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Aviall Services v. Cooper Industries: From Bad to Worse, Is There Any Hope for PRPS Conducting Voluntary Cleanups

Karen Fox

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AVIALL SERVICES v. COOPER INDUSTRIES: FROM BAD TO WORSE, IS THERE ANY HOPE FOR PRPS CONDUCTING VOLUNTARY CLEANUPS?

I. INTRODUCTION

Before the United States District Court for the Northern District of Texas decided Aviall Services, Inc. v. Cooper Industries, LLC (Aviall),1 potentially responsible parties (PRPs) conducting voluntary cleanups of hazardous waste sites still had hope of available compensation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).2 Although the Supreme Court had previously limited a PRP's right to seek contribution one year earlier in Cooper Industries, Inc. v. Aviall Services, Inc. (Cooper),3 the Supreme Court left open the possibility that PRPs undergoing voluntary cleanups could still recover cleanup costs by way of cost recovery or contribution actions under section 107 of CERCLA.4 Given the Supreme Court’s restriction on contribution actions under section 113, section 107 was the only available avenue of recovery through which PRPs performing voluntary cleanups could recover costs after Cooper.5 Commentators warily predicted that the Cooper decision, coupled with the widespread uncertainty as to the interrelationship of sections 107 and 113 could lead to the complete future dissolution of CERCLA recovery for PRPs con-

2. See id. at *1 (declining to extend contribution and cost recovery rights to PRPs under section 107(a)). CERCLA identifies certain parties as potentially responsible parties and holds these parties financially responsible for costs associated with the cleanup of contaminated sites. See 42 U.S.C. § 9607(a) (2006).
3. 543 U.S. 157 (2004) (limiting rights of PRPs to contribution actions brought solely in conjunction with civil actions while failing to identify actions satisfying requirement). The Court did not decide exactly what actions would satisfy the "civil action" requirement of section 113(f)(1). See id. at 168 n.5 (limiting rights of PRPs to contribution actions brought solely in conjunction with civil actions while failing to identify actions satisfying requirement).
4. See id. at 168-71 (leaving district court to decide whether PRPs can sue under section 107 for cost recovery or contribution).
5. See id. at 158 (restricting contribution under section 113 to parties subject to previous civil action). Thus, parties who had not previously been subject to suit were no longer eligible to seek contribution under section 113 after Cooper. See id.
ducting voluntary cleanups. With \textit{Aviall}, this doomsday scenario seems to have become a reality.\footnote{See, e.g., Ronald G. Aronovsky, \textit{Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes}, 33 \textit{ECOLOGY L.Q.} 1, 50-51 (2006) (discussing possibility PRPs will have no remedy following voluntary cleanups). See also Callie Campbell, Note, Cooper Indus., Inc. \textit{v.} Aviall Servs., Inc.: \textit{A Superfast End to Voluntary Cleanups and Efficient Environmental Management}, 13 \textit{SOUTHEASTERN ENVTL. L.J.} 203, 222 (2005) (noting disincentive to perform voluntary cleanups).}

In \textit{Aviall}, the United States District Court for the Northern District of Texas addressed the questions left undecided by the Supreme Court in \textit{Cooper} regarding whether PRPs could bring actions for cost recovery or contribution under CERCLA section 107(a). In answering these questions, the court analyzed the language and legislative histories of sections 107 and 113 as well as existing case law interpreting these provisions. The court ultimately sided with Cooper Industries and held that a private PRP has neither a right to cost recovery nor an implied right to contribution under section 107(a).\footnote{See \textit{id.} at *10 (foreclosing PRPs from cost recovery and contribution under section 107).}

This Note analyzes the rights of PRPs in contribution and cost recovery in light of the court's decision in \textit{Aviall}. Section II describes the relevant facts and arguments presented to the court in \textit{Aviall}. Section III explains the legal framework and relevant case law on the rights of PRPs to bring actions for contribution and cost recovery under section 107(a). Section IV illustrates the court's reasoning in resolving this issue. Section V examines the court's analysis of sections 107 and 113, as well as existing case law on the issue. Section VI explores the potential implications of the
court's holding on future questions of CERCLA liability and the ability of PRPs to recover under the statute.\textsuperscript{16}

II. FACTS

A. Facts Underlying the Claim

Cooper Industries, an airplane engine repair company, originally owned and operated its business on four Texas sites.\textsuperscript{17} In 1981, Cooper sold both its business and its properties to Aviall Services (Aviall).\textsuperscript{18} Years later, Aviall discovered widespread contamination of both the soil and the groundwater at these sites.\textsuperscript{19} Aviall never denied that it may have contributed to the contamination of the properties.\textsuperscript{20} The company notified the Texas state authorities and received instructions that it should clean up the contaminated sites.\textsuperscript{21} Although the state threatened to take action if Aviall did not rectify the problem, Aviall cleaned up the sites before the state was forced to bring action against it.\textsuperscript{22} Because neither the state nor the EPA filed suit against Aviall, and because neither was forced to issue an administrative order to compel cleanup, Aviall was deemed to have voluntarily cleaned up the site.\textsuperscript{23} Aviall later sold the sites to a third party; however, it still remained liable for at least 5 million dollars in cleanup costs.\textsuperscript{24}

B. Procedural History

Throughout the case's expansive procedural history, Aviall has made several attempts to recoup these significant cleanup costs under CERCLA sections 113(f)(1) and 107(a).\textsuperscript{25} Aviall brought its initial suit against Cooper in the United States District Court for the

\textsuperscript{16} For a further discussion of the consequences of the court's holding, see infra notes 170-98 and accompanying text.


\textsuperscript{18} See id. (noting transfer of property to Aviall).

\textsuperscript{19} See id. (noting Aviall's discovery of contamination of properties by hazardous waste).

\textsuperscript{20} See id. (indicating both parties' responsibility for contamination).

\textsuperscript{21} See id. (discussing Aviall's reports to Texas Natural Resource Conservation Commission).

\textsuperscript{22} See Aviall, 2006 WL 2263305, at *1 (noting no state action taken against Aviall).

\textsuperscript{23} See id. (characterizing cleanup as voluntary due to lack of compulsion on part of state agencies and EPA).

\textsuperscript{24} See id. (indicating Aviall's current liability).

\textsuperscript{25} See id. (noting wide-ranging procedural history).
Northern District of Texas in 2000. At first, Aviall brought claims under both sections 107(a) and 113(f)(1) but later amended its pleadings to include only a contribution claim under section 113(f)(1). The district court dismissed Aviall's claim under section 113(f)(1), finding that, as Aviall had not been subject to litigation or administrative order in cleaning up the hazardous sites, the contribution claim was not filed "during or following a 'civil action'" as required by section 113(f)(1).

The United States Court of Appeals for the Fifth Circuit reversed the district court's findings as to Aviall's contribution claim, finding Aviall had asserted a valid claim under section 113(f)(1), despite the fact that its cleanup was voluntary. In reaching its holding, the Fifth Circuit noted the illogical result stemming from the district court's analysis of section 113(f)(1). The court found the district court's interpretation would afford PRPs no contribution remedy until the time the government filed suit against it. The Fifth Circuit thus reasoned that it could not have been Congress's intention to condone such an irrational result and thereby reversed the district court's decision.

