view came with an unsuccessful petition for a writ of certiorari by Monsanto successors Solutia, Inc. and Pharmacia Corporation in the *Solutia, Inc. v. McWane, Inc.* litigation.[70] Solutia, Inc. and Pharmacia Corporation have been conducting cleanup work pursuant to a series of administrative consent orders and a judicial consent decree.[71]

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66. 551 U.S. at 140.

67. 42 U.S.C. § 9613(f)(2) (2012).

68. *Id.* § 9613(f)(1). Most courts, in determining what Congress meant by "equitable factors," have relied on a portion of the legislative history of SARA attributable to then Rep. Albert Gore, including: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment. *See, e.g.*, United States v. R. W. Meyer, Inc., 932 F.2d 568, 576 (6th Cir. 1991) (Guy, J., concurring), *cert. denied*, 494 U.S. 1057 (1990); *see also* H.R. REP. NO. 253, at 19, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042.

69. *Atl. Research Corp.*, 551 U.S. at 140 n.7.

70. Solutia, Inc. v. McWane, Inc., 726 F. Supp. 2d 1316 (N.D. Ala. 2010), *aff'd*, 672 F.3d 1230 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 427 (2012); *see* Petition for Writ of Certiorari, Solutia, Inc. v. McWane, Inc., 133 S. Ct. 427 (2012) (No. 12-89).

71. *Solutia, Inc.*, 726 F. Supp. 2d at 1319–24.

Independently, a group of former foundry operators agreed to clean up residential yards impacted by lead-containing foundry sand. The second group entered into an administrative agreement with a contribution protection provision explicitly applicable to the pending claims.[72] After some initial reluctance, the District Court[73] and the Eleventh Circuit[74] both held that summary judgment for the foundry group was appropriate under the compelled cost doctrine.

According to the petitioners, the Eleventh Circuit erred in concluding that the § 113 contribution remedy is exclusive for those that have it:

> Analyzing the plain language, the Eleventh Circuit should have reached the opposite conclusion. SARA did not amend one word of § 107. Nor did SARA purport to make § 113(f) exclusive. It provided that PRPs "may seek contribution" under §113(f) and § 113(f)(3)(B), not that they may only seek contribution under that sub§. Congress could have expressly provided that § 113 limits the availability of claims under § 107 but, instead, it chose permissive language. Further, if PRPs could seek cost recovery from other PRPs under § 107 before SARA, as most cases held, nothing in SARA abrogated or limited such claims. The Eleventh Circuit and other circuit courts are reading a limitation into the statute that is quite simply not in its text.[75]

The Supreme Court denied certiorari,[76] and no court of appeals has yet to accept this argument. Of course, prior to *Atlantic Research*, virtually every circuit court of appeals also had held that liable parties could not invoke § 107 under any circumstances, despite the lack of an explicit statutory prohibition against them doing so.[77]

The lousy language of the statute and the infrequent and facile opinions issued by the Supreme Court have driven Superfund litigators to devote

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72. *Id.* at 1325–26.

73. *Id.* at 1347–48.

74. *Solutia, Inc.*, 672 F.3d at 1236–37.

75. Petition for Writ of Certiorari, *supra* note 71, at 17.

76. Solutia, Inc. v. McWane, Inc., 133 S. Ct. 427 (2012). Denial of certiorari, of course, does not constitute any opinion on the merits. *See, e.g.*, Boumediene v. Bush, 550 U.S. 1301, 1301 (2007).

77. In *Atlantic Research*, the United States had similarly argued that § 107(a)(4)(B) should not be available to liable parties, and this argument was rejected by the Court. United States v. Atl. Research Corp., 551 U.S. 128, 137–40 (2007). Solutia and Pharmacia tried to draw a direct parallel, arguing, "[f]or two decades, the appellate courts went down this exact path and unanimously held that § 107 was limited to 'innocent' parties to avoid a perceived conflict between § 113 and § 107. The Court has rejected this approach and should not let the courts drift again." Petitioners' Reply Brief in Support of Petition for a Writ of Certiorari at 5, Solutia, Inc. v. McWane, Inc., 133 S. Ct. 427 (2012) (No. 12-89).

