Aviall v. Cooper Industries: The Emerging Controversy Behind CERCLA's Contribution Provision

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AVIALL v. COOPER INDUSTRIES: THE EMERGING CONTROVERSY BEHIND CERCLA’S CONTRIBUTION PROVISION

I. INTRODUCTION

Hazardous waste continuously infiltrates and pollutes all walks of everyday life including land. This widespread pollution has recently resulted in some 1500 sites being designated by the federal government for cleanup. The legislative intervention, however, is not cheap; the cleanup costs could well eclipse sixteen billion dollars by 2009. In light of these high figures, property owners who exhibit the voluntary initiative to clean their own land before hazardous waste accumulates deserve praise. Yet, the reality is that far more landowners wait for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to be triggered first by the Environmental Protection Agency (EPA).

CERCLA’s impact in land contamination cases is twofold: (1) EPA may step in and clean the site and then bring an administrative action against the owners for the costs incurred; or (2) order the landowner to clean the site at his own expense in a cost recovery action. Either remedy permits a landowner’s action for contribution against other parties responsible for that contamination.

2. See id. at 491 (noting that widespread federal intervention has led to increase in cumulative costs of these tasks).
3. See id. (stating that more than 380 sites are being cleaned under supervision of Environmental Protection Agency). The most notorious example of such contamination is Love Canal, New York, where 21,800 gallons of chemical waste were dumped over an eleven year span beginning in 1942 which led to citizen evacuation and the demolition of 500 homes; the disaster stirred the adoption of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See id.
5. See id. (citing pertinent sections of CERCLA and their functions to facilitate cleanup). Section 107 of CERCLA, the cost recovery action, allows for EPA’s intervention in site cleanup. Id. at 212. Section 106 allows the president to issue an order forcing parties to remedy a contamination that threatens the environment. Id. For a detailed discussion of EPA’s remedy against landowners and the relevant operating provisions of CERCLA, see infra notes 27-65 and accompanying text.
Yet, a conflict emerges if the original landowner acts out of this expected framework and attempts the aforementioned voluntary cleanup without a federal mandate. The current conflict in land contamination cases considers whether that party can bring a contribution action if the cleanup preceded a CERCLA action. The core of any current debate regarding CERCLA’s contribution provision mirrors a familiar scenario: Landowner A pollutes a property and sells to Party B; B continues to pollute and then voluntarily hires Party C to cleanup the waste; B is left with a million dollar bill and now wants contribution from A under CERCLA.

The answer to the scenario varies and presents a dilemma for a wide mass of plaintiffs: Do parties attempt to voluntarily promote prompt and effective cleanups of hazardous waste sites or simply wait until CERCLA is triggered and then sue to have a stronger contribution claim?

Section II of this Note discusses the facts of the seminal case involving this issue addressed by the Fifth Circuit Court of Appeals, *Aviall Services, Inc. v. Cooper Industries, Inc.*, where the court held that a party may commence an action for contribution regardless of a prior pending or decided CERCLA action. Section III discusses the historical background behind CERCLA’s relevant cleanup provisions, including its legislative purpose and judicial conflicts. Section IV discusses the Fifth Circuit Court of Appeals majority holding in *Aviall* and notes the dissent’s interpretation in siding with the district court’s ruling. Section V highlights the court’s choice to side with Plaintiff Aviall and discusses how the court should have effectuated the dissent’s and Cooper Industries’ argument. Finally, Section VI analyzes the potential impact of the

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7. See Horton, supra note 4, at 210-11 (considering conflict involving voluntary cleanup procedures and contribution claims).
8. See id. at 210 (establishing common scenario by which voluntary cleanups become problematic and questioning whether plaintiff can recover).
9. See id. (posing current landowners’ dilemma facing cleanup costs). Many courts have barred these actions, holding that a CERCLA action is a prerequisite while others have allowed such suits to go forward without a pending or resolved CERCLA action. *Id.* For a discussion of the circuit split on the contribution issue, see infra notes 59-67 and accompanying text.
10. See 312 F.3d 677 (5th Cir. 2002) (deciding issue of whether CERCLA action is prerequisite to contribution under § 113(f)(1)).
11. For a discussion of the *Aviall* holding, see infra notes 16-26 and accompanying text.
12. For a discussion of CERCLA, see infra notes 27-65 and accompanying text.
13. For a discussion of the court’s rationale, see infra notes 66-98.
14. For a discussion of these arguments, see infra notes 99-144 and accompanying text.
court's holding on contribution disputes among parties involved in land contamination cases.  

II. FACTS

A. The Model Case: Aviall

The most recent case addressing this current controversy behind CERCLA's contribution provision is Aviall.  

Aviall Services, Inc. (Aviall) purchased property from Cooper Industries (Cooper) in 1981. During its ownership and until the sale to Aviall, Cooper allowed numerous hazardous substances to contaminate its facility. Upon the purchase of the property, Aviall continued the pollution for three more years but later learned of the contamination and notified the appropriate state authorities. After prodding from the state, Aviall commenced a nearly decade long cleanup costing millions of dollars. The cleanup was totally voluntary as EPA never classified the property as contaminated and did not take any role in the cleanup. After completing the lengthy project, Aviall contacted Cooper seeking reimbursement for its costs but Cooper refused. Aviall subsequently sued Cooper

15. For a discussion of the policy issues linked to the Aviall decision, see infra notes 145-57 and accompanying text.

16. See Aviall, 312 F.3d at 679 (reviewing District Court's dismissal of case without prejudice).

17. See Horton, supra note 4, at 214 (noting details of transaction between parties).

18. See id. at 216 (noting company's share of pollution). Cooper Industries Inc. ran four aircraft maintenance facilities that rebuilt aircraft engines in Texas during the years the pollution occurred. Id. at 215. The hazardous substances at issue, which included petroleum, contaminated the neighboring grounds and groundwater up until the year of the sale to Aviall. Id. Aviall eventually sold all four sites to other parties during the 1990's but retained responsibility for the cleanup that was necessary. See Brief for Cooper Indus. at 3-4, Aviall Serv., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002) (No. 02-1192).

19. See Aviall, 312 F.3d at 677 (describing that Aviall sent notice to Texas Natural Resource Conservation Commission (TNRCC)). The TNRCC initially sent a letter to Aviall containing a list of required remediation activities. Id. at 679. Later letters alleged violations of state statutory regulations and included a promise of an "enforcement action" if the company failed to follow through on a previously stated remediation option. Id.


21. See Horton, supra note 4, at 216 (emphasizing that EPA never contacted Aviall or Cooper, never took remedial action or issued administrative order demanding cleanup).