The Supreme Court granted certiorari, and in Cooper, again addressed the question of whether a PRP could sue for contribution under section 113(f)(1) without first being subject to a civil action. The Court reversed the Fifth Circuit's decision, holding that PRPs who voluntarily clean up sites could not sue for contribution under section 113(f)(1). The Court specifically did not decide whether a PRP could sue for contribution or cost recovery under section 107(a) and remanded the case to the district court for determination of these issues. On remand, the United States Dis-
district Court for the Northern District of Texas addressed the question of whether a PRP has standing to assert claims for cost recovery and/or contribution under section 107(a) in Aviall, and this issue is the subject of this Note.36

C. The Present Action: Decision on Remand

On remand to the United States District Court for the Northern District of Texas, Aviall amended its complaint to assert claims for cost recovery and alternatively for contribution under section 107(a).37 As the present owner of the properties at the time of the cleanup, Aviall was, by its own admission, a PRP for purposes of any action under CERCLA.38 Under section 107(a), Cooper was also a PRP, as a past owner of the contaminated site.39 As both parties were PRPs, the question for the court was whether a PRP was eligible to bring an action for either cost recovery or contribution against another PRP under section 107(a) (4) (B).40

1. Parties' Arguments as to Cost Recovery

Cooper argued that Aviall had no right to cost recovery under section 107(a) (4) (B) because where one PRP sues another PRP, the action is for contribution and must be brought under section 113(f)(1).41 Cooper's argument rested mainly on the plain language of section 107(a) (4) (B).42 Cooper urged that "any other person" in section 107(a) (4) (B) should be interpreted as referring to any person not previously listed anywhere in section 107.43 As PRPs are listed in section 107, and as Aviall is not "the United States Government or a State or an Indian tribe," parties to whom PRPs are necessarily liable under section 107(a) (4) (A), Cooper's inter-

37. See id. at *2 (identifying Aviall's statutory claims).
38. See id. at *1 (noting parties' status as PRPs).
41. See id. at *3 (referencing Cooper's argument that action between PRPs was one for contribution).
42. See id. at *6 (detailing Cooper's plain language argument).
43. See id. (defining Cooper's interpretation of section 107(a) (4) (B)). Under section 107(a) (4) (A), a PRP is liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe . . . ." 42 U.S.C. § 9607(a) (4) (A). Under section 107(a) (4) (B), a PRP is further liable for "any other necessary costs of response incurred by any other person . . . ." Id. § 9607(a) (4) (B).
pretation would foreclose Aviall, as a PRP, from seeking cost recovery under section 107.44

Aviall argued that the "any other person" language of section 107(a)(4)(B) should be read to mean that PRPs remain liable to those parties specifically mentioned in section 107(a)(4)(A) and to "any other person" not listed in section 107(a)(4)(A), including PRPs.45 Under Aviall's interpretation, a PRP could sue another PRP for cost recovery because under section 107(a)(4)(A), a PRP is liable to "the United States Government or a State or an Indian tribe," and under section 107(a)(4)(B), a PRP is also liable for the cleanup costs of "any other person."46 Therefore, Aviall argued that a PRP fit into the meaning of "any other person," and thus, it was authorized to sue under section 107(a)(4)(B) despite its own PRP status.47 The court ultimately rejected Aviall's argument and held that PRPs have no right to cost recovery under section 107(a)(4)(B).48

2. Parties' Arguments as to Contribution

In the alternative, Aviall argued that if section 107(a) did not authorize a cost recovery action between PRPs, the section did impliedly authorize a PRP to bring an action in contribution against another PRP.49 Its argument rested on the fact that prior to the Superfund Amendments and Reauthorization Act (SARA),50 courts had consistently recognized an implied right of PRPs to sue for contribution under section 107(a).51 Although the SARA amendments created an express right to contribution in section 113, Aviall argued that the initial implied right of section 107(a) still existed, and thereby, it was authorized to seek contribution under section 107(a).52 Despite Aviall's arguments, the court held that Aviall had no claim for contribution under section 107(a)(4)(B), as the sec-

44. See Aviall, 2006 WL 2263305, at *6 (referencing 42 U.S.C. § 9607(a)(4)(A) and arguing that PRPs are precluded by statutory language from cost recovery action).
45. See id. (noting Aviall's counterargument).
46. See id. (arguing statutory language of sections 107(a)(4)(A) and 107(a)(4)(B) allows cost recovery claim).
47. See id. (arguing plain meaning authorizes suit).
48. See id. at *8 (holding action between PRPs was solely for contribution).
51. See Aviall, 2006 WL 2263305, at *9 (detailing evolution of contribution rights leading to SARA).
52. See id. (discussing contribution rights post-SARA).
tion contained no implied right of contribution for PRPs. Thus, the court held that a PRP had no action for cost recovery or contribution under section 107(a).

III. BACKGROUND

On the whole, CERCLA has sparked a massive amount of litigation and has been the source of great controversy since the statute's enactment in 1980. Specifically, the relationship between sections 107 and 113 has become a source of great debate since 1986 when Congress amended the statute with the SARA amendments. Through SARA, Congress enacted CERCLA section 113. Among other things, the amendment was intended to confirm the previously implied right of contribution that impliedly existed in section 107 prior to the amendment. Unfortunately, Congress provided little guidance as to the remaining rights of section 107 after the amendment, and courts have been grappling with the question ever since. Aviall is just one such example.

A. Statutory Provisions

1. Section 107

Prior to 1986 when Congress amended CERCLA with the SARA amendments, the statute contained no express right to con-

53. See id. at *10 (declining to find implied right in section 107).
54. See id. at *1 (holding PRPs have no cause of action under section 107).
58. See id. (explaining congressional intent).
59. See Panzer, supra note 55, at 440-44 (discussing lack of settled precedent due to ambiguity of statute).
distribution. Instead, lower courts consistently interpreted section 107(a) as impliedly authorizing such a cause of action. Section 107(a) defines the parties who are liable for response costs as PRPs for purposes of CERCLA. Section 107(a) identifies four classes of PRPs: (1) the present owners and operators of a facility; (2) any past owners or operators that controlled a facility at the time hazardous substances were disposed of; (3) anyone who arranges for the transport or disposal of hazardous substances and (4) anyone who has accepted hazardous substances for transport. Under section 107(a)(4)(A), these responsible parties are necessarily liable for the cleanup costs of the “United States Government or a State or an

61. See Aronovsky, supra note 6, at 19-20 (describing CERCLA landscape pre-SARA and noting lack of express contribution remedy).


64. See 42 U.S.C. § 9607(a) (2006) (identifying PRPs). The text of section 107 reads:

(a) Covered persons; scope; recoverable costs and damages; interest rate; “comparable maturity” date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

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

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

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

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

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.
Indian tribe." Further, under section 107(a)(4)(B), responsible parties are also liable for the cleanup costs "incurred by any other person." Prior to SARA, courts consistently allowed PRPs to seek contribution under section 107(a)(4)(B), finding that PRPs constituted "any other person" to which other PRPs were liable under the statutory scheme of section 107.

