

TIME TO CLEAN UP THE CONFUSION: REELING IN THE
EXTENSION OF CERCLA CONTRIBUTION TO PARTIES
SETTLING STATE LAW LIABILITY

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The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) is a federal law which allows those who undertake environmental cleanups to obtain contribution from the government and other parties in order to help offset their cleanup costs. Despite it being uncontroverted that parties may seek contribution under CERCLA, the circumstances under which parties are entitled to contribution are less than certain. This uncertainty has led to a circuit split between the Second Circuit and the Third Circuit as to when contribution is available under CERCLA. The Second Circuit requires a party seeking contribution to have first settled their environmental claims under CERCLA. Conversely, the Third Circuit allows parties to receive contribution under CERCLA so long as the party’s liability under state environmental laws has been settled, regardless of whether the party has settled its liability under CERCLA. Under the Third Circuit’s interpretation, the differences between state-law and CERCLA thresholds allow the party seeking contribution to settle claims strategically, by settling its liabilities under whichever laws have the lowest threshold. This Note argues that if the Supreme Court were to address the uncertainty surrounding the issue of contribution under CERCLA, then it should adopt the Second Circuit’s interpretation in order to effectuate the purpose of CERCLA and add much needed clarity to this convoluted statute.

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I. INTRODUCTION

One out of every four Americans live within four miles of at least one toxic spill site.¹ The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)² was enacted in 1980³ as a way to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”⁴ Specifically, CERCLA created the Superfund, which provides the funds to clean up contaminated sites.⁵ CERCLA remains one of the most hotly litigated and debated statutes⁶ even thirty-five years after its enactment.⁷

While Congress laid out the general purpose of the statute, the specific language of the statute itself is not nearly as clear.⁸ Due to its convo-

1. Center for International Earth Science Information Network, *In Your Own Backyard: Mapping Communities Near Superfund Sites*, STATE OF THE PLANET (June 4, 2012, 5:04 PM), <http://www.blogs.ei.columbia.edu/2012/06/04/in-your-own-backyard-mapping-communities-near-superfund-sites/>.

2. 42 U.S.C. §§ 9601–9628 (2012).

3. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96–510, 94 Stat. 2767 (1980).

4. *Id.*; S. REP. NO. 96–848, at 13 (1980) (stating that CERCLA was designed to “assur[e] that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.”).

5. Kathleen Chandler Schmid, Note, *The Depletion of the Superfund and Natural Resource Damages*, 16 N.Y.U. ENVTL. L.J. 483, 484 (2008).

6. Joseph P. Koncelik, *State Settlements: When Can You Recover Costs from Prior Owners/Operators*, OHIO ENVTL. L. BLOG (Aug. 21, 2013), <http://www.ohioenvironmentallawblog.com/tags/cost-recovery/> (“In regards to cleanup of contaminated sites, CERCLA represents the most complicated statute with the broadest authorities and the most litigation.”).

7. 42 U.S.C. §§ 9601–9628 (2012).

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

luted language, CERCLA is often criticized as a hastily passed statute.⁹ The Supreme Court went as far to note that CERCLA “is not a model of legislative draftsmanship.”¹⁰ Given the lack of clear definitions under CERCLA,¹¹ it is unsurprising that the numerous questions surrounding CERCLA are still relevant today. In fact, the Supreme Court resolved a CERCLA discrepancy less than one-year ago,¹² and recently circuit courts were again split on a CERCLA issue, namely, contribution.¹³

On August 20, 2013, the Third Circuit handed down a ruling in *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.* that broke with the well-established Second Circuit interpretation that contribution under CERCLA was only available once parties had settled their CERCLA liability, increasing the circumstances under which a party may seek contribution under CERCLA.¹⁴ The Third Circuit stated that parties can seek contribution under CERCLA regardless of whether they have settled their liability under CERCLA.¹⁵ Thus, the Third Circuit made it possible for parties to settle their cleanup liability under *state* statutes and subsequently seek contribution under a *federal* statute.¹⁶ In doing so, *Trinity Industries* added to the confusion surrounding CERCLA, which leads to the question presented in this Note: Should parties be able to seek contribution after merely settling their state law liability, or should courts require parties to have a pending or settled cause of action under CERCLA before contribution is available?

This Note argues that the Second Circuit is correct in allowing CERCLA contribution only when parties have settled their CERCLA liability or have a pending CERCLA cause of action. Not only will this prevent an inevitable floodgate of litigation if parties are allowed to seek contribution after settling under a state statute, but also this will provide much needed consistency to this haphazardly written statute. Contribution allowed under only one cause of action avoids the duplicative nature that is presented by the Third Circuit’s interpretation and keeps with a more consistent cost-sharing approach. That is, rather than pulling the statute apart into pieces that work best for the parties, if parties want contribution under CERCLA, they must settle their liability under CERCLA.

9. See, e.g., *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) (“It has become de rigueur to criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity.”).

10. *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986).

11. *W.R. Grace & Co.*, 429 F.3d at 1238 (“The definitions of removal and remedial action exemplify this [CERCLA’s] muddled language.”).

12. See *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

13. See Thomas E. Hogan, *Third Circuit Decision Allowing CERCLA Contribution Claim Based on Settlement of State-Law Liability Sets Up Split with Second Circuit*, LEXOLOGY (Sept. 4, 2013), <http://www.lexology.com/library/detail.aspx?g=82390fa8-d104-4d9b-a11c-df9426e4da5b>.

14. *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013); Hogan, *supra* note 13.