22. See Brief for the United States as Amicus Curiae at 7, Aviall Serv., Inc. v. Cooper Indus., Inc., 312 F.3d at 677 (5th Cir. 2002) (No. 02-1192) (outlining that
in the District Court for the Northern District of Texas seeking contribution under CERCLA section 113(f)(1) which allows potentially responsible parties (PRPs) of contamination to seek contribution from other PRPs for cleanup costs.\textsuperscript{23}

Cooper contended that because Aviall had not yet been subjected to a civil action under a CERCLA, it was precluded from a valid contribution claim; the district court agreed with this argument in its dismissal of the claim.\textsuperscript{24} The court found a right of contribution only where a PRP has completed or is in a pending CERCLA civil action and that the provision did not allow contribution without these prerequisites.\textsuperscript{25} On appeal, the Fifth Circuit disagreed and reversed, holding that a PRP seeking a section 113 contribution suit is not required to have an ongoing or adjudged action against it in order to recover its costs.\textsuperscript{26}

\textbf{III. BACKGROUND}

Congress enacted CERCLA in 1980 in response to the environmental dangers posed by contaminated property.\textsuperscript{27} Despite Congress’ best intentions in the statute’s enactment, it remains ambiguous and tremendously litigated.\textsuperscript{28} Nonetheless, CERCLA’s

\begin{itemize}
  \item \textsuperscript{23} See 42 U.S.C. § 9613(f)(1). For terms of the statute, see \textit{infra} note 51 and accompanying text.
  \item \textsuperscript{24} See \textit{Aviall}, 312 F.3d at 679 (stressing that PRP seeking contribution from other PRPs must have pending or adjudged § 106 or § 107(a) action against it). The majority looked foremost at CERCLA’s text to state that a plain reading of § 113(f)(1) required a party seeking contribution to have filed a claim during or following a CERCLA claim against it. \textit{See} \textit{Fershee}, \textit{supra} note 20, at 1753. This was followed by a reference to \textit{BLACK’S LAW DICTIONARY} which found that the common definition of contribution requires a tortfeasor to first face judgment before it can seek contribution from other parties. \textit{Id}.
  \item \textsuperscript{25} See \textit{Fershee}, \textit{supra} note 20, at 1754 (citing lower court’s ruling). Further, the majority cited various district court decisions that supported their decision. \textit{Id}. By contrast, the dissent at the district court level undermined this contention by stating that some of the legislative history relied upon addressed CERCLA provisions never adopted into law. \textit{Id}. at 1756. Further, the dissent argued that the majority’s reliance on a “hodgepodge of other district court cases” was unfounded since none addressed the point at issue. \textit{Id}. at 1754.
  \item \textsuperscript{26} See \textit{Aviall}, 312 F.3d at 690 (stating decision in favor of Aviall disfavoring prior CERCLA action). For a discussion of the majority’s rationale in its reversal, see \textit{infra} notes 66-89 and accompanying text.
  \item \textsuperscript{27} See United States v. Bestfoods, 524 U.S. 51, 55 (1998) (stating that CERCLA responds to serious environmental and health dangers posed by property contaminated by hazardous substances).
  \item \textsuperscript{28} See \textit{Shotts}, \textit{supra} note 1, at 492 (noting that statutory text has caused much litigation and confusion as to provision’s precise understanding). Courts fre-
goals in the realm of environmental law are necessary to provide for the rapid cleanup of hazardous waste contamination and to force polluters to pay for cleanup costs of removing that waste.\textsuperscript{29} Under CERCLA, PRPs cover a broad range of entities which permits the statute to extend liability to as many people as possible involved in the generation of waste.\textsuperscript{30} To facilitate the cleanup goals, CERCLA operates under three primary schemes: a section 106 administrative order, a section 107 cost recovery action and a section 113(f)(1) contribution action.\textsuperscript{31}

A. CERCLA Liability Scheme

1. Section 106

CERCLA section 106 essentially allows the President to issue an order forcing PRPs to provide a remedy for contamination that has been released or potentially could be released in the environment.\textsuperscript{32} The section states in part that if the President determines that there may be a substantial endangerment to the public health or welfare of the environment, "[h]e may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger."\textsuperscript{33} This language authorizes EPA to compel, by means of an administrative order or a request for judicial relief, the

\textsuperscript{29} See id. (citing focus of CERCLA in environmental cases). The legislative history confirms that CERCLA has two goals: (1) to provide for swift cleanup of hazardous waste and contamination; and (2) to hold responsible parties liable for the costs of these cleanups. Id.

\textsuperscript{30} See Horton, supra note 4, at 212 (noting these PRPs include current owner of facility, owner of facility at time hazardous substance was disposed of at facility and any person who transported hazardous substance to facility). The provision's broad reach extends from those who create waste through those who dispose of it. Id.

\textsuperscript{31} See 42 U.S.C. § 9606(a) (1994) (describing administrative order); 42 U.S.C. § 9607(a) (1994) (outlining cost recovery provision); 42 U.S.C. § 9613(f)(1) (describing terms of CERCLA contribution scheme). For a further discussion of the general functions of these provisions, see supra notes 5-6 and accompanying text.

\textsuperscript{32} See 42 U.S.C. § 9606(a) (presenting terms of statute's applicability). Yet, the reality is that most of this power has been delegated to EPA which can successfully operate § 106(a). See Dico v. Diamond, 35 F.3d 348, 349 (8th Cir. 1994) (stating that while CERCLA originally granted authority to President, he has delegated it to EPA).

\textsuperscript{33} See 42 U.S.C. § 9606(a) (outlining President's role in action). The provision also allows the President, after notice to the affected State, to take other action necessary to protect the public health and welfare of the environment. Id.
responsible parties to undertake response actions which the government then monitors.\textsuperscript{94}