2. Section 113

In 1986, in an attempt to specifically confirm the previously implied right of PRPs to seek contribution under section 107, Congress enacted section 113. Thus, section 113(f)(1) became CERCLA's express contribution provision, expressly providing for the right of PRPs to seek contribution from other PRPs "during or following a civil action under section 106 or section 107(a)." SARA also added section 113(f)(2), which provides PRPs who settle with the government special contribution protection from becoming the target of further contribution suits brought by other PRPs. The scope of this protection is limited to matters involved in the settlement. In addition, under section 113(f)(3)(B), a party who has

65. See id. (setting forth full text of section 107(a)(4)(A)).
66. See id. (giving full text of section 107(a)(4)(B)).
67. For a discussion of pre-SARA legislation, see supra notes 61-62 and accompanying text.
68. See Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994) (discussing SARA amendments and creation of section 113).
69. See id. (noting express right to contribution in section 113). The text of section 113(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 of this title or under section 9607(a) 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 action under section 9606 of this title or section 9607 of this title.


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.

Id.
settled with the government “may seek contribution from any person who is not party to the settlement.”72 Thus, section 113(f)(2) shields a settling PRP from being subject to additional suits for contribution and section 113(f)(3)(B) expressly confers on this party a right to bring its own action in contribution against any non-settling PRP.73

Unfortunately, although the amendments were meant to clarify the right of PRPs to seek contribution under the CERCLA provisions, the amendments have created more questions than they have answered.74 With section 113(f)(1) now expressly authorizing a right to contribution, courts have struggled to decipher whether the previously implied right of section 107 still exists.75 This question is even more troubling in light of the last line of section 113(f)(1), known as the “savings clause,” which states: “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.”76 Courts addressing the issue have reached widely differing conclusions as to the relationship of sections 107 and 113 and as to what, if any, implied right exists in section 107 post-SARA.77

B. Supreme Court Precedent on Implied Rights to Contribution: Northwest Airlines and Texas Industries

The Supreme Court addressed the issue of implied rights to contribution in Northwest Airlines, Inc. v. Transport Workers Union

(B) 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 may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

Id. 72. See id. (defining affirmative contribution rights).
74. See Glanvill, supra note 56, at 155 (noting uncertainty in available remedies due to lack of congressional guidance in SARA).
76. For a discussion of section 113(f)(1)’s savings clause, see supra note 69 and accompanying text. See also Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 686-88 (2002) (discussing relationship between first and last line of section 113(f)).
77. See Glanvill, supra note 56, at 160-61 (noting that after SARA, some courts have allowed PRPs to sue under section 107, while others have required claims under section 113).
(Northwest Airlines). In Northwest Airlines, the Court considered whether an employer had either a common law or a statutory right to seek contribution from trade unions under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964. Northwest Airlines sued the unions for contribution after the United States District Court for the District of Columbia found Northwest Airlines liable for millions of dollars in back wages after female employees sued the employer for violations that the airline alleged the unions had caused it to commit. In addressing whether a statute impliedly authorizes a cause of action, the Court identified congressional intent as the most important and most consequential factor for courts to consider. The Court went on to identify "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies" as additional factors for courts to consider when determining the existence of implied rights. The Court further noted that these factors weighed particularly strong in favor of implied rights in cases where the statute was intended to benefit persons of the class to which the moving party belonged. Because nothing in the language, legislative history or express purposes of the Equal Pay Act or Title VII indicated that Congress intended to imply a right of contribution, however, the Court declined to imply the right under those statutory schemes.

Similarly, in Texas Industries, Inc. v. Radcliff Materials, Inc. (Texas Industries), the Supreme Court again considered its ability to fashion implied rights of contribution, this time under the Sherman and Clayton Acts. In Texas Industries, the petitioner sued respondents for contribution after the United States District Court for the Eastern District of Louisiana adjudicated petitioner liable to a third party.

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79. See id. at 79 (indicating legal issue to be resolved).
80. See id. at 80-82 (discussing facts of case).
81. See id. at 91 (finding congressional intent as "ultimate question" in implied rights cases).
82. See id. (listing additional determinative factors).
83. See Nw. Airlines, 451 U.S. at 91-92 (stating rights may be read into statutes when intended beneficiary of statutory provisions are persons such as moving party).
84. See id. at 98 (finding no congressional intent to imply right of contribution under statutes in question).
86. See id. at 630-32 (examining existence of implied right under antitrust acts).
party for conspiring to drive up prices in the concrete business in violation of the acts.\textsuperscript{87} The Court, analyzing the question in accordance with the factors identified in \textit{Northwest Airlines}, held that because nothing in the language or legislative histories of either statute indicated any congressional intent to include a right of contribution, and because the statute was enacted to directly regulate not benefit the class of people in which petitioner was a member, the Court had no authority to fashion a statutory or common law right to contribution under either act.\textsuperscript{88}

C. Implied Rights to Contribution Post-SARA: \textit{Key Tronic} and \textit{Cooper}

In \textit{Key Tronic Corp. v. United States} (\textit{Key Tronic}),\textsuperscript{89} the Supreme Court considered whether attorneys' fees could be recovered as "necessary costs of response" under section 107(a)(4)(B).\textsuperscript{90} Key Tronic and several other parties, including the United States Air Force, were involved in several lawsuits after the EPA determined that the parties were responsible for contaminating a water supply in the State of Washington.\textsuperscript{91} Key Tronic initiated a cost recovery action under section 107(a)(4)(B) seeking the recovery of 1.2 million dollars in costs, including \textit{inter alia}, attorneys' fees incurred in finding other PRPS, settling with the EPA and prosecuting its cost recovery claim.\textsuperscript{92} After noting the rule against the recovery of attorneys' fees in the absence of congressional intent, the Court looked for evidence of the requisite congressional intent in the legislative histories of sections 107 and 113.\textsuperscript{93}

The Court noted in dicta that Congress amended the CERCLA provisions to enact section 113(f), which makes specific reference to section 107(a), and further amended section 107(a) to specifically reference section 113.\textsuperscript{94} "Thus the statute now expressly authorizes a cause of action for contribution in [section] 113 and

\textsuperscript{87} See \textit{id.} at 632-34 (discussing factual background).

\textsuperscript{88} See \textit{id.} at 639-40 (analyzing issue in terms of congressional intent, legislative history and intended beneficiary of statute and determining no implied right exists in Sherman Act or Clayton Act).

\textsuperscript{89} 511 U.S. 809 (1994).

\textsuperscript{90} See \textit{id.} at 811 (identifying legal issue).

\textsuperscript{91} See \textit{id.} (discussing facts of case).

\textsuperscript{92} See \textit{id.} at 812 (discussing claim leading to present litigation).