15. Hogan, *supra* note 13.

16. *Id.*

Part II of this Note discusses the background of this contribution issue, namely through looking at the history of CERCLA itself, examining CERCLA as a whole, noting the remedies currently available and how lower courts apply such remedies, and concluding with examples of the variance found amongst state superfunds. Part III analyzes the impact that allowing contribution from all parties who have settled under state law would have on environmental jurisprudence. Specifically, Part III examines contribution based on the issues that are inherent in state superfunds, the inconsistent state approaches to hazardous waste liability, the Second Circuit's thoughtful and forward-looking approach to contribution, and the glaring flaws in the Third Circuit's reasoning. Part IV recommends consistent CERCLA applications, namely, the approach followed by the Second Circuit. Part V concludes and highlights the importance of this issue and the usefulness the topic will have in years to come.

II. BACKGROUND

“. . . Superfund has been a disaster.”—President Bill Clinton.¹⁷

A. CERCLA Defined

Congress enacted CERCLA in December 1980.¹⁸ CERCLA was enacted partially in response to the Love Canal disaster, one of the worst environmental disasters in United States history, where toxic substances began oozing into residents' basements, causing ailments as severe as leukemia and the eventual mass-displacement of people from their homes.¹⁹ The increased environmental awareness of the 1970s also contributed to the passing of CERCLA,²⁰ as the nation was fueled by images of hazardous waste sites like Valley of the Drums.²¹ While CERCLA certainly has noble goals and was born of a desire to provide relief for those affected by environmental disasters, the statute, which is the result of a lame duck president,²² is difficult to interpret.

Additionally, CERCLA aimed to enable the “EPA [Environmental Protection Agency] to respond efficiently and expeditiously to toxic spills [through the Superfund], and . . . holding those parties [Potentially Re-

17. Rudy Abramson, *The Superfund Cleanup: Mired in Its Own Mess*, L.A. TIMES, May 10, 1993, http://www.articles.latimes.com/1993-05-10/news/mn-33610_1_superfund-reform.

18. *Superfund History*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/policy/cercla.htm> (last updated Oct. 8, 2015).

19. Laura DeAngelo, *Love Canal, New York*, THE ENCYCLOPEDIA OF EARTH (June 19, 2008), <http://www.eoearth.org/view/article/154300/>.

20. MARQUITA K. HILL, UNDERSTANDING ENVIRONMENTAL POLLUTION 170 (1997).

21. See Press Release, U.S. Env'tl. Prot. Agency, EPA Schedules Emergency Cleanup at Valley of the Drums (Sept. 18, 1981), available at www2.epa.gov/aboutepa/epa-schedules-emergency-cleanup-valley-drums.

22. BRUCE A. WILLIAMS & ALBERT R. MATHENY, DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGES OF SOCIAL REGULATION 103 (1995).

sponsible Parties] responsible for the release liability for the costs of the cleanup.”²³

In a *prima facie* CERCLA case, the plaintiff must prove:

(1) [D]efendant fits one of the four classes of responsible parties outlined in § 9607(a); (2) the site is a facility; (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the National Contingency Plan [NCP] set up under the Act and administered by the EPA in order to prioritize hazardous substance release sites throughout the nation.²⁴

The four classes of responsible parties include parties that owned or operated a vessel or facility; a person who at the time of disposal owned the vessel or facility; a person who had an agreement to dispose of such waste; and any person who accepted hazardous substances for disposal.²⁵ This means that there is a long list of potentially responsible parties²⁶ who the moving party may go after for contribution.

Additionally, depending on whether the plaintiff is the government or a private party, the burden of proof regarding response costs is different. “Based on the wording of [section] 107, federal, state, and perhaps municipal government plaintiffs enjoy a rebuttable presumption that the costs they incur are ‘not inconsistent’ with the NCP; on the other hand, private plaintiffs must demonstrate affirmatively that their response costs are necessary and consistent with the NCP.”²⁷

B. *Cleaning up Under CERCLA*

The Environmental Protection Agency (“EPA”) is the federal agency that is responsible for managing the Superfund program, including forcing responsible parties to cleanup hazardous waste sites.²⁸ The CERCLA cleanup process has nine steps, starting with discovery and ending, ideally, with a successful cleanup that removes the site from the EPA’s list of priority cleanups.²⁹ A Preliminary Assessment/Site Inspection occurs first, where the EPA conducts an initial investigation of a site.³⁰ The EPA may address the site under the Emergency Response program if the release of hazardous substances requires immediate or

23. B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992).

24. *Id.*

25. 42 U.S.C. § 9607(a)(1)–(4)(D) (2012).

26. *See id.*

27. 57 AM. JUR. TRIALS, *Private Cost Recovery Actions Under CERCLA* § 4 (1995) [hereinafter *Private Cost Recovery Actions Under CERCLA*]. For additional information on the National Contingency Plan see *infra* Part II.C.

28. *CERCLA/SUPERFUND Operation Manual*, U.S. ENVTL. PROT. AGENCY (1992), <http://www.epa.gov/superfund/policy/remedy/pdfs/542r-92005-s.pdf>.

29. *Superfund Cleanup Process*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/cleanup/> (last updated Sept. 30, 2015).