2. \textit{Section 107}

CERCLA section 107, known as the cost recovery provision, allows specified parties to clean toxic sites and then sue for the cost of cleanup against other parties.\textsuperscript{35} The provision authorizes the United States or other entities to seek the recovery of cleanup costs from four categories of PRPs which commonly include "owners and operators of facilities at which hazardous substances are located."\textsuperscript{36} The section states, in relevant part, that PRPs are liable for all costs of removal or remedial action incurred by the United States Government or a state and any other necessary costs of response incurred by any other person consistent with the national contingency plan.\textsuperscript{37} The majority of courts have ruled that persons who are not themselves liable may clean up contaminated property and then invoke this provision to seek reimbursement from other PRPs, but a party who falls within one of the four categories cannot rely on section 107(a) to seek full recovery from another jointly liable party.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{34} See Brief for the United States as Amicus Curiae, \textit{supra} note 22, at 3 (explaining facts and procedural steps of CERCLA's various contribution provision after 1986 amendments).
\item \textsuperscript{35} See \textit{Shotts}, \textit{supra} note 1, at 491 (emphasizing that any party bringing such a claim must prove that: (1) the site classifies as a facility; (2) the defendant is a PRP; (3) a release or threatened release has occurred; and (4) the release or threatened release has caused the plaintiff to incur response costs). \textit{Id.} at 495. The defenses to a 107(a) claim are limited to an act of God, an act of war or "an act or omission of a third party other than an employer or agent of the defendant." See \textit{42 U.S.C. § 9607(b)} (1994).
\item \textsuperscript{36} See \textit{42 U.S.C. § 9607(a)} (detailing 4 classes of persons covered). There are three other classes of PRPs, including the owner and operator of a facility and anyone who accepts any hazardous substances for transport to treatment facilities from which there is either an actual release or potential release which then causes the incurrence of response costs of a hazardous substance. \textit{Id.}
\item \textsuperscript{37} See \textit{id.} § 9607(a) (4) (underscoring PRP liability situations).
\item \textsuperscript{38} See \textit{Horton}, \textit{supra} note 4, at 217-18 (noting that courts effectually created circuit split in their attempt to reconcile § 107). A minority of federal district courts allow plaintiffs who themselves are PRPs to sue other responsible parties under 107. See \textit{Shotts}, \textit{supra} note 1, at 492 (emphasizing that most federal circuits have barred plaintiff PRPs from pursuing 107 because 113 actions allow for pro rata recovery from other PRPs). Plaintiff PRPs prefer a 107(a) cost recovery claim as the provision allows strict, joint and several liability over defendant PRPs and has a longer statute of limitations. \textit{Id.} at 498.
\end{itemize}
B. The Beginning of CERCLA’s Contribution Scheme

CERCLA originally remained silent as to a right of contribution.\(^{39}\) The first cases allowing such a remedy evolved through federal common law, most notably in *City of Philadelphia v. Stepan Chemical Co.*\(^{40}\) In that case, the city of Philadelphia sued another PRP for cleanup costs from illegal dumping in a city landfill though neither the federal nor state governments had brought a suit under CERCLA.\(^{41}\) The district court rejected the defendant’s argument that as the city was subject to liability under the statute, it could not recover cleanup costs and concluded that Philadelphia’s right to maintain the action was not barred.\(^{42}\) Subsequent cases with similar facts agreed with the court’s holding.\(^{43}\) The Supreme Court in *Key Tronic Corp. v. United States*\(^{44}\) expressly acknowledged this development of the federal common law when it held that section 107 “impliedly authorizes” a contribution cause of action.\(^{45}\)

In *Sun Co., Inc. v. Browning-Ferris, Inc., (Sun Co.),*\(^{46}\) the court addressed the statute of limitation period in voluntary cleanup cases and the contribution claims that emerge from them.\(^{47}\) The plaintiff, who had waited five years to sue, had not incurred costs

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\(^{39}\) See *Aviall Serv. Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 682 (5th Cir. 2002) (stating that as enacted, CERCLA contained no explicit provision allowing recovery via contribution). For a discussion of the evolution of CERCLA’s contribution provision, see infra notes 40-54 and accompanying text.

\(^{40}\) See 544 F. Supp. 1135, 1137 (E.D. Pa. 1982) (holding that city was not precluded from maintaining action under CERCLA).

\(^{41}\) See id. at 1139 (noting that there was no indication that city had been sued or been object of CERCLA administrative cleanup order). The city sought to recover all cleanup costs and consequential damages which resulted from the illegal dumping, claiming that they were owed recovery under 42 U.S.C. § 9607(a)(4)(B) for their “necessary costs of response.” *Id.* at 1141.

\(^{42}\) See id. at 1143 (noting that city’s action was valid under CERCLA).

\(^{43}\) See *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (concluding that even responsible party under CERCLA, who voluntarily pays CERCLA response costs, may bring action in its own behalf to collect cleanup costs against parties allegedly responsible for production of waste).

\(^{44}\) See generally 511 U.S. 809 (1994) (deciding implications of remedies under § 107).

\(^{45}\) See *Aviall Serv., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 683 (5th Cir. 2002) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994)). In *Key Tronic*, which was decided after § 113(f)(1)’s enactment, the court considered § 113 and § 107 as overlapping remedies, the former express and the latter implied. See *Key Tronic*, 511 U.S. at 809.

\(^{46}\) See 124 F.3d 1187 (10th Cir. 1997) (noting need for clarification regarding relationship between §§ 107 and 113).

\(^{47}\) See id. at 1189. The facts at issue involved an abandoned limestone quarry in Oklahoma that operated as a landfill from 1972 to 1976. *Id.* During the period, hazardous material were brought to the site and seeped into the soil and ground water. *Id.* EPA identified plaintiffs as well as other parties as PRPs who had contributed to the waste of the site leading to the action. *Id.*
pursuant to a civil action under section 106 or 107 and claimed that his three year statute of limitations in which to bring a contribution suit had not run. The Court of Appeals for the Tenth Circuit held that PRPs who incur cleanup costs pursuant to a voluntary action must bring a claim for contribution within six years and not the standard three year statutory limit that usually triggers after a formal administrative order.

C. The Passage of Section 113 Contribution Action

Congress passed section 113(f) against this judicial backdrop. The CERCLA section 113 contribution provision, which Congress added as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), explicitly addressed when a PRP may seek contribution and reads in part:

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

Congress hoped to give all PRPs the right to sue for contribution and to codify the judicially created right in prior years’ caselaw. Further, the amendment promoted equitable solutions for apportioning waste site cleanup costs by holding appropriate parties to joint and several liability. The SARA amendments further allow a federal right of contribution for those who have contributed mini-

48. See id. (noting that district court held that plaintiff’s action was not governed by triggering events of limitation period because Congress had created omission in statute as it pertained to plaintiff’s case).

49. See id. at 1192 (holding that six year statute of limitations applied to contribution claims of PRPs that incur cleanup costs in other ways such as unilateral EPA orders). For the text of the statute outlining the statute of limitations for CERCLA contribution suits, see infra note 97.

50. See Aviall, 312 F.3d at 683 (noting that Supreme Court had cast doubt on availability of contribution and § 113 created machinery to create actions for contribution).

51. See 42 U.S.C. § 9613(f)(1). See also Horton, supra note 4, at 215. Congress had a variety of agendas in passing the amendments: to encourage cost sharing among PRPs, to rectify the lower courts’ mistake of implementing contribution rights that did not depend on pre-existing EPA administrative orders and to strengthen actions for contribution. See Aviall, 312 F.3d at 683.