\textsuperscript{93} See \textit{id.} at 815 (deciding whether implied right to contribution was intended in section 107 based upon legislative history of section 113 and SARA amendments).

\textsuperscript{94} See \textit{Key Tronic}, 511 U.S. at 816 (discussing relationship of sections 107/113 post-SARA).
impliedly authorizes a similar and somewhat overlapping remedy in [section] 107. Therefore, the Court determined that the two statutes work together to provide the right of contribution under CERCLA. Nevertheless, the Court rejected Key Tronic's cost recovery claim with regard to attorneys' fees because (1) section 107(a) only impliedly authorized contribution, as Congress did not include express provisions relating to the recovery of attorneys' fees in either section 107 or section 113 although it did so in other SARA provisions and (2) the recovery of attorneys' fees of this kind would extend section 107 beyond its plain meaning.

Since Key Tronic, the only word from the Supreme Court regarding the operation of sections 107 and 113 in light of SARA came in the Court's Cooper decision. The central issue in Cooper was whether Aviall could assert a contribution claim under section 113(f)(1) without first being subject to a civil action. In deciding this question, the Court looked to the plain language of section 113(f)(1) and determined that "may," as used in the statute, should be read as demanding the existence of a civil action as a prerequisite to a claim for contribution. Thus, Aviall's suit was foreclosed due to the fact that it had not been subject to the requisite civil action.

The Court declined to decide whether Aviall could assert a cost recovery claim under section 107, stating: "we are not prepared . . . to resolve the [section] 107 question solely on the basis of dictum in Key Tronic." The Court noted that the main question presented in Key Tronic was whether attorneys' fees constituted "necessary costs of response" under section 107(a)(4)(B). The Key Tronic Court did not consider the effect that a party's status as a PRP would have on its ability to bring claims under section 107, nor

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95. See id. (characterizing dual relationship of sections 107 and 113).
96. See id. (noting intersection of provisions to provide contribution remedy).
97. See id. at 818-21 (identifying three reasons for rejecting implied right to contribution with regard to attorneys' fees).
99. See id. at 160-61 (identifying issue presented).
100. See id. at 166-68 (interpreting statutory language of section 113(f) as specifically requiring prior civil action).
101. See id. at 168 (reading statutory language of section 113(f) as barring contribution claims in absence of civil action).
102. See id. at 170 (refusing to reach section 107 cost recovery issue).
103. See Cooper, 543 U.S. at 170 (distinguishing Key Tronic as addressing different issue).
the effect PRP status would have on the interrelationship of sections 107 and 113.\textsuperscript{104}

The \textit{Cooper} Court similarly declined to decide whether Aviall had an implied right to seek contribution under section 107.\textsuperscript{105} The Court seemed somewhat resistant to the implication of such a right, noting that it had previously addressed the issue of implied rights in \textit{Texas Industries} and \textit{Northwest Airlines}, where the Court rejected the implied right in both instances, and that section 113 expressly provides for the contribution rights offered under the CERCLA statute.\textsuperscript{106} The Court, nevertheless, took pains to stress that its holding was limited to the section 113 question.\textsuperscript{107}

IV. \textbf{Narrative Analysis}

The question before the United States District Court for the Northern District of Texas in \textit{Aviall} was whether a PRP has a valid claim for either cost recovery or contribution against another PRP under CERCLA section 107(a).\textsuperscript{108} In starting its analysis, the court addressed the parties' arguments as to the meaning of "any other person" in section 107(a)(4)(B).\textsuperscript{109} The court first looked to other sections of CERCLA, focusing particularly on the language of sections 113(f)(2) and 113(f)(3)(b).\textsuperscript{110}

A. Cost Recovery Claim

In rejecting Aviall's argument that "any other person" in section 107(a)(4)(B) included PRPs and thereby authorized PRPs to bring cost recovery actions under this section, the court determined that allowing PRPs to bring cost recovery actions under section 107(a) would nullify the intended goals of sections 113(f)(2) and

\begin{itemize}
  \item \textsuperscript{104} See id. (characterizing \textit{Key Tronic}'s section 107 analysis as dicta).
  \item \textsuperscript{105} See id. at 170-71 (declining to decide whether section 107 impliedly authorizes contribution remedy after SARA).
  \item \textsuperscript{106} See id. (suggesting right may not exist in light of prior precedent and enactment of section 113).
  \item \textsuperscript{107} See id. at 171 (holding only that section 113 does not authorize contribution in absence of civil action and leaving all remaining issues for district court's determination).
  \item \textsuperscript{109} See id. at **6-7 (stating statutory analysis should begin with examination of plain language).
  \item \textsuperscript{110} See id. at *6 (interpreting section 107 in light of all CERCLA provisions, particularly section 113).
\end{itemize}
The court noted that section 113(a) speaks only to contribution and provides no protection for actions in cost recovery.\textsuperscript{111} Thus, if the court were to allow PRPs to sue for cost recovery under section 107(a), PRPs could circumvent the protection offered by section 113(a) by suing a settling party for cost recovery under section 107(a).\textsuperscript{113} As the purpose behind section 113(f)(2) was to encourage settlement with the government in exchange for protection against further contribution suits, Aviall's interpretation rendered section 113(a) inoperable.\textsuperscript{114} As courts are urged to "construe a statute to give every word some operative effect," Congress could not have intended "any other person" to include PRPs because such an interpretation would render section 113(a) functionally useless.\textsuperscript{115}

The court found support for its interpretation of section 107(a)(4)(B) in the holdings of numerous circuit court cases that came down pre-Cooper, finding that PRPs had no cause of action in either cost recovery or contribution under section 107(a).\textsuperscript{116} The court noted that these cases were somewhat factually distinguishable from Aviall by stating that, in the overwhelming majority of cases, the moving party had been subject to a civil action, and therefore, would have had a valid claim for contribution under section 113(f)(1).\textsuperscript{117} Nevertheless, the court determined that these cases represented a consensus among circuit courts that PRPs have no cause of action under section 107(a) and that an action between

\textsuperscript{111} See id. at *7 (barring cost recovery under section 107 on grounds that section 107 action would subject parties who have settled with government to further suit).

\textsuperscript{112} See id. (noting section 113 makes no mention of cost recovery). For a discussion of section 113(f)(2)'s settlement protections, see supra note 70 and accompanying text.

\textsuperscript{113} See Aviall, 2006 WL 2263305, at *7 (characterizing contribution protection of section 113(f)(2) as meaningless if PRPs are still subject to cost recovery claims).

\textsuperscript{114} See id. (stating rules of statutory construction caution against reading one provision to nullify another).

\textsuperscript{115} See id. (rejecting Aviall's argument as violating "cardinal principle of statutory construction").

\textsuperscript{116} See id. (citing Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 352 n.11 (6th Cir. 1998)) (interpreting findings of lower courts as advising against section 107 cost recovery actions).