30. *Id.*

short-term response actions.³¹ After that, the site goes on the National Priorities List (“NPL”), which identifies the “most serious sites . . . for possible long-term cleanup.”³² Next, the EPA conducts a Remedial Investigation/Feasibility Study, which determines the magnitude of contamination and “assess[es] potential threats to human health and the environment . . . [and includes an] evaluation of the potential performance and cost of the treatment options identified for a site.”³³ The next step, the Records of Decision, details which cleanup alternatives will be used at NPL sites.³⁴ The majority of the cleanup occurs during the next phase, the Remedial Design/Remedial Action phase, in which preparation and implementation of plans and “specifications for a site cleanup” occurs.³⁵ The Construction Completion phase occurs next, in which sites are identified after “any necessary physical construction needed for the cleanup has been completed (even though final cleanup levels may not have been reached), or when EPA has determined that the site qualifies for deletion from the NPL.”³⁶ Next, the Post Construction Completion “ensures that Superfund cleanups provide for the long-term protection of human health and the environment.”³⁷ In the next step, the National Priorities List Deletion, the EPA removes the site from the NPL once “all site cleanup has been completed and all cleanup goals have been achieved.”³⁸ Lastly, in the Site Reuse/Development stage, the site is ready for reuse or redevelopment.³⁹

C. Settling CERCLA Liability

While the number of CERCLA lawsuits is certainly plentiful, the EPA encourages settlement agreements “that are in the public interest and consistent with the National Contingency Plan.”⁴⁰ The purpose of the National Contingency Plan (“NCP”) is “to provide the organizational structure and procedures for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.”⁴¹ A pri-

31. *Id.*

32. *About the Superfund Cleanup Process*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/superfund/about-superfund-cleanup-process#tab-2> (last updated Oct. 14, 2015).

33. *Superfund Cleanup Process*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/cleanup/> (last updated Sept. 30, 2015).

34. *Id.*

35. *Id.*

36. *About the Superfund Cleanup Process*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/superfund/about-superfund-cleanup-process#tab-6> (last updated Oct. 14, 2015).

37. *Id.*

38. *Id.*

39. *Superfund Cleanup Process*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/cleanup/> (last updated Sept. 30, 2015).

40. 42 U.S.C. § 9622(a) (2012).

41. 40 C.F.R. § 300.1 (2014).

vate party may seek cost recovery if the party is able to prove that the remedial actions were consistent with the NCP.⁴²

1. CERCLA-Quality Cleanups

CERCLA-quality cleanups are considered consistent with the NCP.⁴³ For a response action to qualify as a “CERCLA-quality cleanup,” it must “(1) ‘satisfy the three basic remedy selection requirements of . . . § 121(b)(1)’; (2) ‘attain [ARARs [Applicable or Relevant and Appropriate Requirements]]’; and (3) ‘provide for meaningful public participation ([§]117).’”⁴⁴

Section 121 provides that the government “shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable.”⁴⁵

Applicable or Relevant and Appropriate Requirements (“ARAR”), as required by section 121(d) “require[] that on-site remedial actions attain or waive Federal environmental ARARs, or more stringent State environmental ARARs, upon completion of the remedial action.”⁴⁶ State environmental statutes were found to be ARARs if the statute is properly promulgated, more stringent than federal standards, legally applicable or relevant and appropriate, and timely identified.⁴⁷

Section 117 provides that before a plan for remedial action can be adopted by the federal or a state government, or a private party, the moving party shall: “(1) [p]ublish a notice and brief analysis of the proposed plan and make such plan available to the public. (2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility.”⁴⁸

2. Avoiding Litigation

If parties decide to avoid litigation and go straight for a settlement, the party may enter into an agreement and the opposing party must perform a specified response action, if the federal government “determines that such action will be done properly by such person.”⁴⁹ Settlements are

42. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 137 (2d Cir. 2010) (“One way of establishing compliance with the national plain is to conduct a response under the monitoring, and with the ultimate approval, of the state’s environmental agency.”).

43. See 40 C.F.R. § 300.700(c)(3)(i) (2014).

44. JOHN M. HYSON, *PRIVATE COST RECOVERY ACTIONS UNDER CERCLA* 216 (2003).

45. 42 U.S.C. § 9621(b)(1) (2012).

46. *Applicable or Relevant and Appropriate Requirements (ARARS)*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/superfund/applicable-or-relevant-and-appropriate-requirements-arars> (last updated Oct. 16, 2015).

47. *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1440–46 (6th Cir. 1991).

48. 42 U.S.C. § 9167(a)(1)–(2) (2012).

49. 42 U.S.C. § 9622(a) (2012).

encouraged to “expedite effective remedial actions and minimize litigation.”⁵⁰ If a party decides to settle its liability with the government, the federal government must follow specific notice requirements.⁵¹ Specifically, the federal government must notify all parties and provide them with:

(A) The names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 9607(a) of this title), to the extent such information is available.

(B) To the extent such information is available, the volume and nature of substances contributed by each potentially responsible party identified at the facility. (C) A ranking by volume of the substances at the facility, to the extent such information is available.⁵²

CERCLA states that the government may provide any person with a covenant not to sue, including for future liability.⁵³ This covenant, however, does not go into effect until the party performs the remedial action as specified.⁵⁴

D. Post-Settlement CERCLA: Cost Recovery and Contribution

After the settlement discussions have concluded, there are two remedies for parties wishing to offset some of their cleanup costs.⁵⁵

I. Cost Recovery Versus Contribution

If a private party voluntarily cleans up their site, they may seek cost recovery from other potentially responsible parties under section 107.⁵⁶ Alternatively, the government may bring a civil lawsuit against a party under section 106 or section 107, which qualifies as an involuntary cleanup.⁵⁷ When a party is part of an involuntary cleanup under section 106 or section 107, or when the party settles its CERCLA liability with the government, the party may bring a section 113 “contribution action against other responsible parties to recover costs based on their *fair share* of responsibility for the site contamination.”⁵⁸

Cost recovery refers to the act of restoring a party with the costs that they incurred due to the cleanup.⁵⁹ Contribution, on the other hand, is defined as “[o]ne tortfeasor’s right to collect from joint tortfeasors when—and to the extent that—the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined

50. *Id.*

51. *See* 42 U.S.C. § 9622(e)(1) (2012).

52. 42 U.S.C. § 9622(e)(1)(A)–(C) (2012).

53. 42 U.S.C. § 9622(f)(1) (2012).

54. 42 U.S.C. § 9622(f)(3) (2012).

55. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 129 (2007).