52. See Aviall, 312 F.3d at 684 (restating aims of CERCLA provisions).

53. See id. (noting that liability under CERCLA is strict and even joint and several in some cases) (citing H.R. Rep. No. 99-253, pt. I, at 74 (1985)).
mally to the contamination provided they agree to an approved settlement with the federal or state environmental enforcement authority.\textsuperscript{54}

D. CERCLA's Contribution Controversy

The CERCLA provisions have not been entirely flawless and have led to judicial interpretation problems, most notably with the cost recovery split tied to Congress' failure to delineate the relationship between sections 107(a) and 113(f).\textsuperscript{55} Though the cost recovery split was eventually resolved, \textit{Aviall} underscored a new emerging controversy in CERCLA: must a PRP first face an administrative order or cost recovery action before invoking 113(f)(1)?\textsuperscript{56} This new contribution split opposes the opening language of section 113(f)(1) (the enabling clause) against the final sentence (the savings clause).\textsuperscript{57} The question is whether the opening language denoting "during or following" a civil action is affected by the conclusion of the section that states the right of contribution is not undermined in the absence of a civil action.\textsuperscript{58}

Various circuit courts have added to the confusion.\textsuperscript{59} In \textit{Rumpke of Indiana v. Cummins Engine Co.},\textsuperscript{60} the Seventh Circuit stated that it appeared that the statute required a 106 or 107(a) action be underway or completed in order to seek contribution under

\begin{thebibliography}{99}
\item \textsuperscript{54} See Brief for Cooper Indus., \textit{supra} note 18, at 12 (citing scope of contribution provision). Contribution from § 113(f)(3)(B) can be sought only from other PRPs who have not settled their response costs with respect to the same site. \textit{Id.}
\item \textsuperscript{55} See Robert P. Redemann and Michael F. Smith, \textit{The Evolution of PRP Standing Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980}, 21 WM. & MARY ENVTL. L. & POL'Y REV. 300, 307 (2004) (noting that interplay between these two provisions has caused problems of courts confronting whether PRP has standing to pursue cost recovery action). This controversy has been termed the "cost recovery split." \textit{Id.}
\item \textsuperscript{56} See Horton, \textit{supra} note 4, at 222 (examining current controversy under CERCLA contribution that led to \textit{Aviall}).
\item \textsuperscript{57} See \textit{Aviall}, 312 F.3d at 687 (adding that one point of contention concerns inter-relationship of first and last sentences of § 113(f)(1)).
\item \textsuperscript{58} See \textit{id.} (citing that district court majority believed that interpreting savings clause to allow contribution suits in the absence of CERCLA actions would render enabling clause superfluous). For a discussion of the Court of Appeals decision countering this viewpoint, see \textit{infra} notes 66-89 and accompanying text. For the pertinent text of § 113(f)(1), see \textit{supra} note 51 and accompanying text.
\item \textsuperscript{59} See Fershee, \textit{supra} note 20, at 1750 (establishing that broad framework has been established for contribution splits due to several circuit holdings).
\item \textsuperscript{60} See 107 F.3d 1235, 1241 (7th Cir. 1997) (noting § 106 or 107(a) requirements when seeking contribution under 113(f)(1)).
\end{thebibliography}
113(f)(1). In *Ohm Remediation Services v. Evan Cooperage Co.*, the Fifth Circuit held that a party must be at least potentially liable under CERCLA before seeking contribution, and the court there found the contribution action appropriate because the defendant in the case was in a pending CERCLA action. The Fourth Circuit has stated that a PRP can seek contribution if it can show that it has incurred response costs. In that jurisdiction, parties have continued to bring 113(f)(1) suits despite the absence of a pending section 106 or 107 action.

IV. NARRATIVE ANALYSIS

A. The Majority Opinion

The Fifth Circuit Court of Appeals reversed the judgment of the district court and ruled in favor of Aviall. Judge Edith H. Jones, writing for the majority, began her evaluation with a focus on the plain language of the provision. While acknowledging that reasonable minds can conflict over the interpretation of section 113(f)(1), Judge Jones adopted what Aviall had argued as the most reasonable interpretation of the provision: a broader interpretation of the "during or following" language of section 113(f)(1) was ap-

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61. See Fershee, supra note 20, at 1750-51 (noting court's recognition that its holding could provide disincentive for voluntary cleanups).

62. See 116 F.3d 1574, 1575 (5th Cir. 1997) (discussing party liability and contribution action).

63. See Fershee, supra note 20, at 1751 (stating prerequisites for valid contribution action).

64. See id. (noting that courts do not examine whether PRP instituted cleanup which another entity then supervised).

65. See id. (noting that § 113(f)(1) suits have been brought without 106 or 107 action). Earlier Fifth Circuit cases have also addressed this identical issue. See Amoco Oil Co v. Borden, Inc, 889 F.2d 672, 673 (5th Cir. 1989) (holding that plaintiff who incurred response costs met § 113(f)(1) if liability was shown under state or federal standards regarding release of hazardous waste). Federal district courts have added to the conflict: some have declared a pending CERCLA claim mandatory, others have found such a claim unnecessary and a contrary view has allowed recovery if the parties were PRPs, regardless of other pending or adjudicated CERCLA actions. See Fershee, supra note 20, at 1752. When Aviall was decided by the lower court, the court stated there was no binding case law and treated the issue as a case of first impression. Id.

66. See Aviall Serv., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 678 (5th Cir. 2002) (holding 10-3 majority decision contrary to district court panel majority whose opinion generated en banc proceeding).

67. See id. (establishing that "plain" does not always equate to "indisputable;" rather, such statutory construction draws strength from enactment's history and legislation's general policies) (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990)).
The court found that Cooper's argument limited section 113(f)(1) and thereby distorted the interplay of the enabling clause and the savings clause. After proceeding with an analysis of the background behind CERCLA and tracing the origin of section 113(f), the court returned to the statutory text to complete its analysis.

The court agreed that an expansive interpretation of section 113(f)(1) suited the text more since it facilitated PRP claims without requiring pending or completed civil actions. The court found crucial the use and omission of certain words in the relevant section. Because Congress used "may bring an action for contribution" rather than the more limiting and narrow "only," it hinted to the court that contribution actions were allowed in any circumstances. The court further adopted Aviall's contention that requiring a prior civil suit is predicated on an erroneous understanding of the savings clause of section 113(f)(1). The court's remedy was to give the savings clause a broad reading and consider the enabling clause to be a statement of non-exclusive circumstances in which contribution actions applied.

The majority dismissed any contrary reading to the relationship of the enabling clause and the saving's clause of section.
113(f)(1). They noted that prior caselaw before the SARA Amendment had failed to restrict contribution actions for parties who had incurred disproportionate response costs. The court also believed that the savings clause furthered the statute's integrity. Specifically, the savings statement confirmed that federal courts were correct to enable PRPs to recover a proportionate share of their costs against other PRPs. Combined, the two clauses of the provision properly effectuated parties' claims in complex hazardous waste disputes and did not negate each other.

Though Cooper relied heavily on judicial decisions that had sided with their claim, the court found that many other appeals courts that had ruled on CERCLA supported their non-restrictive view and that any mention of a "cramped" reading of the provision was usually isolated dicta without substance. The majority relied heavily on *Sun Co.* to address the statute of limitations issue that voluntary cleanup cases involve. The court, much like the majority in *Sun Co.*, rationalized that the statute potentially allows plaintiffs to have an expanded time in which to bring their contribution claims though the plain language does not expressly authorize this. The court consequently agreed with the six year statute of

76. *See Aviall*, 312 F.3d at 687 (noting each sentence combines to provide maximum latitude to parties rather than savings clause vitiating effects of enabling clause).