\textsuperscript{117} See id. (noting plaintiffs in lower court cases had additional relief available). See also Aronovsky, supra note 6, at 50 (highlighting underlying rationale of pre-Cooper courts in disallowing section 107 cost recovery claim was that such actions were unnecessary due to availability of relief under section 113). In light of Cooper, Aronovsky suggested that courts should rethink the decision to exclude PRPs from cost recovery under section 107(a)(4)(B) and allow this cause of action. See id. at 84.
two PRPs is necessarily one for contribution under section 113(f)(1). As Aviall admitted its status as a PRP, the company’s only avenue for recovery was a suit for contribution under section 113(f)(1).

B. Implied Contribution Claim

The court next considered whether Aviall, as a PRP, had an implied right to seek contribution under section 107(a)(4)(B). In rejecting Aviall’s claim to an implied right of contribution, the court relied heavily on the Supreme Court’s decision in Cooper. In Cooper, the Court acknowledged that in the absence of a CERCLA provision expressly providing for such a remedy, a number of lower courts had recognized an implied right to contribution under section 107(a) prior to the SARA amendments. Nonetheless, the Court called these lower court decisions into question, stating that the “conclusion was datable” given its decisions in Texas Industries and Northwest Airlines, where the Court refused to recognize implied rights of contribution.

Although the Cooper Court did not explicitly address the issue, the district court determined that the Court had voiced “disapproval” of an implied right of contribution in its opinion. In Cooper, the Court stated that it had previously addressed the issue of implied rights to contribution and “also note[d] that in enacting [section] 113(f)(1), Congress explicitly recognized a particular set (claims ‘during or following’ the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law.” Based on this language, the district court determined that the Supreme Court discouraged the fashioning of implied rights and rejected Aviall’s argument that sec-

118. See Aviall, 2006 WL 2263305, at *7 (reading PRPs out of section 107’s statutory language).
119. See id. at *8 (restricting PRPs to contribution).
120. See id. at *9 (addressing contribution claim).
121. See id. (referencing Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 162 (2004)) (noting Supreme Court addressed issue of implied rights previously in Texas Industries and Northwest Airlines).
122. See id. (discussing lower court holdings pre-SARA). See also Glanvill, supra note 56, at 160-61 (collecting cases and noting state of CERCLA litigation pre-SARA).
123. See Aviall, 2006 WL 2263305, at *9 (referencing Cooper decision’s hesitation to fashion implied rights after Texas Industries and Northwest Airlines).
124. See id. (observing Cooper decision seemed to “disapprove” of an implied right to contribution).
125. See id. (characterizing Cooper as suspicious of implied rights).
tion 107(a) should be read as conferring an implied right of contribution on PRPs.126

V. CRITICAL ANALYSIS

A. Cost Recovery under Section 107

In deciding whether a PRP may bring an action for cost recovery under section 107, the court placed too much emphasis on the plain meaning of sections 107 and 113 at the expense of a more equitable result.127 The court itself stated that "the plain meaning of legislation should be conclusive, except in 'rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of the drafters.'"128 Nevertheless, the court went on to follow what it determined to be the plain meaning of the statute under precisely these same circumstances.129 In deciding the plain meaning of "any other person" in section 107(a)(4)(B), the court determined that "any other person" could not include PRPs because such an interpretation would render the contribution protection of section 113(f)(2) ineffective.130 Essentially, if PRPs could sue other PRPs for cost recovery under section 107, then section 113(f)(2) offered no real protection.131

Although the court's rationale is an increasingly common argument that has gained some force,132 the fact that including PRPs in the meaning of "any other person" could potentially impinge on

126. See id. at *10 (declining to extend to PRPs an implied right to contribution under section 107(a)). As Aviall's federal CERCLA claims were the basis of the court's jurisdiction, once dismissed, Aviall's only option was to pursue action under state law. See id.

127. See id. at **5-9 (adhering to plain meaning of section 107 despite consequences for PRPs).


129. See id. at *8 (acknowledging its plain meaning analysis leaves certain class of PRPs with no remedy).

130. See id. at *7 (rejecting Aviall's argument that language of section 107(a)(4)(B) includes PRPs). The court found that because section 113(f)(2) protects parties who have settled with the government from being subject to further contribution suits, allowing PRPs to sue a settling PRP under section 107 would essentially serve as a way to sidestep the intended protections of section 113(f)(2). See id.

131. See id. (noting purpose of section 113(f)(3)(B) was to save settling PRPs from any additional lawsuits). If PRPs were allowed to circumvent this purpose by simply suing for cost recovery instead of contribution, this protection would be rendered meaningless. See id.

132. See Glanvill, supra note 56, at 164-65 (noting courts usually do not allow PRPs to seek contribution under section 107 based on rationale that it undermines section 113(f)(2)).
the contribution protection offered by section 113(f)(2) is not enough on its own to foreclose all PRPs from actions in cost recovery under section 107.133 Section 113(f)(2) protects settling PRPs from becoming targets of further contribution suits bought by other PRPs,134 however, the provision does not and was not intended to offer settling PRPs blanket protection from all suits whatsoever; in fact, under section 113(f)(2), a settling PRP is restricted to protection only from suits involving the “subject matter covered in the settlement.”135 As a settling PRP is still open to a host of other suits, including any matter not pertaining to the settlement and claims under state laws, it seems logical that a settling PRP would also remain liable for other suits, such as cost recovery claims, that are brought pursuant to federal statutes and CERCLA itself as long as these suits were not related to the previous settlement.136

The court’s interpretation, however, expands section 113(f)(2) to protect settling PRPs not only from contribution suits but also from cost recovery actions.137 The court itself stated in its discussion of implied rights: “It is a ‘frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy . . . courts should not expand the coverage of the statute to subsume other remedies.’”138 Despite this assertion, nothing in the plain language of section 113(f)(2) suggests that the provision is meant to shield settling PRPs from any action other

133. See id. (recognizing specific limitations on contribution protection of section 113(f)(2)).
134. See 42 U.S.C. § 9613(f)(2) (2006) (limiting contribution protection to issues involved in settlement). See also Glanvill, supra note 56, at 164-65 (noting main issue in contribution protection cases is whether issue in suit was issue in settlement).
135. See Glanvill, supra note 56, at 164-65 (stating protection under section 113(f)(2) extends only to issues involved in settlement). A PRP is still free to sue on any issue that was not part of the settlement, including any claims arising under state laws. See id.
136. See id. (describing situations where settling PRP would be subject to liability in cost recovery or suits based on other claims).
137. See Aviall Servs., Inc. v. Cooper Indus., LLC, No. 3:97-CV-1926-D, 2006 WL 2263305, at *7 (N.D. Tex. Aug. 8, 2006) (withholding right of PRPs to seek cost recovery under section 107 because allowance of section 107 claim would undermine contribution protection of section 113(f)(2)). Thus, the court afforded PRPs additional protection against actions in cost recovery despite the literal language of section 113(f)(2), which speaks only to “claims for contribution.” See id.
138. See id. at *9 (citing Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 94 n.30 (1981)) (asserting courts should refrain from expanding statutory remedies beyond those provided by statute).
than one for contribution concerning the “subject matter covered in the settlement.”