56. Linda L. Rockwood, *Recovery of Voluntary Cleanup Costs After United States v. Atlantic Research Corp.*, FAEGRE BAKER DANIELS (June 19, 2007), <http://www.faegrebd.com/2706>.

57. *Id.*

58. *Id.* (emphasis in original).

59. *See* BLACK’S LAW DICTIONARY 1466 (10th ed. 2014).

as percentages of causal fault.”⁶⁰ Contribution claims “presuppose an initial assessment of liability for a third party’s response costs, whereas recovery of response costs under [section] 107(a) is reserved for ‘innocent’ parties who have incurred CERCLA cleanup costs.”⁶¹ Thus, when potentially responsible parties (“PRPs”) sue other PRPs for cleanup and response costs, the original PRP must bring the claim under section 113 as a contribution action.⁶²

Accordingly, at issue in this Note is section 113, which covers contribution claims brought by one responsible party seeking compensation from other PRPs.⁶³ While the Supreme Court recently debated section 107,⁶⁴ this Note will focus exclusively on section 113.

2. *Contribution: 42 U.S.C. § 9613(f)*

In 1986, Congress passed the Superfund Reauthorization and Amendments Act of 1986 (“SARA”), which amended CERCLA and attempted to clarify the scope of the Act.⁶⁵ SARA specifically pointed to the then circuit split dealing with contribution.⁶⁶ Prior to SARA, CERCLA did not provide an explicit provision allowing for contribution from other PRPs, leaving one party to bear the brunt of cleanup costs.⁶⁷ Circuit courts, therefore, read an “implied” contribution action into the statute; however, circuit courts used varying methods to “imply” contribution.⁶⁸ The Supreme Court did not have an opportunity to decide which approach was appropriate before SARA was codified into section 113 of CERCLA, which thereby allowed one PRP to sue another for contribution.⁶⁹

Section 113 allows for contribution in two explicit ways: PRPs may seek contribution from other PRPs during or following specified civil actions under section 113(f)(1) or parties may seek contribution after an administrative or judicially-approved settlement resolving a governments

60. *Id.* at 402.

61. *Private Cost Recovery Actions Under CERCLA*, *supra* note 27, at § 4.

62. *Id.*

63. *See id.*

64. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 131 (2007) (holding that PRPs may bring an action to recover costs from other PRPs when the original PRP voluntarily cleaned up the contaminated site).

65. *The Superfund Amendments and Reauthorization Act (SARA)*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara> (last updated Sept. 30, 2015).

66. *Navigating the CERCLA Contribution Landscape in the Aftermath of Cooper Industries, Inc. v. Aviall Services, Inc.*, ENVTL. L. ADVISORY (Jan. 2005), http://www.goodwinprocter.com/~media/Files/Publications/Newsletters/Environmental%20and%20Energy%20Advisory/2005/Navigating_the_CERCLA_Contribution_Landscape_in_the_Aftermath_of_iCooper_Industries_Inc_v_Aviall_Ser.pdf [hereinafter *Navigating the CERCLA Contribution Landscape*].

67. *Id.*

68. *Id.* (“Some circuit adopted the Uniform Contribution Among Tortfeasors Act (‘UCATA’), while others applied the Uniform Comparative Fault Act (‘UCFA’), which resulted in differing approaches to cost allocation.”).

69. *Id.*

liability under section 113(f)(3)(B).⁷⁰ Specifically, the defendant will be liable for contribution if: “(1) a release or threatened release of a hazardous substance occurred in defendant’s facility; (2) plaintiff incurred in response costs because of the release or threatened release; and (3) the costs were necessary costs of response in accordance with the national contingency plan.”⁷¹

a. Contribution Under Section 113(f)(1)

Section 113 is no stranger to attention from the Supreme Court; specifically, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court held that in order to seek contribution under section 113(f)(1), private parties must have been sued under section 106 or section 107(a) of CERCLA.⁷² A consistent theme in CERCLA cases is the contention over the meanings of specific words, as the statute frequently does not define statutory terms, and *Cooper Industries* is no exception. The Court, in its reasoning, pointed to the “natural meaning” of the first clause that enables contribution under section 113(f)(1).⁷³ Specifically, the Court opined that the natural meaning of the clause “[a]ny person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a).” demonstrated how contribution can be brought only when under those specific conditions.⁷⁴ The Court made a point to note that it relied on the provisions of the law rather than the concerns of the legislators in reaching its decision.⁷⁵

b. Contribution Under Section 113(f)(3)(B)

Section 113(f)(3)(B) provides:

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 administratively or judicially approved settlement may seek contribution from any person who is not party to a settlement⁷⁶

Most courts agree that a plaintiff seeking contribution “must at least establish that the defendant disposed of waste at a site and that some

70. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

71. *Private Cost Recovery Actions Under CERCLA*, *supra* note 27, at § 21.

72. 543 U.S. at 160–61.

73. *Id.* at 165–66 (“First, as just noted, the natural meaning of ‘may’ in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others.”).

74. *Id.* Additionally, the Court reasoned, “[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.” *Id.* at 166.