77. *See id.* (noting that savings provision takes on new light in terms of this fact). Pre-SARA caselaw did not restrict common law contribution actions until during or after proceedings or civil actions against the party who had incurred disproportionate remediation and response costs. *Id.*

78. *See id.* (claiming this was not situation in which text of savings clause robs first sentence of § 113(f)(1) of its meaning).

79. *See id.* (noting that savings provision reinforced that federal courts were correct to allow PRPs to recover and that this eliminated uncertainty in case law prior to 1986 amendments regarding availability of contribution under CERCLA).

80. *See id.* (concluding that first and last sentence of section combine to afford maximum latitude in such cases).

81. *See Aviall*, 312 F.3d at 688 (arguing that given monetary exposure and volume of litigation surrounding CERCLA mandates, one must assume that lawyers have had sufficient incentive and opportunity to explore statutory meaning).

82. *See id.* at 689 (addressing Tenth Circuit's reasoning behind broad interpretation).

83. *See id.* (emphasizing PRPs who voluntarily incur cleanup costs potentially have unlimited time in which to bring their contribution claims) *(citing Sun Co., Inc. v. Browning-Ferris Inc., 124 F.3d 1187 (10th Cir. 1997)).* The court also cited that this authority permitted PRPs which had incurred costs in some other way other than a suit to classify as a covered party under § 113(f). *Id.* The court agreed that prior cases had done nothing to wreak havoc with the framework established in 113(g) governing the CERCLA limitations period. *Id.*
CERCLA's CONTRIBUTION PROVISION

limitation construct in voluntary cleanup cases in which to bring a contribution claim.84

In its conclusion, the court considered supporting policy considerations.85 The narrower view of section 113(f)(1) had adverse consequences in light of CERCLA's aforementioned stated purposes: the slowing of reallocation costs to more culpable PRPs, the discouraging of voluntary expenditures of PRP funds on cleanups, and the diminishing of incentives for responsible parties to voluntarily report contamination.86 The court was particularly troubled by the dissent's notion that the savings clause exclusively enabled an action for contribution under state law because state laws dealing with contribution varied greatly and potentially were pre-empted by CERCLA.87 Though acknowledging that these considerations did not change Congress' language, the court realized that such an overview behind the policy could aid in an understanding of the statute.88 Thus, based on the apparent understanding of the language and its function in section 113(f)(1) and other key policy and precedent, the court held that a prior section 106 or 107 action was not required for a contribution suit.89

B. The Dissenting Opinion

Judge Emilio M. Garza established his argument against the majority by citing the term "may" found in the contribution clause.90 For the dissent, the word created an exclusive cause of action and 113(f)(1) thus could not operate outside the function of a civil action.91 Further, the dissent emphasized that the phrase "during or following" served the purpose of setting a limitation that

84. See id. (agreeing that six year statute of limitations construct was consistent with policy).
85. See id. at 689-90 (stating that dissent's view would create obstacles to achieving CERCLA's purposes).
86. See Aviall, 312 F.3d at 690 (claiming dissent's limiting position operates to contravene goals and focus that CERCLA aims to facilitate and are unnecessary in light of faithful reading of § 113).
87. See id. (noting state law is inferior and questionable remedy for Congress to have embraced). The majority found problematic that not all states allow contributions before the party seeking contribution has been subjected to judgment and from those that do, the substantive and procedural rules greatly varied. See id.
88. See id. at 691 (proposing since policy considerations add to understanding of language, stronger understanding would better fulfill statutory purpose).
89. See supra notes 68-69 and accompanying text (outlining reasons for overturning district court).
90. See Aviall, 312 F.3d at 691 (Garza, J., dissenting) (noting statute's plain language).
91. See id. at 692 (Garza, J., dissenting) (stating the word "may" in enabling provision generally establishes exclusive cause of action) (citing Resolution Trust
requires an initial cost recovery action prior to any claim for contribution. In its support, the dissent found that to have the savings clause override the enabling clause would negate the elementary canon of statutory construction which aims to avoid weakening an enacting sentence. In response to the court's reliance on the savings clause, the dissent subsequently argued that the sentence exemplified Congress' attempt to preserve state law causes of action since the omission of the word "civil action" aimed to relegate proceedings in a non-federal forum.

In closing, the dissent emphasized that the comprehensive structure of section 113 supported their interpretation. Section 113(g)(3) sets forth a three year statute of limitations for a potential contribution action which begins to run only following a section 106 or 107 action. The majority interpretation required the courts to derive the limitations period to apply in a certain class of cases, an effort the dissent deemed unnecessary. These facts supported Cooper's argument that the language and statutory structure of CERCLA's contribution provision, regardless of the majority's emphasis on countervailing public policy and case prece-

Corp v. Miramon, 22 F.3d 1357, 1361 (5th Cir. 1994)). Further, the dissent cited WEBSTER'S DICTIONARY as defining "may" as "must" or "shall." Id.

92. See id. (Garza, J., dissenting) (explaining that § 113(f)(1) requires cost recovery action before contribution triggers). The dissent noted that the phrase served the dual purposes to reflect that contribution actions do not require the execution of a final judgment before they can be brought and that an initial cost recovery action commence before a claim for contribution. Id.

93. See id. at 693 (Garza, J., dissenting) (noting enacting sentence with limiting language cannot be trumped by savings clause).

94. See id. at 693 n.34 (Garza, J. dissenting) (stating that if § 113(f)(1) uses the term "civil action," it is referring to action brought in federal court while savings clause only references "action"). According to the dissent's reasoning, § 113 permits contribution actions following an administrative order only when the government files suit in federal court; this is further supported by the section's additional reference to the FEDERAL RULES OF CIVIL PROCEDURE. Id.

95. See Aviall, 312 F.3d at 694 (Garza, J., dissenting) (referring to framework of provision).

96. See 42 U.S.C. § 9613(g)(3) (outlining when period begins to run).

97. See Aviall, 312 F.3d at 695 (Garza, J., dissenting) (criticizing such attempts by courts as "herculean," noting that § 113(g)(3)(A) provides clear statute of limitation). § 113(g)(3) provides:

No action for contribution for any response costs or damages may be commenced more than 3 years after-

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relation to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613 (g)(3).
dent, supported that a pending or complete 106 or 107(a) action must occur before a PRP may seek contribution under section 113(f)(1). 98

V. CRITICAL ANALYSIS

A. The Majority's Nullification of Contribution

Though the majority gave an elaborate argument for its ruling for Aviall, the decision rests on a shaky foundation typified by the court's treatment of a fundamental term in the claim: contribution. 99 The court permitted Aviall to seek recovery from Cooper despite traditional understandings of contribution principles in tort law. 100 Consistent with the common notions of the term, section 106 and 107(a) allow contribution claims in an attempt to quantify and resolve joint liability among multiple responsible parties. 101 The Fifth Circuit, however, ignored that typically "[a] right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." 102

Many scholars had, until recently, noted that contribution is barred as long as the claim of an original plaintiff remains outstanding and that a settlement or judgment resolving that claim must exist. 103 Only recently has the Restatement of Torts changed the definition to allow a person to sue for contribution both during the

98. See Aviall, 312 F.3d at 696 (Garza, J., dissenting) (arguing that case law provided no clear guidance on interpretation of contribution provision due to various courts' differing conclusions and that clear statutory language did not deem it necessary to weigh policy considerations).