immense attention to labels. Working plaintiffs cast their claims against other liable parties as claims for cost recovery under § 107, hoping that the magic 107 label and its potential for imposing joint and several liability will crush their targets.[78] Non-working parties devote enormous effort to arguing that plaintiffs are relegated to seeking contribution under § 113, since that is certain to force plaintiffs to make the equitable allocation case.[79] Nobody wants to bear the burden of proving how the court should fairly allocate liability arising from distant acts of contamination that were likely legal at the time, if stupid. For several decades, it has been common (and correct) wisdom that case posture is destiny in Superfund litigation. Those targeted by the government face the risk of joint and several liability, and the added burden of proving how much those ignored by the government should pay.[80] Those lucky enough to wind up as third-party defendants take comfort in the fact that joint and several liability is immediately off the table.[81]

Viewed from this perspective, the Supreme Court's rulings have been a disappointment, as they have failed to clarify when one is entitled to invoke the magic 107 label, and what happens to others if that occurs. Looking deeper, however, the Court deserves more credit. Many of its narrow rulings have been informed by healthy skepticism about arguments made by the United States when the government has both an enforcement interest (via EPA) and a pecuniary interest (because a federal agency is itself a liable party).[82]

One recent petitioner has described the United States' record on CERCLA cases at the Supreme Court as "dismal."[83] That is a fair characterization of the government's batting average when its arguments reflect not only the interests of EPA, but also those of agencies that are themselves liable under CERCLA. The United States, wearing its EPA hat, has repeatedly argued that CERCLA must be interpreted in a manner that achieves it goal of inducing early settlement and expediting cleanups, which in turns requires allowing the government to offer certainty and finality.[84]

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78. *See supra* notes 71–77 and accompanying text.

79. *Id.*

80. Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 614 (2009) ("Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists.").

81. *Atl. Research Corp.*, 551 U.S. at 139 (those who do not incur their own response costs are limited to filing a contribution claim under § 113, for which the court equitably allocates costs as it sees fit).

82. *See infra* notes 92–93 and accompanying text.

83. Petitioners' Reply, *supra* note 77, at 6.

84. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 21.

At the same time, for many years the United States has argued for statutory interpretations that go beyond what is necessary to achieve EPA's goals, and additionally serve the interest of the United States as a liable party, often a very big one.[85] The government's self-imposed "unitary executive" doctrine essentially means that EPA will never sue a liable federal agency and never issue such an agency a unilateral order under § 106.[86] That leaves liable federal agencies in a very favorable litigation posture, so long as private parties cannot sue them under § 107 and seek to impose joint and several liability.

By the time *Atlantic Research* reached the Supreme Court, the courts had become openly skeptical of the United States' CERCLA interpretations. The United States most frequently has appeared before the Supreme Court in its role as a liable federal agency, rather than on behalf of the Environmental Protection Agency as CERCLA enforcer.[87] *Atlantic Research* presented a similar posture, with defendant United States arguing that liable volunteer Atlantic Research had neither a contribution remedy (in light of *Aviall*) nor a right of cost recovery under § 107 (according to the United States, because liable parties could not seek cost recovery). This was too much for the Eighth Circuit, which held:

> Congress resolved the question of the United States' liability 20 years ago. It did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its

85. *Id.*

86. The unitary executive doctrine, set forth in Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), holds that separation of powers prevents one executive agency from suing another, absent consent of the chief executive, the President. *See Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. On Energy and Commerce*, 100th Cong. 210 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division). Page 29 of Habicht's written testimony states, "Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order without the opportunity to contest the order within the Executive Branch." *Id.* In practice, this means that EPA cannot be expected to include other agencies in civil litigation or to issue a sister agency a unilateral cleanup order. *But see* CONG. RESEARCH SERV., JUSTICIABILITY OF EPA ENFORCEMENT ACTIONS AGAINST OTHER EXECUTIVE BRANCH AGENCIES CRS-8 (1987) ("it appears highly likely that a court would take jurisdiction of a suit brought by EPA to enforce one of its administrative orders against a sister agency"), *reprinted in Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigation of the H. Comm. On Energy and Commerce*, 100th Cong. 17 (1987). The seminal article on the doctrine's applicability in environmental cases is William C. Tucker, *The Manacled Octopus: The Unitary Executive and EPA Enforcement Involving Federal Agencies*, 16 VILL. ENVTL. L.J. 149 (2005).