75. *Id.* at 167 (“[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

76. 42 U.S.C. § 9613(f)(3)(B) (2012).

quantity of a hazardous substance was present in that waste.”⁷⁷ At issue in the current circuit-split is the language regarding the resolution of state of liability.⁷⁸ The next sections will explore the approaches that the Second and Third Circuits have taken with respect to contribution under section 113(f)(3)(B).

i. Second Circuit: Consolidated Edison

The Second Circuit’s contribution approach was first articulated in *Consolidated Edison Co.*, where the Second Circuit considered a CERCLA question—whether subject matter jurisdiction existed under section 113(f)(3)(B).⁷⁹ In the case, the plaintiff entered into a voluntary cleanup agreement with the New York State Department of Environmental Conservation (“DEC”).⁸⁰ Because the underlying cause of action was not CERCLA, the plaintiff argued that its voluntary cleanup agreement with New York’s DEC constituted a section 113(f)(3)(B) administrative settlement.⁸¹ As such, the plaintiff argued it should be able to receive contribution from the defendant, as the plaintiff had resolved its liability with the state.⁸²

The Second Circuit rejected the plaintiff’s argument, holding that a party may seek contribution under section 113(f)(3)(B) only when a CERCLA claim is resolved, rather than a state law based environmental cleanup.⁸³ The court opined that applying contribution after settling a CERCLA action seems like the obvious choice because settling under CERCLA is necessary to resolve response actions, and “‘response action[]’ is a *CERCLA*-specific term describing an action to clean up a site or minimize the release of contaminants in the future.”⁸⁴ Additionally, the court relied on a House Report that was issued at the same time as SARA, noting “section 113 ‘clarifies and confirms the right of a person held jointly and severally liable *under CERCLA* to seek contribution from other potentially liable parties.’”⁸⁵ The Second Circuit also justified its holding by pointing to how New York was not precluded from bringing CERCLA claims against the plaintiff because the settlement was made under New York law, not federal law.⁸⁶ Thus, the Second Circuit

77. 80 AM. JUR. PROOF OF FACTS, *Current Landowner’s Right to Recover Cleanup Costs From Other Liable Parties under § 107(a) of CERCLA* § 4 (2004).

78. *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (“The statutory language of §113(f)(3)(B) requires only the existence of a settlement resolving liability to the United States or a state ‘for some or all of a response action.’ Section 113(f)(3)(B) does not state that the ‘response action’ in question must be initiated pursuant to CERCLA . . .”).

79. *Consol. Edison Co. of N. Y. v. UGI Utils. Inc.*, 423 F.3d 90, 92 (2d Cir. 2005).

80. *Id.* at 92–93.

81. *Id.* at 95.

82. *Id.*

83. *Id.*

84. *Id.* at 95–96. *See also Glossary*, UNITED STATES ENVTL. PROT. AGENCY, <http://www.epa.gov/svpe-fund/programs/reforms/glossary.htm>.

85. *Id.* at 96 (emphasis in original) (quoting H.R. REP. NO. 99-253, pt. 1, at 79 (1985)).

86. *Id.* at 96–97.

opined, that the plaintiff had not resolved its liability under CERCLA, a prerequisite to seeking contribution.⁸⁷

In concluding, the court held that section 113 created “a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved.”⁸⁸

ii. Second Circuit: *W.R. Grace*

Later, the Second Circuit was faced with a similar contribution question, and it held fast in its reasoning. In *W.R. Grace & Co. Conn. v. Zotos Int'l, Inc.*, the plaintiff asserted that its consent order with the New York State DEC qualified as an administrative settlement.⁸⁹ Section 113(f)(3)(B) provides that a party that completes an administrative settlement may seek contribution.⁹⁰ The court did not break with its previous reasoning, noting that the text of the consent order settled state law liability only and in the future the DEC or the EPA could assert other claims against the plaintiff.⁹¹

iii. Second Circuit Support

The Second Circuit has not been alone in deciding that CERCLA contribution is available only after settling under CERCLA. For example, in *Differential Development-1994, Ltd. v. Harkrider Distributing Co.*, the plaintiff argued that due to its participation in a voluntary cleanup agreement it had resolved some or all of its “CERCLA liability to the State of Texas or the United States” and should be able to receive contribution under section 113(f)(3)(B).⁹² Here, the court reasoned that the agreement does not resolve claims, but “merely agrees to work toward resolution,”⁹³ noting that when an agreement does not specifically resolve CERCLA liability to the state, the agreement does not constitute a settlement of CERCLA claims.⁹⁴

The court in *Asarco, Inc. v. Union Pacific Railroad Co.* faced a similar argument, which it also disregarded, saying “[i]t makes little sense that an agreement with a state agency based on state law without any authorization from federal authorities could serve as a springboard for a CERCLA contribution claim.”⁹⁵ In *Cadlerock Properties Joint Venture, L.P. v. Schilberg*, the court doubted that “settlement of state environmental law obligations could somehow be considered equivalent to a judicially-approved federal settlement triggering contribution rights under

87. *Id.* at 97.

88. *Id.* at 95.

89. *W.R. Grace & Co. Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009).

90. 42 U.S.C. § 9613(f)(3)(B) (2012).

91. *W.R. Grace*, 559 F.3d at 90.

92. 470 F. Supp. 2d 727, 738 (S.D. Tex. 2007).

93. *Id.* at 743.

94. *Id.* at 741.

95. No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *7 (D. Ariz. Jan. 24, 2006).

§ 113(f)(3)(B).⁹⁶ While this is not an exhaustive list of courts that have considered and decided against allowing CERCLA contribution to parties that have only settled state law liability, these few cases show the current prevalence of this contribution question and how courts are frequently unwilling to further complicate CERCLA by allowing settlements under one court system and contribution under another.⁹⁷

iv. Third Circuit: *Trinity Industries*

The Third Circuit shook up CERCLA-contribution case law when it recently handed down a decision in *Trinity Industries*.⁹⁸ Much like in *Cooper Industries* and *W.R. Grace*, the plaintiff in *Trinity Industries* sought contribution from the defendant after settling liability through a consent order under Pennsylvania's Hazardous Sites Cleanup Act and the Land Recycling and Environmental Remediation Standards Act.⁹⁹ The consent order that was provided, however, did not resolve the plaintiff's CERCLA liability.¹⁰⁰ The Third Circuit attacked the Second Circuit's reasoning in *Consolidated Edison*, noting that the House Report that the Second Circuit relied on "refers to contribution claims under [section] 113(f)(1), not [section] 113(f)(3)(B)."¹⁰¹ It claimed that the Second Circuit "read the legislative history's 'under CERCLA' requirement to apply to [section] 113(f)(3)(B)."¹⁰²