Although the purpose of section 113(f)(2) is to encourage PRPs to settle with the government in exchange for contribution protection, the protections of section 113(f)(2) extend to contribution only; section 113(f)(2) offers no protections beyond that. Thus, nothing in the language of section 113 suggests that PRPs are not, under section 107(a)(4)(B), eligible to recoup “any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .”

In addition, although the court correctly noted that allowing PRPs to bring actions for cost recovery would induce PRPs to simply sue under section 107 instead of under section 113 to circumvent the contribution protection of section 113(f)(2), such a result is plainly warranted by the plain language of section 107(a)(4)(B); this result would be both more equitable and more in line with the underlying goals of CERCLA than completely foreclosing PRPs from all actions under section 107. Even if PRPs circumvented section 113(f)(2) by suing for cost recovery under section 107, the defendant PRP still has the ability under section 113(f)(3)(B) to seek contribution from the plaintiff PRP to regain any cost incurred beyond its proportionate liability. Thus, the PRP who actually incurred the response costs of cleaning up the site would be able to recoup its costs from the defendant, who although having settled, was still partially responsible for the contamination, and the defen-

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139. See 42 U.S.C. § 9613(f)(2) (establishing contribution protection for settling PRPs from further contribution suits).

140. For a discussion of settlement protections under section 113(f)(2), see supra notes 132-39 and accompanying text.

141. See 42 U.S.C. § 9607(a)(4)(B) (2006) (defining recoverable costs under CERCLA provisions). See also Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., 891 F. Supp. 221, 225 (E.D. Pa. 1995) (noting plain language of sections 107 and 113 did not foreclose cost recovery under section 107); Aronovsky, supra note 6, at 82-83 (highlighting that courts pick and choose when to argue plain language). Aronovsky noted that courts adhere to a rigid plain language argument when interpreting provisions of section 113 but then ignore the plain language of section 107(a)(4)(B) to advance policy considerations of section 113. See Aronovsky, supra note 6, at 82-83. “The courts should similarly recognize that the plain language of section 107(a)(4)(B) allows cost recovery by ‘any other person,’ not ‘any other innocent, non-liable and non-culpable person,’ whether or not the courts view such rights of action as sound public policy.” Id. at 83.

142. See Bethlehem, 891 F. Supp. at 225 (allowing section 107 claims encourages voluntary cleanup).

143. See Glanvill, supra note 56, at 161 (referencing United States v. Kramer, 757 F. Supp. 397, 416 (D.N.J. 1991)) (acknowledging that even though courts would be allowing PRPs to sue for full cost recovery under section 107, defendants have specific right to countersue for contribution).
dant PRP may then counterclaim in contribution to recollect any money that it paid out beyond its liability. Under this scenario, both responsible parties pay their fair share for their part in the contamination. Alternatively, under the court’s interpretation, the non-settling plaintiff PRP is stuck with the entire cost of cleanup while the settling defendant PRP essentially gets off scot-free. Although such an interpretation would render section 113(f) superfluous, it produces a more equitable result than the court’s interpretation and is authorized by the plain language of section 107(a)(4)(B).

Realizing the practical insufficiency of its holding, the court stated: “If this interpretation of CERCLA leaves a remedial gap that Congress thinks it wise to fill, it can do so by amending CERCLA.” Thus, the court failed to take into account its own role in this matter and simply passed off the issue as more or less not its problem. Even though it is entirely clear that it is the job of the legislature, not the courts, to amend statutes, is it not the courts’ job to promote justice and equality where it is able? The court here had the chance to do so, but instead pushed the job off on Congress, noting that the court “undoubtedly will not have the final word on this question . . . .” Unfortunately, at this point, this is all a PRP can hope for.

144. See id. at 168 (citing Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 748-49 (7th Cir. 1993)) (noting defendant always has section 113 contribution remedy to regain costs beyond scope of liability).

145. See Aronovsky, supra note 6, at 85-86 (arguing that PRPs should not be allowed to assert cost recovery claim because nothing in section 107(a) demands joint and several liability). “The courts, therefore, are free to fashion a form of liability in section 107(a)(4)(B) cases that reflects the underlying circumstances of the dispute . . . a liable plaintiff should be limited to a contribution-like claim imposing several liability.” Id. at 85.


147. See Aronovsky, supra note 6, at 81-82 (stating plain language of section 107 authorizes cost recovery claims and would allow for more equitable distribution of costs).


149. See id. (stating that responsibility lies with Congress to deal with problems relative to its refusal to allow PRPs to bring action for cost recovery under 107).

150. See id. (noting Congress could amend statute to create different result).

151. See id. (deciding issue and leaving remaining interpretation problems to Congress).

152. See Aronovsky, supra note 6, at 81-82 (questioning rationale of courts after Cooper and suggesting new approach for more equitable result).
B. Implied Rights of Contribution under Section 107

In rejecting Aviall's argument that section 107 impliedly authorizes a right of contribution, the court first looked to the Supreme Court's Cooper decision, which the United States District Court read to "suggest disapproval of such an argument," and then proceeded to examine other cases that refused to recognize implied rights; however, a closer analysis of the issue would have revealed the longstanding, prevalent nature of implied rights in both Supreme Court and lower court cases.\(^{153}\) Although the Supreme Court in Cooper seemed hesitant to imply a federal right of contribution based upon its prior holdings in Northwest Airlines and Texas Industries, both of those cases recognized that courts have the authority to imply a right of contribution when, as in Aviall, the legislative history of the statute supports the conclusion that Congress intended such a right to exist.\(^{154}\) In both Northwest Airlines and Texas Industries, the Court refused to implying a right of contribution because there was nothing in the legislative histories of the statutes in question to suggest that Congress intended such a right.\(^{155}\) The Court stated in Texas Industries: "[c]ongressional intent may be discerned by looking to the legislative history and other factors: e.g., the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief."\(^{156}\)

Thus, in both cases, the Supreme Court not only specifically recognized that the right of contribution may be implied, but the Court explained the factors that should be considered when implying such a right, identifying congressional intent and legislative history as two imperative factors that must be considered when deciding whether a statute impliedly authorizes a right of contribution.\(^{157}\) Noticeably, in neither case did the Court demonstrate an unwillingness to imply a right of contribution.\(^{158}\) Rather, it was the

\(^{153}\) See, e.g., Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1990) (citing Walls v. Waste Res. Corp., 761 F.2d. 511 (6th Cir. 1985)) (arguing for private right of action). The judge stated: "District Court decisions 'have been virtually unanimous' in holding that [section 107(a)(4)(B)] creates a private right of action . . . for the recovery of necessary response costs." Walls, 761 F.2d. at 318.

\(^{154}\) For a discussion of requisite factors in implication of rights, see supra notes 81-87 and accompanying text.

\(^{155}\) For a discussion of requisite factors in implication of rights, see supra notes 81-87 and accompanying text.


\(^{157}\) For a discussion of factors considered in implying right of contribution, see supra notes 81-87 and accompanying text.