99. See Brief for Cooper Indus., supra note 18, at 26 (stating majority created "free-standing" cause of action for parties like Aviall).

100. See Brief for the United States as Amicus Curiae, supra note 22, at 10 (arguing that term's basic tenets were violated).

101. See id. (emphasizing interplay between CERCLA's remedial provisions, § 106 and § 107 and basic tenets of contribution).

102. See id. (citing Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 87-88 (1981)). Scholars have noted that the notion of contribution centers on equity. See Nicholas Wallwork, Spreading the Cost of Environmental Cleanup: Contribution Claims Under CERCLA and RCRA, SJ065 ALI-ABA 227 (2004). This means that parties must share a common liability and each must be responsible for its equitable share of that liability. Id. The means to determine this share vary from the pro tanto approach (establishing each defendant's share by dividing the total amount paid to the plaintiff by the number of defendants) or the comparative fault approach which measures fault by holding each defendant responsible for the amount of their own liability. Id.

103. See Wallwork, supra note 102, at 227(emphasizing that settlement or judgment resolving claim as prerequisite for contribution). This understanding was emphasized in the Restatements: "[a] person seeking contribution must extinguish the liability of a person against whom contribution is sought for the portion
pendency as well as after a judgment or settlement regarding liability. The essence of contribution under either definition is that one who makes voluntary payments cannot seek reimbursement.

Thus, Aviall should not have been allowed to bring a section 113(f)(1) contribution action until facing a 106 administrative order or a section 107 cost recovery action, each of which may have legally established Aviall’s joint underlying liability. As Aviall had not faced or was not facing liability in the form of a pending CERCLA action and could not be classified as a “tortfeasor,” its claims should have been dismissed. The Fifth Circuit mistakenly implanted into CERCLA a right of a PRP, neither adjudged liable nor even facing liability, to seek contribution when a party who normally discharges liability voluntarily may not have such a claim. In doing so, the court ignored that it is best for Congress to alter the law of contribution so dramatically as to fit CERCLA’s contribution scheme.

B. Legislative Intent Sides with a Plain Reading

The Fifth Circuit further concluded that the first sentence of section 113(f)(1) allows contribution actions in the absence of an ongoing or completed section 106 or 107(a) action because Con-
gress omitted the term "only."\textsuperscript{110} Yet, the court failed to discern that Congress' intentions are clear from the plain language of the statutory text that it did choose to include.\textsuperscript{111} The legislative inclusion of "may" in an enabling provision leaves no strong interpretation that a PRP may sue before a pending CERCLA action since the term prevents alternative causes of action.\textsuperscript{112} Further, section 113(f)(1)'s language is clear and exact and follows the paradigm of a permissive but limited license.\textsuperscript{113} That is, the statute grants affirmative rights of contribution only under certain prerequisites (a prior or pending section 106 and 107(a)) and not when a claimant still desires to sue but has not met those requirements.\textsuperscript{114} The "during or following" language clearly outlines the narrow limitation of the statute.\textsuperscript{115}

The legislative history corroborates this interpretation and strongly suggests that Congress intended to prevent such a liberal right of contribution.\textsuperscript{116} The pertinent Senate and House bills that ultimately became 113(f)(1) contained different contribution provisions, but each chamber targeted the goal of contribution only after a section 106 or 107(a) suit or after a CERCLA based settlement.\textsuperscript{117} When the Judiciary Committee amended a previous version of section 113, the change was outlined as affecting only those persons who settle with EPA and defendants in CERCLA actions who seek contribution from other PRPs.\textsuperscript{118} The legislative history

\textsuperscript{110} See Aviall Serv., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 686 (5th Cir. 2002) (arguing for broader interpretation of statute). For a further discussion of the court's plain language interpretation of the statute, see supra note 75 and accompanying text.

\textsuperscript{111} See id. at 691 (ignoring plain language of statute). For a further discussion of the dissent's interpretation of CERCLA's contribution provision language, see supra notes 90-92 and accompanying text.

\textsuperscript{112} See id. (indicating "may" forecloses other causes of action).

\textsuperscript{113} See Brief for the United States as Amicus Curiae, supra note 22, at 11 n.6 (equating provision to license with limited privileges). The dissent in Aviall argued CERCLA 113(f)(1) granted affirmative rights but only to a very limited extent. See Aviall, 312 F.3d at 691.

\textsuperscript{114} See Aviall, 312 F.3d at 691 (explaining basics of permissive, but limited license). The dissent argued that the provision's familiar syntax and grammar is routinely employed in this sort of license. Id. A sign stating "Visitors May Enter Through the Front Door During Normal Business Hours" affirmatively informs that a visitor may enter through the front door only during proscribed periods and may not simply enter any time the visitor wishes. Id.

\textsuperscript{115} See id. (outlining limitation created by "during or following" language).

\textsuperscript{116} See id. at 695 n.5 (referring to SARA's legislative history to support argument of limitation on contribution).

\textsuperscript{117} See Brief for the United States as Amicus Curiae, supra note 22, at 14 (relying on Senate and House bills as focusing on contribution).

\textsuperscript{118} See Aviall, 312 F.3d at 695 n.12 (referring to judiciary report).
does not mention that a contribution action may be brought in the absence of a prior or pending CERLCA action nor does it advocate such liberal suits. A subsequent House-Senate Conference Committee, which produced the final language of the bill, adopted this precise "during or following" formulation.

The court also ignored that section 113(f)(1) relies on 107(a)’s definition of liability and apportions cost among liable parties. Congress intended to create the contribution provision as a mechanism for apportioning CERCLA-defined costs and to incorporate the liabilities established in 107. In other words, section 113 is a subset of section 107 which then must mean that a contribution action should be contingent upon the commencement of a prior or pending cost recovery action.

C. The Improper Nullification of State Law

The majority holding is further problematic in that it assumes CERCLA’s goals are not met outside of federal mandates. Section 113(f)(1)’s savings clause clearly creates and facilitates state law causes of action rather than overriding the enabling clause. When Congress has meant to preserve both federal and state law causes of action, it has said so explicitly in other provisions of CER-

119. See id. (stating that legislative history of § 113(f)(1) never stated that contribution action can be brought in absence of prior or pending cost recovery action.)