The Third Circuit in *Trinity Industries* turned to the language of the statute, just as the Second Circuit had; however, the Third Circuit pointed to a different clause that allows a settlement resolving liability "'to the United States or a state' for some or all of a response action."¹⁰³ It opined that CERCLA does not require a party to settle CERCLA liability "in particular" before seeking contribution under section 113(f)(3)(B).¹⁰⁴ The court reasoned that section 113(f)(3)(B) "does not state that the 'response action' in question must have been initiated pursuant to CERCLA—a requirement that might easily have been written into the provision."¹⁰⁵ Thus, the court was persuaded by the fact that there was no language indicating otherwise.¹⁰⁶ It pointed to the similarities in the Pennsylvania State statute that "bear[s] a strong resemblance" to CERCLA.¹⁰⁷

96. No. 3:01CV896 (MRK), 2005 WL 1683494, at *4 n.3 (D. Conn. July 19, 2005).

97. See, e.g., *Differential Development-1994, Ltd.*, 470 F. Supp. 2d at 739 n.13.

98. See *Trinity Indus., Inc., v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 135–38 (3d Cir. 2013).

99. *Id.* at 133–34.

100. *Id.* at 135.

101. *Id.* at 136.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. See *id.*

107. *Id.* at 137.

Additionally, the *Trinity Industries* court focused on the language of the consent order and concluded that resolution under the Pennsylvania statute “necessarily means resolution of claims under CERCLA,” which would mitigate the Second Circuit’s concern that the DEC or EPA could assert future CERCLA claims.¹⁰⁸ Lastly, the Third Circuit construed the Second Circuit’s point that “states play a critical role in effectuating the purposes of CERCLA”¹⁰⁹ as evidence of the Second Circuit retreating from its holding in *W.R. Grace* and *Consolidated Edison* and moving toward the interpretation that the Third Circuit had adopted.¹¹⁰

E. State Superfunds

The process of settling CERCLA liability was discussed above.¹¹¹ Because the Third Circuit maintains that parties do not have to settle CERCLA liability specifically, this means that parties are able to settle their state law liability and seek contribution under CERCLA.

A significant number of states have enacted “state companion statutes.”¹¹² Commonly called states superfunds, these statutes are “created to fulfill the state’s responsibilities under CERCLA.”¹¹³ These state superfunds, however, are not “simple clones” of CERCLA, as states have not accepted each aspect of CERCLA.¹¹⁴ Therefore, this next section will examine the state superfunds in the Second and Third Circuits, the circuits at issue in this Note. The background relating to the state superfunds and settlement techniques is not intended to be an exhaustive list, but is meant to demonstrate the key differences in state superfunds and settlement techniques.¹¹⁵

I. State Superfunds and State Settlement Techniques in the Second Circuit

To illustrate the differences in state superfunds within the Second Circuit, this next section will examine three state superfunds within the

108. *Id.*

109. *Id.* at 137–38 (quoting *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 126 (2d Cir. 2010)).

110. *Id.* at 137.

111. *Supra* Part II.C.

112. Tod I. Zuckerman et al., *State “Superfunds” and Other Environmental Statutes*, ENVTL. LIABILITY ALLOCATION L. & PRAC., § 1:24 (2014).

113. *Id.* § 9:41.

114. John M. Hyson & John P. Judge, *A Comparative Analysis of the Federal and Pennsylvania Superfund*, 1 VILL. ENVTL. L.J. 1, 3 (1990).

115. For a comprehensive overview of state superfunds, see John Pendergrass, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update*, ENVTL. L. INST., at 134 (2002), available at <http://www.eli.org/sites/default/files/eli-pubs/d12-10a.pdf>.-superfund-programs-50-state-study-2001-update.

Second Circuit—Connecticut, Vermont, and New York¹¹⁶—all of which have state superfunds.¹¹⁷

a. Connecticut

Connecticut's superfund authorizes the Department of Environmental Protection (“DEP”) “to clean up hazardous waste disposal sites and to use funds from the Emergency Spill Response Account or other accounts authorized by law for clean up purposes.”¹¹⁸ Additionally, Connecticut provides for strict, joint and several liability, and cost recovery.¹¹⁹ The state is also required to pursue cost recovery.¹²⁰

Connecticut's superfund does not have a specific settlement provision,¹²¹ but the state does include a provision for the reimbursement of costs and expenses associated with remedial actions.¹²² The statute provides that the commissioner shall request that the Attorney General move for cost recovery from the responsible party.¹²³ The commissioner can move for costs limited to:

- (1) [T]he actual cost of the remedial action;
- (2) any administrative costs not exceeding ten per cent [sic] of the actual costs;
- (3) the costs of recovering the reimbursement; and
- (4) interest on the actual costs at a rate of ten per cent a year from the date such expenses were paid.¹²⁴

Interestingly enough, the statute provides for the commissioner to move for cost recovery from the responsible party, but it does not speak to what individual private parties can get from one another.¹²⁵ CERCLA, on the other hand, does not limit recovery only to the government, as the statutory language permits “a person”¹²⁶ to seek contribution.

b. Vermont

In Vermont, the Water Pollution Control Act establishes the Environmental Contingency Fund for “emergency responses, studies and design, and remedial actions.”¹²⁷ The Waste Management Act “establishes

116. *About the Court*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/about_the_court.html (last updated Dec. 13, 2013).