\(^{158}\) For a discussion of Supreme Court precedent on implied rights to contribution, see supra notes 81-87 and accompanying text.
circumstances of the cases before it that led the Court to decline to imply the right under those circumstances. The Court explained, however, that if the legislative histories of the statutes at issue had given some indication that Congress intended those statutes to embody a right of contribution, then the Court would have read the right into the statutes. Consequently, where, as here, the legislative history of section 113(f)(1) clearly demonstrates congressional intent to imply a right of contribution under section 107(a)(4)(B), the right may be implied under the Supreme Court’s precedent in Texas Industries and Northwest Airlines. Yet, without taking a closer look at the available precedent, the district court dismissed Aviall’s implied rights claim based only on its determination that the Cooper Court had expressed disapproval of implied rights.

The court found further support for its rejection of an implied right to contribution under section 107 in the fact that section 113 expressly confers a right of contribution post-SARA. Nevertheless, the court failed to address the argument of Key Tronic, which provided that section 113 does not displace, but rather complements, the right of contribution previously implied in section 107. Looking to the legislative history behind the enactment of section 113, the Key Tronic Court determined that it was Congress’s intent in enacting section 113(f)(1) to codify the right of contribution that had impliedly existed previously in section 107.

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159. See Texas Indus., 451 U.S. at 639-40 (analyzing Sherman Act and Clayton Act and finding no congressional intent to include contribution remedy); Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 94 (1981) (holding no congressional intent to include contribution remedy in Equal Pay Act or Title VII). “[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.” Id.

160. See Nw. Airlines, 451 U.S. at 77 (noting Court will recognize implied remedies when consistent with statute’s legislative intent).


163. See id. at **9-10 (construing Congress’s enactment of section 113 as replacing any previously implied rights existing before section 113’s enactment).

164. For a discussion of the relation between sections 107 and 113, see supra notes 93-96 and accompanying text.
The effect of the SARA amendments on the implied right of contribution under section 107 was that post-SARA, section 107(a) and section 113(f)(1) specifically referenced each other, and the two provisions somewhat meshed together with both sections authorizing the right to contribution. Thus, the Court adopted the position that section 113 created an express right of contribution with an implied right of contribution existing in section 107.

Under Key Tronic, Aviall had a valid claim for contribution under section 107(a)(4)(B) because the statute continues impliedly to authorize such claims, even after the SARA amendments. Although the court was certainly free to disagree with the analysis in Key Tronic, as the question of whether section 113 replaces or only reinforces the previously implied right of section 107 has been frequently debated and has never been resolved one way or the other; the court failed to address the argument at all, relying too heavily on dicta in Cooper, which possibly could be read as casting a negative light on implied rights, and specifically declined to decide whether any implied right to contribution remains under section 107 after the enactment of section 113.

VI. IMPACT

The Aviall decision is a true hurdle for PRPs conducting voluntary cleanups. With no remedy under the CERCLA provisions following Aviall, gone is any motivation for PRPs to voluntarily clean up waste sites. With no federal remedy, PRPs will be forced to pursue recovery under state law remedies, which may prove com-

165. See Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994) (noting how section 113 complements, but does not replace section 107).

166. See id. (noting intersection of sections 107 and 113 to confer right of contribution).

167. See id. (determining implied right to contribution in section 107 survived passage of SARA).

168. For a discussion of implied right to contribution post-SARA, see supra notes 93-96 and accompanying text.


170. See Campbell, supra note 6, at 222 (discussing limited incentive for proactive cleanup in absence of recovery method).

171. See id. (noting lack of inducement to conduct voluntary cleanup with no compensatory remedy).
pletely inapplicable or wholly inadequate.\textsuperscript{172} In this way, \textit{Aviall} undermines the very goals of CERCLA itself and leaves PRPs conducting voluntary cleanups facing a whirlwind of undesirable consequences.\textsuperscript{173}

A. Foreclosure of Compensatory Remedies Under CERCLA

The court’s decision leaves a PRP who cooperates with the government and voluntarily cleans up a hazardous waste site with absolutely no statutory remedy under CERCLA through which to recoup costs.\textsuperscript{174} After \textit{Cooper}, a PRP who undertakes cleanup voluntarily and not “during or following a civil action under 106 or 107” is not entitled to contribution under section 113.\textsuperscript{175} After the court’s decision here, however, a PRP who conducts a voluntary cleanup is similarly not entitled to an action in cost recovery or contribution under section 107.\textsuperscript{176} Thus, a PRP who cooperates with the EPA and cleans up voluntarily is left, after the court’s decision, with absolutely no remedy through which to recoup cleanup costs.\textsuperscript{177}

B. Frustration of CERCLA’s Statutory Goals

\textit{Aviall} seriously undermines the statutory goals of CERCLA. As previously noted, some of the most basic goals underlying CERCLA are to (1) encourage the quick and voluntary cleanup of contaminated sites; (2) encourage settlements hastening response time for clean up and (3) hold responsible parties fiscally liable for the cost of cleanup.\textsuperscript{178} After \textit{Aviall}, a PRP who wished to cooperate with the government and clean up sites voluntarily, after realizing it would

\textsuperscript{172} See id. (explaining unavailability of CERCLA remedy forces PRPs to seek compensation under state laws, which are frequently unsatisfactory and require higher standards, making initiation of suits more cumbersome).


\textsuperscript{174} See \textit{Aviall}, 2006 WL 2263305, at *10 (refusing to recognize right of PRP in cost recovery or contribution under section 107). See also Aronovsky, \textit{supra} note 6, at 50-53 (discussing lack of available remedies after Cooper and possibility of continued deterioration of PRP remedies in court of appeals).

\textsuperscript{175} See \textit{Cooper Indus., Inc. v. Aviall Servs., Inc.}, 543 U.S. 157, 162 (2004) (holding no contribution action under section 113(f)(1) in absence of civil action).

\textsuperscript{176} See \textit{Aviall}, 2006 WL 2263305, at *10 (holding no PRP right to contribution or cost recovery under section 107).

\textsuperscript{177} See Aronovsky, \textit{supra} note 6, at 50-53 (predicting post-Cooper, no CERCLA remedy available following voluntary cleanup).

\textsuperscript{178} See Faulk & Bishop, \textit{supra} note 173, at 324-26 (reiterating goal of CERCLA to induce prompt cleanup to place burden on responsible party).
have no remedy for recovering costs, no longer has any incentive at all to be cooperative and take voluntary remedial action.\textsuperscript{179}

In fact, the PRP would be far better off sitting back and ignoring any orders coming its way.\textsuperscript{180} The longer the PRP refuses to take remedial action, the more likely it is that the EPA or another PRP will initiate suit against it.\textsuperscript{181} Once a government agency or another PRP initiates suit, the PRP then becomes eligible to recover any cleanup costs it incurred beyond its own liability through a contribution action under section 113 because now the cleanup will have occurred "during or following a civil action under 106 or 107."\textsuperscript{182} If, however, the PRP cleaned up voluntarily without first waiting for another party to initiate suit against it, the PRP would be entitled to no relief under the CERCLA provisions and would be responsible for the entire cost of cleanup, despite the fact that other PRPs may have been or were also responsible for the contamination.\textsuperscript{183} Thus, the court's interpretation produces direct disincentives to cooperate with the EPA, discourages cleanup and fails to hold responsible parties accountable for their actions, thereby undermining the very basis of CERCLA itself.\textsuperscript{184}

C. Inadequacy of State Law Remedies

Under the various provisions of CERCLA, the government is able to sue and be sued as a PRP, just as if it was a private party

\textsuperscript{179}. See Panzer, \textit{supra} note 55, at 463-64 (discussing practical disincentive to voluntarily cleanup of contaminated sites).