87. *See, e.g.*, Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (involving a claim by working private parties against the United States Air Force).

> CERCLA enforcement power. Congress put the public's right to a clean and safe environment ahead of the sovereign's traditional immunities.
>
> We hold that a private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party.[88]

Although many of the amicus briefs filed by the United States over the years had stressed the importance of ensuring the integrity of contribution protection, at oral argument in the *Atlantic Research* case the Court repeatedly focused on the government's disparate interests. The Court was exceedingly sympathetic to the argument that EPA must be able to offer those willing to settle contribution protection that will prevent non-settlors from suing them later.[89] The Court was entirely unsympathetic to the view that, in order to achieve that result, it was necessary to preclude voluntarily working liable parties from seeking cost recovery under § 107, since they had no right to seek contribution under § 113 following *Aviall*.[90]

At oral argument, Justices Ginsburg, Breyer, and Souter expressed great concern about whether the United States' position on use of § 107 was driven by the pecuniary interest of liable government agencies.[91] Justices Roberts, Ginsburg, and Stevens noted that the enforcement interest of EPA—as opposed to the pecuniary interests of liable federal agencies—could be achieved by simply ruling that contribution protection bars claims nominally brought under both § 107 and § 113, so long as the § 107 claim purports to seek recovery of costs within the definition of matters covered by the settlement.[92]

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88. Atl. Research Corp. v. United States, 459 F.3d 827, 837 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007).

89. Transcript of Oral Argument at 24, Atl. Research Corp. v. United States, 551 U.S. 128 (2007) (No. 06-562), 2007 LEXIS 34.

90. *Id.* at 15–24. Even if one wanted to honor EPA's stated desire to ensure finality to those with whom the agency settles, it was never necessary to argue that mere liability by itself limited a working plaintiff to seeking contribution under §113. Only at sites where some of the litigants have obtained contribution protection is either policy implicated. The holding in *Atlantic Research* that a liable volunteer can assert a claim under §107 is perfectly compatible with both finality and equitable allocation of costs. By definition, a plaintiff that has not settled with the government does not possess contribution protection and accordingly can be compelled to absorb its own equitable share of costs via a counterclaim for contribution. And that is even assuming that a §107 plaintiff is entitled to an initial finding of joint liability to begin with, which is hardly a given.

91. *Id.*

92. *Id.*

2. Where Do We Go From Here?

The Supreme Court has left a number of crucial questions unresolved. At the top of the list is whether liable but working parties can use their § 107 rights to obtain additional recovery from previously settling parties who have contribution protection and thought they had purchased finality. At least in *Atlantic Research*, the Court suggested that the answer to this question would turn on whether response costs absorbed by a private party following government compulsion are "incurred" sufficient to support a § 107 claim. If so, then the issue becomes whether allowing the plaintiff to cast a claim as one for cost recovery necessarily trumps contribution protection or makes joint and several liability available. Less significantly, the Court has yet to definitely rule on whether there is an implied right of contribution under § 107. In light of *Atlantic Research*, that issue is likely of relevance only if it turns out that the recipient of a unilateral cleanup order under § 106 satisfies neither the *Aviall* trigger nor the *Atlantic Research* one.

A pessimist can easily conclude, based on the Supreme Court's dicta in its major cases, that the Court is likely to someday rule that 1) plaintiffs who incur costs pursuant to a judicial consent decree or administrative consent order may seek recovery of them under § 107; 2) claims under § 107 are not extinguished by contribution protection; and 3) private § 107 plaintiffs may seek joint and several liability, even if they have their own contribution protection and accordingly are not vulnerable to a contribution protection counterclaim. On several occasions, the Court has assumed without deciding that contribution protection does not bar claims brought under § 107 and that § 107 claims by liable parties carry with them the possibility of imposing joint and several liability. Nowhere does CERCLA unequivocally say that the § 113 remedy is exclusive for those who have it. This would open up the possibility of new claims being made against hundreds of parties who have paid cash to the United States or a State to resolve their liability at contaminated sites being cleaned up by the most culpable actors. That, in turn, might be chaotic enough to induce Congress to address the issue with a statutory amendment.