117. CONN. GEN. STAT. §§ 22a-133a to 22a-133j (2011); N.Y. ENVTL. CONSERV. LAW §§ 27-1301 to 27-1321 (2003); VT. STAT. ANN. tit. 10, §§ 1280–1283, 6615–6617 (1973); VT. STAT. ANN. tit. 12, § 5783 (1991).

118. Margaret Filbey et al., *An Analysis of State Superfund Programs: 50-State Study, 2001 Update*, ENVTL. L. INST., at 134 (2002), available at <http://www.eli.org/research-report/analysis-state-superfund-programs-50-state-study-2001-update>.

119. *Id.*

120. *Id.* at 135.

121. CONN. GEN. STAT. §§22a-114; 22a-133a to j22a-133j, (1987).

122. § 22a-133g.

123. *Id.*

124. *Id.*

125. *Id.*

126. 42 U.S.C. § 9613(f)(3)(B) (2012).

127. Filbey et al., *supra* note 118, at 147.

the State's hazardous waste program and authorizes the Department of Environmental Conservation to take removal and remedial actions to clean up sites contaminated by the release of hazardous materials¹²⁸ and provides for strict, joint and several liability, and for cost recovery from responsible parties.¹²⁹

The Waste Management Act provides that if an action is brought by the government, a responsible party "may implead, or in a separate action a responsible person may sue, another person or persons and may obtain contribution or indemnification."¹³⁰ Additionally, a party that has resolved its state law liability "through a judicially approved settlement and secured lender or fiduciary . . . shall not be liable for claims for contribution or indemnification regarding matters addressed in the judicially approved settlement or in the agreement."¹³¹ This is nearly identical to the language in CERCLA.¹³² Unlike Connecticut,¹³³ but like CERCLA,¹³⁴ Vermont specifically provides an option for private parties to recover costs.¹³⁵

c. New York

New York's State Superfund Act establishes a remedial fund for site cleanup and "[s]tate CERCLA match, and a State capital account for cleanups."¹³⁶ New York establishes liability as joint and several, retroactive, and strict.¹³⁷ Common law defenses are available, and civil penalties are \$25,000 per violation, in addition to another \$25,000 per day if the violations continue.¹³⁸ Additionally, criminal penalties are available in New York, and can be imposed up to \$25,000 per day and/or one year of imprisonment.¹³⁹ Cost recovery is also permitted in New York.¹⁴⁰

To settle under New York's state superfund, the commissioner must first notify potentially responsible parties.¹⁴¹ New York grants power to the commissioner to make every effort "to secure appropriate relief from the owner or operator . . . and/or any person responsible for the disposal of hazardous wastes at such site."¹⁴² Clarifying "appropriate relief," New York law states that such recovery includes, but is not limited to "development and implementation of an inactive hazardous waste disposal site

128. *Id.*

129. *Id.*

130. VT. STAT. ANN. tit. 10 § 6615(i) (1977).

131. *Id.*

132. *See* 42 U.S.C. § 9613 (2012).

133. CONN. GEN. STAT. § 22a-133g (1987).

134. 42 U.S.C. § 9613(f)(3)(B) (2012).

135. VT. STAT. ANN. tit. 10 § 6615(i) (1977).

136. Filbey et al., *supra* note 118, at 154.

137. *Id.* at 155.

138. *Id.*

139. *Id.*

140. *Id.*

141. N.Y. ENVTL. CONSERV. LAW § 27-1305(a) (McKinney 2003).

142. *Id.* § 27-1313(g).

remedial program, payment of the cost of such program, recovery of any reasonable expenses incurred by the state.”¹⁴³ New York, however, does not explicitly address contribution.¹⁴⁴

2. *State Superfunds and State Settlement Techniques in the Third Circuit*

The Third Circuit is comprised of Delaware, New Jersey, Pennsylvania, and the Virgin Islands.¹⁴⁵ Delaware, New Jersey, and Pennsylvania each have state superfunds.¹⁴⁶

a. Delaware

Delaware’s Hazardous Substance Cleanup Act establishes a fund of the same name and authorizes the Department of Natural Resources and Environmental Control to clean up contaminated sites.¹⁴⁷ Delaware’s law provides for: “strict, joint, and several liability; cost recovery; public participation; natural resource damage assessment and recovery; property transfer provisions; water replacement; a priority list . . . and a voluntary cleanup program.”¹⁴⁸ Delaware also establishes retroactive liability.¹⁴⁹

Delaware’s superfund states that a settlement agreement providing for a remedy “may be in the form of a consent decree, administrative order of consent, [or] memorandum of agreement.”¹⁵⁰ The statute elaborates, “the Secretary may choose to resolve a person’s liability with the State under this section through the use of settlement agreements entered into pursuant to CERCLA.”¹⁵¹ Once a party has resolved his or her liability with the state, the party is no longer responsible for claims of contribution.¹⁵² Additionally, the state may “enter into a settlement agreement that requires the Secretary to provide a specified amount of money from the Fund [state superfund] to help defray the costs of implementing the remedy.”¹⁵³

b. New Jersey

New Jersey’s Spill and Compensation Control Act of 1977 was CERCLA’s predecessor.¹⁵⁴ The statute establishes a fund for cleanups

143. *Id.* § 17-1313(b).

144. *See id.* §§ 27-1301 to 27-1323.

145. *Third Circuit District Courts*, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, <http://www.ca3.uscourts.gov/third-circuit-district-courts> (last visited Oct. 6, 2015).

146. DEL. CODE ANN. tit. 7, §§ 9101–9120 (1990); N.J. STAT. ANN. § 58:10-23.11g(a) (West 2009); 35 PA. CONS. STAT. ANN. § 6020.702 (1988).

147. Filbey et al., *supra* note 118, at 160.

148. *Id.*

149. *Id.* at 161.