120. See Brief for the United States as Amicus Curiae, supra note 22, at 15. The House bill initially provided that "[a]ny defendant alleged or held to be liable in an action under § 106 or 107" may bring a contribution action. Id. Similar to the Senate, the House Report agreed that the proposed language confirmed the right of a person to be held jointly and severally liable. See id. The House Judiciary Committee later made technical changes to the House Bill upon which the House-Senate conference formulated the final language which adopted “during or following.” Id.

121. See Aviall, 312 F.3d at 693-94 (claiming that contribution provision does not create categories of liability).

122. See id. (citing Sun Co., Inc. v. Browning-Ferris Inc., 124 F.3d 1187 (10th Cir. 1997)). For an explanation of the Sun Co. holding, see supra notes 46-49 and accompanying text. There, the court explained that § 113 incorporates the liability scheme of § 107 and apportions all CERCLA-defined costs. See id.

123. See Aviall, 312 F.3d. at 694 (arguing regulatory scheme of contribution provision hinges on those sections that preceded it, namely cost recovery action).

124. See id. at 690-91 (arguing against reliance on state remedies). Specifically, the court cited that as of 2000, six states had “contribution statutes limited to contribution between judgment debtors,” each with varying procedural rules. Id.

125. See id. at 692-93 (arguing for existing state law cause of action). The dissent acknowledged that other circuit court decisions had held that federal contribution rights preempt state law, but they did not believe those decisions conflicted with their interpretation. Id.
CERCLA's Contribution Provision

The court consequently ignored the elementary canon of statutory construction that an enacting sentence is never trumped by a savings clause in the same provision. In doing so, the majority "nullified the substantive portion of the section" to render one part (the enabling clause) inoperative.

The practical effect of underscoring the savings clause was to invalidate state law causes of action in site contamination cases, namely in negligence, nuisance, abnormally dangerous activities or trespass actions. This contravenes the general purpose of a savings clause which is to ensure that the statute in which it appears will not preempt whatever other rights of action exist to rectify the harm addressed in the legislation. As Aviall had two separate state law contribution claims against Cooper under Texas statutes, the provision should have saved those causes of action outside of the federal courts.

D. Inconsistent Case Law and Public Policy

The final critical flaw in the Fifth Circuit's holding was its insistence that case precedent and public policy together supported Aviall's contention. The reliance on case precedence is especially troubling when one considers the issue here involved one of first impression and that many district courts had reached differing conclusions on a PRP's ability to bring suit before a pending CERCLA

126. See id. at 692-93 (citing 42 U.S.C. § 9652(d) (1994)). Relevant provisions of this CERCLA section state: "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law. . . ." Id.

127. See id. (showing court erred in statutory interpretation) (citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985)).

128. See Fershee, supra note 20, at 1754 (discussing difference between majority opinion approach and district court). The district court reasoned that a "more reasonable reading" was to preserve rather than negate state law claims. Id.

129. See Horton, supra note 4, at 231 (listing state law claims). To make a negligence claim in most jurisdictions, the plaintiff must demonstrate that the defendant did not meet a reasonable standard of care; In nuisance, the claim requires proof the invasion was unreasonable; a common law action for abnormally dangerous behavior requires the balancing of various factors; trespass requires a showing the defendant acted intentionally. Id.

130. See Aviall, 312 F.3d at 693 (arguing majority's opinion simply provides example of when contribution claim might be brought). The dissent believed that if any repugnancy existed between the two clauses, it was the savings clause that should have been invalidated. Id.

131. See Brief for Cooper Indus., supra note 18, at 3 (claiming Aviall had available remedies). The state law contribution claims involved two Texas environmental statutes: the Texas Solid Waste Disposal Act and the Texas Water Code. Id.

132. See Aviall, 312 F.3d at 688, 690 (citing published cases supporting holding and policy reasons for decision).
action.\textsuperscript{133} Many other courts had simply refused to comment on the issue when presented with a similar factual scenario.\textsuperscript{134} In light of these facts, the court's insistence that there was a clear guidance on section 113(f)(1)'s interpretation is unconvincing when no circuit decision confronted Aviall's argument.\textsuperscript{135}

Further, the court relied tremendously on public policy to bolster its arguments that PRPs like Aviall require favorable contribution privileges to further environmental goals.\textsuperscript{136} The court's contention that a landowner would not effectuate a prompt cleanup of their property and culpable PRPs would avoid paying their share of cleanup costs without liberal contribution law remains questionable.\textsuperscript{137} In its decision, the court remained convinced of these fears without any strong evidence that state remedies could not mitigate these policy concerns effectively.\textsuperscript{138}

The majority's argument, however, is internally inconsistent; if policy is a deciding issue, the majority ignored that the central policy here is to enable persons liable for costs under section 106 or 107(a) to join or otherwise pursue other joint tortfeasors in an action for contribution.\textsuperscript{139} Maintaining the integrity of the spirit and purpose of the statute's language meets that goal.\textsuperscript{140} The court failed to cite convincing evidence to support that their fear in delayed clean-ups or the mis-allocation of costs to PRPs was a substantial threat or that the availability of a liberal contribution action

\begin{itemize}
  \item \textsuperscript{133} See \textit{id.} at 695-96 (stating other appellate courts have addressed related questions concerning the proper interpretation of § 113(f)(1), but none of them have specifically addressed the issue of whether § 106 or § 107 action is prerequisite to § 113(f)(1) contribution action). The district court noted prior cases indicating a § 106 or a § 107(a) action was not required for a § 113(f)(1) had distinguishable fact patterns. See Fershee, \textit{supra} note 20, at 1755. The district court also dispensed with Fifth Circuit cases that allowed CERCLA contribution suits where there had been only state agency enforcement because not one raised the issue of whether a PRP could seek such contribution without a CERCLA action against it. \textit{Id.}
  \item \textsuperscript{134} See \textit{Aviall,} 312 F.3d at 695 n.13 (listing cases permitting § 113 actions but not commenting on statute's language).
  \item \textsuperscript{135} \textit{See id.} (emphasizing lack of case precedent for subject matter of dispute).
  \item \textsuperscript{136} \textit{See id.} at 689 (arguing for removal of substantial obstacles to facilitate CERCLA's purposes). For an overview of the policy considerations the majority cited, see \textit{supra} notes 85-89 and accompanying text.
  \item \textsuperscript{137} \textit{See id.} at 690 (noting byproducts of dissent's narrow holding).
  \item \textsuperscript{138} \textit{See id.} (emphasizing lack of force for state remedies without reference to evidence to indicate such effects).
  \item \textsuperscript{139} \textit{See Brief for Cooper Indus.,} \textit{supra} note 18, at 36 (citing Cooper's contention effectuates true policy of act). Nowhere in the act did Congress tie the enactment of § 113(f)(1) to a policy favoring voluntarism. \textit{Id.}
  \item \textsuperscript{140} \textit{See id.} (stating that codification of federal right of contribution was aimed for parties to pursue jointfeasors).
\end{itemize}
CERCLA's Contribution Provision was critical to facilitating CERCLA's goals. Even in light of these policy arguments, it is clear that such considerations should not be substituted for the legislature's judgment when a provision's text and structure is unambiguous as exhibited in section 113(f)(1).