For the optimist, there is some basis for predicting that the Court will not follow this mechanistic approach and create chaos. The Court's oral arguments have displayed more sensitivity to the chaos that endorsing an unfettered § 107 claim would bring than has its sporadic dicta. The oral argument in *Atlantic Research* suggests that the Court is likely to ensure that CERCLA plaintiffs cannot obtain additional recovery from defendants who previously settled with the government and have contribution

protection for the costs at issue.[93] It would be difficult to reconcile a regime that allows working liable parties to circumvent contribution protection held by others with one that calls for courts to defer to the government's judgment when determining whether to approve a consent decree conferring contribution protection. If contribution protection could be so easily ignored, the exercise of determining whether a settlement is "fair, reasonable, and consistent with CERCLA" would be largely pointless.[94]

Exactly how the Court may ultimately reach this outcome remains a bit unclear, but there are several possibilities. First, as the courts of appeal have uniformly decided subsequent to *Atlantic Research*, one can avoid the end-run and windfall problems by precluding the use of § 107 by parties that possess contribution protection themselves. There is no dispute that, in order to assert a claim for cost recovery under § 107(a)(4)(B), a plaintiff must have "incurred" response costs.[95] The Supreme Court in footnote six suggested, and the courts of appeal have largely decided, that one way out is to distinguish between "costs incurred" voluntarily and "expenses sustained" by compulsion to satisfy liability owed to another. That is not especially elegant, but it does give effect to all of CERCLA's provisions and, concurrently, honors the policy of encouraging settlement by offering finality. The Third Circuit's opinion in *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*[96] reflects this simple approach: a settling plaintiff who has contribution protection—and who accordingly will not face a counterclaim for contribution—must therefore be limited to seeking contribution at the outset.[97]

But it could well be that the Court declines to hold that CERCLA prevents parties "compelled" to incur cleanup costs from seeking recovery of them under § 107, rather than under § 113, since doing so would attribute a huge amount of significance to a single word, "incurred." In that event, a second possible route to achieving what seems to be the fairest outcome

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93. Transcript, *supra* note 89, at 15–24.

94. Courts approve CERCLA consent decrees if they are procedurally and substantively fair, reasonable, and consistent with CERCLA's goals. *In re* Tutu Water Wells CERCLA Litigation, 326 F.3d 201, 201 (3d Cir. 2003).

95. Atl. Research Corp. v. United States, 551 U.S. 128, 139–40, and n.6 (2007) (§ 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs).

96. 602 F.3d 204, 228 (3d Cir. 2010).

97. Remarkably, the U.S. Court of Appeals for the Seventh Circuit recently managed to muddy the waters even further. In *Bankert v. Bernstein*, the Court held that while settling parties who have a contribution claim are indeed precluded from invoking § 107 instead, the right of contribution in a consent decree calling for future work does not arise until the work is completed. 733 F.3d 190 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 1024 (2014).

would be to simply hold that CERCLA's contribution protection immunizes settlors who possess it not only from claims expressly brought under § 113, but also those asserted under § 107. The Supreme Court has assumed without deciding that the contribution protection bar does not apply to "cost recovery" claims brought under § 107, stating that "the settlement bar does not by its terms protect against cost-recovery liability under § 107(a)."[98] Yet the Court also insisted that a liable party—presumably even one having contribution protection—cannot avoid bearing its own equitable share of costs.[99] Given all of that, perhaps, for purposes of honoring contribution protection, claims under § 107 and 113 need not be treated differently after all.[100] It is unclear, if that is the direction of the courts, whether applying contribution protection to purported § 107 claims can be readily resolved by way of a motion to dismiss. In *Ford Motor Co. v. Michigan Consolidated Gas Co.*,[101] for instance, the district court denied a motion to dismiss by third-party defendant the United States. While the court seemed to honor the voluntary-versus-compelled distinction, it found that issue not capable of resolution until summary judgment.[102]

A third possibility is that the Court will conclude that the "traditional and evolving principles of common law" that Congress intended to determine the scope of liability[103] mandate that the recovery of private § 107 plaintiffs (liable or not) be limited to what the defendant should equitably bear. That would mean recovery under § 107 would approximate the recovery available under the § 113 contribution remedy. Nothing in CERCLA itself expressly mandates that joint liability be imposed, and the common law has

98. *Atl. Research Corp.*, 551 U.S. at 140.

99. *Id.* ("a PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a)").