\textsuperscript{180}. See Campbell, \textit{supra} note 6, at 222 (noting likelihood of PRPs to postpone action until another party files suit); Faulk & Bishop, \textit{supra} note 173, at 335-36 (exemplifying need for party to await suit, yet noting adverse consequences of ignoring governmental orders). Faulk & Bishop noted that in the context of an administrative order coming from the EPA, a party would have to ignore the order and await suit in order to be eligible to seek contribution under section 113. See Faulk & Bishop, \textit{supra} note 173, at 335-36. The EPA, however, could conduct the cleanup in the interim and then come after the PRP to recover as much as three times the cost. \textit{See id.} "In addition, the noncompliant PRP could be liable for daily penalties of $32,500 per day over the course of a cleanup that could last for years." \textit{Id.}

\textsuperscript{181}. See Faulk & Bishop, \textit{supra} note 173, at 335 (analyzing possible avenues for PRP recovery).

\textsuperscript{182}. See \textit{Cooper Indus., Inc. v. Aviall Servs., Inc.}, 543 U.S. 157, 160 (2004) (allowing contribution actions under section 113(f) "during or following a civil action").

\textsuperscript{183}. See Brief of Respondent at 27, \textit{Cooper Indus., Inc. v. Aviall Servs., Inc.}, 543 U.S. 157 (2004) (No. 02-1192) (arguing that all financial responsibility should not fall on one party when multiple parties are responsible). \textit{See also} Panzer, \textit{supra} note 55, at 481-82 (noting unlikelihood of voluntary cleanups in face of huge financial burdens).

\textsuperscript{184}. See Panzer, \textit{supra} note 55, at 481-82 (noting contradiction between recent cases and goals of CERCLA).
because under the CERCLA provisions, the government has forfeited its rights to claim sovereign immunity. This safeguard, however, is only applicable in federal courts under federal CERCLA provisions because "although CERCLA plainly waived sovereign immunity for claims brought under its provisions, it did not waive immunity for claims made against the United States under state law." Therefore, the court's decision in Aviall completely eviscerates the ability of a PRP to seek contribution from the government. The court's interpretation forces PRPs into state court in order to seek contribution. Once in state court, the government is free to assert its governmental immunity because it has not forfeited that right under state law. This of course has the effect of sheltering the government from all CERCLA liability and leaves the private PRP with absolutely no remedy. Clearly, this is an illogical result that Congress did not intend when it enacted the CERCLA provisions.

Furthermore, even a PRP suing a private PRP would encounter substantial obstacles bringing an action in state court. Several states do not offer the type of cost recovery and contribution provisions offered under the federal CERCLA statute and require more

185. See Maine v. Dept. of Navy, 973 F.2d 1007, 1010-11 (1st Cir. 1992) (discussing government's waiver of sovereign immunity in both federal and state contexts).

186. See id. (holding federal government has not waived sovereign immunity with regard to state law claims).

187. See Brief of Respondent at 30 n.18, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192) (stating that "[r]elegating contribution claims to state courts also shields from liability the largest PRP — the federal government").

188. See Aviall Servs., Inc. v. Cooper Indus., LLC, No. 3:97-CV-1926-D, 2006 WL 2263305, at *10 (N.D. Tex. Aug. 8, 2006) (N.D. Tex.) (stating "[h]aving dismissed Aviall's federal question claims on the merits, the court declines to exercise supplemental jurisdiction over its remaining state-law claims and dismisses them without prejudice").

189. For a discussion of sovereign immunity, see supra notes 185-88 and accompanying text. See also Faulk & Bishop, supra note 173, at 335 (predicting PRPs seeking costs from federal government in state court will encounter government's assertion of its sovereign immunity).

190. See Brief of Respondent at 30 n.18, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192) (noting government shielded from state law claims under sovereign immunity doctrine); Faulk & Bishop, supra note 173, at 335 (recognizing "federal action is the only option for many").

191. See Faulk & Bishop, supra note 173, at 335 (stating current state of affairs is contrary to congressional goals of CERCLA).

192. See id. at 334-35 (noting undesirability of state court actions as compared to federal court actions).
stringent burdens of proof in the remedies that are available. 193 In addition, some state statutes are preempted by federal provisions; thus, to the extent they conflict with policy considerations underlying CERCLA, these state provisions would be unavailing to PRPs, leaving them with no remedy, as is the case in the federal scheme. 194 Further, state provisions vary widely from state to state, making stability and uniformity in recovery an impossibility for PRPs. 195

The problems and inequities stemming from the Aviall court’s decision to deny PRPs a federal remedy are clear. 196 Although the lack of clarity in CERCLA and the lack of available precedent admittedly make the issue of PRP liability after Cooper a difficult one, several commentators have suggested more equitable alternatives that would give credence both to the congressional goals underlying the statute as well as to its statutory language. 197 The only hope for PRPs conducting voluntary cleanups is for courts to rethink their prior holdings in light of Cooper and Aviall and afford PRPs some remedy under CERCLA. 198

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193. See id. (noting action for contribution or cost recovery would not be possible in numerous states containing no statutory provisions for such actions). See also Aronovsky, supra note 6, at 69-70 (explaining nuisance theory of tort law has often been used to recover under state law and noting difficulties in initiating nuisance action).

194. See Brief of Respondent at 19-20, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192) (asserting petitioner’s argument failed to give meaning to CERCLA sections 302(a) and 114(a), both of which expressly provide that CERCLA was not intended to preempt state law and has lead to discord in circuit courts concerning preemption question). For a full discussion of federal preemption under CERCLA, even in the face of CERCLA provisions seemingly to the contrary, see Aronovsky, supra note 6, at 90-105.


196. See Campbell, supra note 6, at 222 (highlighting serious problems stemming from courts’ foreclosure of federal remedies).

197. See Aronovsky, supra note 6, at 81-86 (suggesting courts should read language of section 107(a)(4)(B) as including PRPs in order to allow PRPs to recover under section); Campbell, supra note 6, at 229-30 (discussing how to allow PRPs to recover under section 107(a)(4)(B)); Faulk & Bishop, supra note 173, at 336 (noting importance of language of section 107(a)(4)(B) to PRP recovery); Panzer, supra note 55, at 472-77 (commenting on other alternatives).

198. See Aronovsky, supra note 6, at 51-53 (questioning validity of lower court decisions barring PRPs from asserting claims under section 107 after Cooper and suggesting need for new approach).