The ironic inconsistency of the court's policy argument is to undermine section 113 altogether, most notably when the court chooses to ignore the 113(g)(3) limitations period and creates its own "savings clause contribution claim" time period which Congress did not mandate. Based on the statutory text and the essential purposes behind SARA and CERCLA, Cooper's contention properly effectuates the fundamental policies behind section 113(f)(1), and their argument should have not been defeated.

VI. Impact

The en banc court's conclusion that CERCLA authorizes responsible parties to bring federal suits when they please broadly undermines CERCLA-based contribution suits and the foundation of equitable contribution. The by-product of Aviall is that federal courts faces a difficult dilemma; the courts may be compelled in future cases to order a PRP to pay "contribution" to another PRP when the joint liability they potentially owe to the federal or state government under CERCLA is not discharged. The unfortunate result is that defendants could be subject to multiple liability since a settlement in a voluntary cleanup scenario would not discharge the

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141. See Brief for the United States as Amicus Curiae, supra note 22, at 15 (arguing majority's claim lacked evidence in record). In fact, even if the court's assumption is correct, contribution under their terms still creates the prospect of creating the bad policy of double liability, a circumstance when a previous landowner is liable both to the current PRP and then again to the government in a separate action. Id. at 16.

142. See Aviall, 312 F.3d at 697 (arguing that as long as the statutory scheme is coherent and consistent, no need exists for court to inquire beyond plain language of statute) (citing United States v. Ron Pair Enters. Inc., 489 U.S. 235, 240-41 (1989)).

143. See Brief for Cooper Indus., supra note 18, at 32 (arguing that if Congress had intended to create such provision, it would have crafted limitations period to match). Some courts have attempted to fill this void by creating a six-year limitations period; however, opponents argue this is still clearly not the proscribed contribution time period under § 113(g). Id. For the pertinent text of 113(g)(2), see supra note 97.

144. See Brief for Cooper Indus., supra note 18, at 40 (noting Cooper's interpretation neither conflicts with nor contravenes CERCLA's dual purposes).

145. For a discussion of the basic tenets of contribution in common law and the argument that they have been undermined after the Aviall holding, see supra notes 103-09 and accompanying text.

146. See Brief for the United States as Amicus Curiae, supra note 22, at 18 (noting hardships of resolving complex cases in CERCLA-based contribution suits).
defendant's fault with the government and potentially subject PRPs to double liability. This seriously undercuts CERCLA's goal to equitably allocate cleanup costs among joint tortfeasors because the policy facilitates inconsistent liability among existing PRPs.

Further, the court will now be responsible for applying CERCLA to state law claims. Due to the court's liberal interpretation of 113(f)(1) and their choice of underscoring federal suits in the savings clause, parties will choose to bypass weaker state remedies and initiate a federal suit to effectuate their chance for recovery. It is very unlikely that Congress intended for CERCLA to expand so dramatically the jurisdiction of federal courts in such cases that should be best resolved in state forums.

The Aviall holding has also created a discrepancy as to when a 113(f)(1) statute of limitations runs thus allowing more litigants and more suits to occur than would have within a strict a three year time period. Consequently, the controversy behind 113(g)(2) will certainly lead to a circuit split adding to the inconsistency as to when voluntary cleanup acts are allowable. The consequence of this is an overall increase in the quantity of plaintiffs who may bring

147. See Brief for Cooper Indus., supra note 18, at 34 (arguing that expansive reading of savings clause removes “contribution protection” that § 113(f) provides). A responsible party's voluntary cleanup does not discharge the underlying liability to the government. Id. Thus, a party ordered to pay “contribution” under Aviall has no assurance that its payment will discharge its liability and it can remain subject to a future government cost recovery action. See id.

148. For a discussion of the purpose behind § 113(f)(1)’s passing, see supra notes 52-54 and accompanying text. Some have suggested that Congress might wish to create a remedy, apart from 113(f), for responsible parties who engage in voluntary cleanup. See Brief for the United States as Amicus Curiae, supra note 22, at 18. Yet, this remains a policy decision that Congress should effectuate, not the courts. Id.

149. See Brief for Cooper Indus., supra note 18, at 12, and accompanying text (citing that savings clause creates non-exclusive causes of action rather than just state suits); see supra note 54 and accompanying text.

150. See supra notes 129-31 and accompanying text (noting weakness of state remedies in favor of federal suits if savings clause augments federal claims).

151. See Brief for the United States as Amicus Curiae, supra note 22, at 19 (stating that CERCLA gives federal courts structures and limits). Even in the present case, Aviall had state contract claims under the law of Texas that were ignored in favor of the federal suit. See supra note 131. Some scholars have noted that given the varying standards of common law, state court actions are often unpredictable leading to unpredictable and inconsistent results. See Horton, supra note 4, at 231. However, the solution to this problem may lie in an amendment to § 113 rather than expanding the Federal court's jurisdiction. Id.

152. See supra notes 95-98; see also Brief for the United States as Amicus Curiae, supra note 22, at 31 (adding expansiveness in time limitation after Aviall is beyond Congress' intentions).

153. See Brief for the United States as Amicus Curiae, supra note 22, at 19 (addressing that decision allows issue to “percolate” in lower courts).
suit and as these land contamination case are complex and costly, an increase in court time and expenditures is inevitable. The court effectively bypassed Congress by allowing some suits a three year statute of limitations and those brought under the savings clause a six year leniency, the latter of which allows ineligible PRPs to seek relief.

Perhaps understanding the immediacy of this problem, the Supreme Court of the United States granted Cooper’s petition for writ of certiorari on January 9, 2004. The issue of CERCLA’s contribution provision is an issue best resolved sooner so that this controversial debate and the host of other issues that stem from the Aviall holding are resolved before serious problems accumulate in the realm of environmental law.

Saleel V. Sabnis

154. See id. (noting adverse effects on court). Not only are there a substantial number of potential plaintiffs who have a great incentive to bring such suits, but the nature of these suits are inherently complex. See id. The land contamination cases center around expert testimony based on a scientific inquiry about the conditions at the site which involve a great expenditure in costs and court resources. Id.

155. See Brief for Cooper Indus., supra note 18, at 32 (stating such construction undermines statutory framework Congress created).

156. See id. at 2 (stating date of grant).

157. See Brief for the United States as Amicus Curiae, supra note 22, at 20 (stating that conflict warrants immediate resolution for fear of wasting time and resources).