100. No reported case appears to have addressed this issue squarely, but one may be looming in the District of Arizona. In a pending CERCLA case brought by the Roosevelt Irrigation District seeking imposition of joint and several liability, defendant City of Phoenix has raised as a defense the contribution protection it previously received by virtue of a judicial consent decree with the State of Arizona. Moreover, the decree expressly provides that the City's contribution protection shall apply to claims under either § 107 or 113. *See* City of Phoenix Answer to Second Amended Complaint, Roosevelt Irrigation District v. Salt River Project Agricultural Improvement and Power District, No. CV-2010-00290-DAE-BGM (D. Ariz. Oct. 24, 2013); Consent Decree Between the State of Arizona and Defendants City of Phoenix and Motorola, Inc. at para. 70, State of Arizona v. City of Phoenix and Motorola, Inc., Case No. CV-96-2626-PHX-ROS (D. Ariz. Apr. 4, 1997) ("Contribution protection under this section shall apply to CERCLA claims by any person under §§ 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613.").

101. No. 08-13503, 2014 WL 255968 (E.D. Mich. Jan. 23, 2014).

102. *Id.* at *10 n.9.

103. Burlington N. and Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613 (2009).

been steadily moving away from imposing it.[104] Further, as reflected in the Restatements of Law, there is recognition that allowing one joint tortfeasor to continue seeking contribution from another after the latter has settled with the plaintiff is highly problematic.[105] Under this approach, the dispositive issue would merely be whether the government intended that the scope of the settling party's contribution protection extend to costs to be incurred by non-settlors. Many courts—perhaps most rigorously the *Solutia* Court—are already conducting this analysis, albeit after first concluding that the party seeking to evade contribution protection is barred from proceeding under § 107.

Assuming that issue gets sorted out, there may be but one last battle in this area. Recipients of unilateral cleanup orders by EPA under § 106—generally not subject to pre-enforcement review and carrying the threat of daily penalties or treble damages—may face the worst of all possible worlds.[106] Conceivably, the courts could someday decide that such an order does not trigger a right of contribution under *Aviall*, but does contain a level of compulsion sufficient to deprive a recipient who complies with it the ability to proceed under § 107. The Supreme Court expressly declined to decide in *Aviall* whether such an order would qualify as a "civil action" for purposes of enabling a contribution claim.[107] Especially galling would be this outcome at a site where the federal government itself is also a liable party, since the United States interprets the unitary executive doctrine as prohibiting the issuance of a § 106 order by EPA against a liable sister agency such as the Department of Defense.[108]

B. More Litigation About Divisibility and Apportionment.

The Supreme Court's apparent inclination to make Superfund reasonably fair—inconceivable for years to many jaded defense lawyers—is likewise evident in its next major ruling, *Burlington Northern v. United States*.[109] The Court held that private parties may avoid imposition of joint and several liability if they can demonstrate a mere "reasonable basis" for

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104. *See* RESTATEMENT (SECOND) OF TORTS § 433 and § 886A (1965); RESTATEMENT (THIRD) OF TORTS § 17 (1998).

105. RESTATEMENT (SECOND) OF TORTS § 886A (1965).

106. 42 U.S.C. § 9606 (2014) authorizes the United States, but not States, to issue unilateral cleanup orders against liable parties. Those who decline to comply with them "without sufficient cause" face daily penalties and potential treble damages.

107. Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157, 168 n.5 (2004).

108. *See* Tucker, *supra* note 86.

109. Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009).

apportionment.[110] The Court's ruling—while purporting to reaffirm existing law—clarified that lower courts have been too stingy in allowing relief from joint and several liability.[111] CERCLA targets have long complained about the unfairness of facing retroactive and joint and several liability under the Superfund program, particularly at sites where the acts of hazardous substance disposal occurred decades ago and were legal and customary at the time.[112]

Congress considered and rejected expressly making CERCLA liability joint and several, fearful that doing so might "impose financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury."[113] Instead, liability under CERCLA was intended to be determined from the "traditional and evolving principles of common law."[114] Legislative history and policy historically have led the courts to import strict liability from the Clean Water Act and impose joint liability on the assumption that it was difficult or impossible to segregate most environmental harms. While divisibility was theoretically possible, the factual bar was set very high.[115]

As the Court noted, the "starting point" for divisibility in CERCLA cases is Restatement (Second) of Torts § 433A, which provides:

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110. *Id.* at 618–19.

111. In *Burlington Northern* itself, for instance, the Ninth Circuit had demanded "sufficient data to establish the *precise* proportion of contamination that occurred" based on "*specific* and *detailed* records." *Id.* at 617 (emphasis added).

112. *See, e.g.*, *In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 897 (5th Cir. 1993) (CERCLA "can be terribly unfair in certain instances"); United States v. Alcan Alum. Corp., 990 F.2d 711, 716 (2d Cir. 1993) ("In passing CERCLA faced the unenviable choice of enacting a legislative scheme that would be somewhat unfair to generators of hazardous substances or one that would unfairly burden the taxpaying public."); United States v. Rohm & Haas Co., 721 F. Supp. 666, 686 (D.N.J. 1989) ("Unfortunately for Rohm & Haas, CERCLA, as we read it, is not a legislative scheme which places a high priority on fairness to generators of hazardous waste."); *see also* KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND HOW? 26 (1995) ("Ever since Superfund was enacted there have been complaints that its liability scheme is unfair and should be changed."); Robert W. McGee, *Superfund: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. ENVTL. L. & POL'Y 165, 173–74 (1993) ("The potential liability waste generators face can be grossly disproportionate to the harm they might have caused."); *Hearing on Superfund Reauthorization Liability Before the Subcomm. On Commerce*, 104th Congress 20 (1995) ("Gentlemen, in all fairness, how can a small company like Stamas be held responsible for actions taken 30 years ago that were at that time legal, particularly when this action is by another company, Bay Drums, Incorporated?") (statement of Mr. J. L. Williams).

113. 126 CONG. REC. 30,897, 30,972 (1980) (statement of Sen. Helms).

114. *See* 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph) ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability.").

115. *Burlington Northern*, 556 U.S. at 613–14 (emphasis added).

> when two or more persons acting independently caus[e] distinct or single harm for which there is a *reasonable basis* for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused . . . .[116]

The Court said that "apportionment is proper when 'there is a *reasonable basis* for determining the contribution of each cause to a single harm.'" Further, while defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists, they may be able to meet that burden with "the simplest of considerations" to establish divisibility.[117]

Applying those rules, the Supreme Court held that it was "reasonable" for the district court "to use the *size* of the leased parcel and the *duration* of the lease as the starting point for its analysis."[118] The Court also supported a statement by the Ninth Circuit that "divisibility may be established by '*volumetric*, *chronological*, or other types of evidence,' including appropriate *geographic* considerations."[119] Although the Supreme Court questioned the district court's conclusion that two chemicals released on the railroad parcel "accounted for only two-thirds of the contamination," the Court deemed that error harmless due to the district court's margin of error adjustment.[120] The Supreme Court thus affirmed the district court's apportionment.

The Court's opinion was initially seen as likely to make a substantial difference in litigation and settlement of CERCLA cases.[121] District courts know they only need a "reasonable basis" for apportioning liability. They also have examples of "safe" apportionment factors, including time on-site, contaminant remedy drivers, and area impacted.[122] The courts of appeals, meanwhile, should be more reluctant to second-guess district courts on apportionment.

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116. *Id.* at 614.

117. *Id.* at 617.

118. *Id.* at 617 (quoting United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, at 936, n. 18 (9th Cir. 2008)).

119. *Id.*

120. *Id.* at 618.

121. *See, e.g.*, Aaron Gershonowitz, *The End of Joint and Several Liability in Superfund Litigation: From Chem-Dyne to Burlington Northern*, 50 DUQ. L. REV. 83, 124 (2012) ("If trial courts pay close attention to the Burlington Northern Court's reasoning and to the facts of each case, joint and several liability in CERCLA actions will become the exception and not the rule.").

122. *See Burlington Northern*, 556 U.S. at 614.

Alas, as applied, *Burlington Northern* has had negligible impact. District courts have repeatedly declined to find CERCLA liability to be reasonably capable of apportionment. Indeed, there appears to be no published opinion finding a basis for reasonable apportionment subsequent to *Burlington Northern*.[123] The two courts of appeals that have addressed the issue have both affirmed district court determinations rejecting apportionment theories.[124] The issues are not going away, and while the lower courts seem to have missed the message in *Burlington Northern*, it seems inevitable that eventually they will be more willing to find apportionment to be warranted.

C. Bona Fide Prospective Purchaser Litigation.

The original version of CERCLA contained a defense known as the "innocent landowner" or "innocent purchaser" defense. That defense protects current owners who did not know and had no reason to know of the presence of hazardous substances on their property at the time they acquired it.[125] A buyer could and can establish that it did not have "reason to know" of hazardous waste activity by conducting "all appropriate inquiry" into the previous ownership and uses of the property before the purchase.[126]

Because that defense did not allow parties to knowingly acquire previously impacted property for purposes of productive redevelopment, Congress amended CERCLA in 2002 to add an additional defense to a "bona fide prospective purchaser" of property at which hazardous substance disposal previously occurred.[127] A "bona fide prospective purchaser" is one who acquires property with knowledge of a hazardous substance release, but who has made an "all appropriate inquiry" into the environmental condition of the property, and thereafter exercises appropriate care with respect to the hazardous substances found at the property. A bona fide prospective purchaser will not be held liable for the hazardous substances as long as the purchaser does not impede the performance of a response action

123. Petition for Writ of Certiorari, PCS Nitrogen, Inc. v. Ashley II of Charleston, L.L.C., No. 13-139 (U.S. July 29, 2013); Steven Ferrey, *Reconfiguration of Superfund Liability?: The Disconnection Between Supreme Court Decisions and the Lower Federal Courts*, 41 SW. U. L. REV. 589, 610–12 (2012) ("There has not been any watershed change on this point in the lower courts.").

124. PCS Nitrogen, Inc. v. Ashley II of Charleston, L.L.C., 714 F.3d 161, 181–86 (4th Cir. 2013); United States v. NCR Corp., 688 F. 3d 833, 838–42 (7th Cir. 2012). The *PCS* Court did find grounds for equitably allocating costs. *PCS Nitrogen*, 714 F.3d at 185–86.

125. *Id.*

126. 42 U.S.C. § 9601(35)(B)(i) (2012).

127. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002).

or natural resource restoration.[128] Furthermore, a bona fide purchaser must also satisfy a host of other requirements, including taking steps to stop a continuing release, preventing any threatened future release, and preventing or limiting exposure to the released hazardous substance.[129] The defense applies only to acquisitions after the date of the act, January 11, 2002.

Demonstrating that one has undertaken "all appropriate inquiry" ("AAI") into the prior ownership and uses of the property is a straightforward affair with clear guidance.[130] The real fun starts thereafter. The leading case on the bona fide prospective purchaser defense remains *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*[131] *Ashley II* arose out of a brownfields

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128. *See* 42 U.S.C. § 9607(r)(1), which provides:

> Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

129. 42 U.S.C. § 9601(40) requires a "bona fide prospective purchaser" to establish, among other things:

> (A) Disposal prior to acquisition
> All disposal of hazardous substances at the facility occurred before the person acquired the facility.
> (B) Inquiries
> (i) In general
> The person made all appropriate inquires into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).
> . . . .
>
> (D) Care
> The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to –
> (i) stop any continuing release;
> (ii) prevent any threatened future release; and
> (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

130. AAI has been evaluated by reference to due diligence standards promulgated by the American Society for Testing and Materials ("ASTM"). EPA promulgated its own AAI Rule, largely incorporating ASTM International Standard E1527-05, on November 1, 2005. 70 Fed. Reg. 66069 (Nov. 1, 2005). The Agency has subsequently adopted by rule two amended versions of the ASTM standard, E1527-08 and E1527-13. 40 C.F.R. §§ 312.11 and 312.20; 73 Fed. Reg. 78655 (Dec. 23, 2008); 78 Fed. Reg. 79319 (Dec. 30, 2013). EPA recommends but does not mandate that the 2013 standard be employed.

131. 791 F. Supp. 2d 431 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

developer's acquisition of a variety of contaminated parcels for the purpose of developing the large Magnolia mixed-use property.[132] Ashley properly engaged a consultant to conduct pre-acquisition due diligence and to assist with post-acquisition site demolition and redevelopment.[133]

The district court found Ashley had failed to demonstrate it was entitled to the bona fide prospective purchaser defense, citing several alleged missteps that hardly seem remarkable in the context of redeveloping a former industrial property.[134] After a sixteen-day bench trial, the district court found that Ashley failed to prove that all hazardous substance releases had occurred prior to its acquisition of the property and that Ashley had not thereafter exercised appropriate care with regard to pre-existing hazardous substances. Ashley's sins? First, Ashley failed to prevent a debris pile—later found to contain hazardous substances—from accumulating on the site, and failed to characterize and remove the debris for more than a year.[135] Second, during its due diligence, Ashley's environmental consultant identified sumps and impacted pads as recognized environmental conditions.[136] After demolishing the buildings above them, however, Ashley left the sumps and pads in place for a year.[137] Although Ashley later commissioned a study of the sumps that concluded that no hazardous substance releases had occurred, the court was unpersuaded.[138] On appeal, the Fourth Circuit agreed that Ashley had failed to take the "reasonable steps to . . . prevent any threatened future release."[139]

The *Ashley* ruling has justifiably generated a considerable amount of concern.[140] Any significant industrial site redevelopment will necessarily require demolition and construction activities that will arguably create exposure to hazardous substances. Grading soil impacted by hazardous substances—even at levels below cleanup standards—seems to fall within the courts' view of post-closing releases.[141] When hazardous substances are

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132. *Ashley II*, 791 F. Supp. 2d at 467–69.

133. *Id.* at 467–72.

134. *Id.* at 475-77.

135. *Id.* at 469.

136. *Id.* at 469–72.

137. *Id.*

138. *Id.*

139. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 714 F.3d 161, 180–81 (4th Cir. 2013).

140. Hong N. Huynh, *Managing the Risks of* Ashley II *to Protect CERCLA Defense*, 28 NAT. RESOURCES & ENV'T 52 (2013); Kellie Fisher, *The* PCS Nitrogen *Case: A Chilling Effect on Prospective Contaminated Land Purchases*, 41 B.C. ENVTL. AFF. L. REV. 29 (2014).

141. *See, e.g.*, Kaiser Alum. & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342–43 (9th Cir. 1992) (alleging that contractor spread contaminated dirt was sufficient to state claims for operator and trasporter liability); Tanglewood East Homeowners v. Charles-Thomas,

uncovered, it is unrealistic to expect them to be instantaneously characterized and capped or removed. Indeed, at most sites it is likely that federal or state enforcement agencies would insist on reviewing work plans before any work is conducted.[142] And if the possibility of stormwater carrying away traces of hazardous substances is truly enough to defeat the appropriate care element, then courts will have effectively vetoed the use of very common, risk-based soil cleanup standards that allow detectable levels of hazardous substances to remain on site.[143] Combined with EPA's unhelpful guidance,[144] the first major effort to interpret the bona fide prospective purchaser defense gives little reason for optimism and many reasons to expect more litigation.

CONCLUSION

Progress has been slow, but the Supreme Court has been steadily trying to lift the fog that has enveloped key Superfund issues for decades. Perhaps the next generation of Superfund lawyers can litigate over the application of facts to settled law.

Inc., 849 F.2d 1568, 1573 (5th Cir. 1998) (spreading contaminated soil across subdivision constituted CERCLA "disposal").

142. § 121(d)(1) of CERCLA, 42 U.S.C.A. § 9621(d)(1) (West 2014), requires selection of a remedial action that, at a minimum, "assures protection of human health and the environment." CERCLA does maintain its own soil cleanup standards.

143. Neither CERCLA nor the National Contingency Plan establishes uniform numeric cleanup standards for either soil or groundwater. *See* 42 U.S.C.A. § 9621 (West 2014); 40 C.F.R. § 300.430(e)(9). Superfund cleanups never call for elimination of all detectable contamination. For instance, EPA and states very commonly select surface soil cleanup levels based on an excess cancer risk of one in a million. That means that negligible levels of carcinogens are allowed to remain on the surface, but even if a million people were exposed to those levels for their entire lives, only one extra case of cancer would result. 40 C.F.R. § 300.430(e)(2)(i)(A)(2).

144. *See* Memorandum from Susan E. Bromm, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (Mar. 6, 2003), *available at* http://www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf. About as definitive as the Common Elements guidance gets is stating that a landowner who is not the source of contaminated groundwater beneath its property will "generally not" be required to remediate it in order to maintain a defense. *Id.* at app. B pt. 6.