150. DEL. CODE ANN. tit. 7, § 9107(b) (West 1990).

151. *Id.*

152. *Id.* § 9107(c).

153. *Id.* § 9107(d).

154. Zuckerman et al., *supra* note 112, at § 1:26.

and grants authority to the state for “emergency response[s], removals, remedial actions, enforcement, cost recovery, a priority list, natural resources damages, and voluntary cleanup.”¹⁵⁵ New Jersey goes further than CERCLA by regulating the release of petroleum.¹⁵⁶ The statute provides that responsible parties are jointly and severally liable for cleanup and response costs,¹⁵⁷ and that private parties may recover their response costs from other liable parties.¹⁵⁸ Liability can also be retroactive, and “civil penalties are authorized up to \$50,000 per violation and treble damages may be assessed through the courts.”¹⁵⁹

The way in which New Jersey’s superfund handles settlements is extremely similar to CERCLA. Specifically, New Jersey provides for strict notice requirements to potentially responsible parties.¹⁶⁰ Additionally, New Jersey provides for cost recovery, stating that “dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance.”¹⁶¹ Courts may also “allocate the cost of cleanup among the responsible parties.”¹⁶² Also, a plaintiff may seek treble damages.¹⁶³ Finally, New Jersey treats cleanup and removal costs made by the state as a “debt of the discharger to the fund.”¹⁶⁴

c. Pennsylvania

Pennsylvania’s Hazardous Site Cleanup Act establishes a cleanup fund and “authorizes the Department of Environmental Protection to clean up sites contaminated by hazardous substances.”¹⁶⁵ The Act “provides for enforcement; strict, proportional, joint and several liability; cost recovery; public participation; natural resource damages assessment and recovery; water replacement; a priority list; a voluntary cleanup program; environmental disclosure upon property transfer; and long-term stewardship.”¹⁶⁶

The right to seek contribution from nonsettling parties under the Pennsylvania statute is similar to section 113(f)(3)(B) under CERCLA.¹⁶⁷ Pennsylvania holds responsible parties strictly and jointly and severally liable for response costs,¹⁶⁸ and the statute provides for liability, without proof of causation, for all damages within 2,500 feet of the perimeter of

155. Filbey et al., *supra* note 118, at 151.

156. *Id.*

157. N.J. STAT. ANN. § 58:10-23.11g(b) (West 2009).

158. *Id.* § 58:10-23.11f(a)(2)(a).

159. Filbey et al., *supra* note 118, at 152.

160. N.J. STAT. ANN. § 58:10-23.11e2 (West 2009).

161. *Id.* § 58:10-23.11(f)(a)(2)(a).

162. *Id.*

163. *Id.* § 58:10-23.11(f)(a)(3).

164. *Id.* § 58:10-23.11f(f).

165. Filbey et al., *supra* note 118, at 168.

166. *Id.*

167. Hyson & Judge, *supra* note 114, at 77.

168. 35 PA. CONS. STAT. ANN. § 6020.702 (1988).

the area where a release has occurred.¹⁶⁹ Civil penalties are handed out a minimum of \$5,000 per-day and a maximum of \$25,000 per-day.¹⁷⁰ Additionally, Pennsylvania's superfund distinguishes between sites put on the National Priority List, and thus subject to CERCLA, and all other sites within the state.¹⁷¹

Pennsylvania also dedicates an entire section to recovery costs.¹⁷² Further, Pennsylvania allows the department to include "administrative and legal costs incurred from its initial investigation up to the time that it recovers its costs."¹⁷³ The amount is equal to ten percent "for the response action or actual costs, whichever is greater."¹⁷⁴ Pennsylvania also allows for treble damages.¹⁷⁵

III. ANALYSIS

The federal circuits are split as to the meaning of section 113(f)(3)(B) and whether settling state law liability should allow a party to seek contribution under CERCLA. Specifically, the language in dispute provides that a party cannot seek liability from "[a] person who has resolved its liability to the United States *or a State* for some or all of a response action."¹⁷⁶ In this Part, Section A assesses the increasing competence of state environmental laws, focusing on the different avenues under which parties may seek contribution. Part B evaluates the Second Circuit's approach to contribution, targeting the legislative and judicial understanding of the section 113(f)(3)(B) contribution issue. Part C evaluates the Third Circuit's contribution approach, dissecting the judicial responses to the comingling of state settlements and CERCLA contribution. Lastly, Part D examines the variances found amongst state superfunds.

A. *The Many Routes to Contribution*

The debate over whether to extend CERCLA contribution to parties who have settled under state law seems to ignore a very important point: CERCLA contribution is not the only way to obtain contribution from other parties.

1. *The Evolution of State Law Claims*

There are clear advantages to state law claims such that parties could easily bring contribution under their state laws. Specifically, state

169. *Id.* § 6020.1109.

170. Filbey et al., *supra* note 118, at 169.

171. 35 PA. CONS. STAT. ANN. § 6020.502(e).

172. *Id.* § 6020.507.

173. *Id.* § 6020.507(b).

174. *Id.*

175. *Id.* § 6020.507(c).

176. 42 U.S.C. § 9613(f)(3)(B) (2012).

law claims have become increasingly competent in dealing with environmental cleanup and contribution. CERCLA was enacted, in part, due to the inadequacies of state laws in addressing hazardous waste contamination.¹⁷⁷ This, however, is no longer true, as “state laws have progressively evolved into potent means of addressing environmental harms, at least in part, because of CERCLA’s own inadequacies.”¹⁷⁸ While it is true that “[a] federal cleanup cost contribution remedy under CERCLA would ensure the availability of contribution claims for sites in every state,”¹⁷⁹ state law remedies are viewed as more effective than CERCLA.¹⁸⁰ Not only are state judges well versed in contaminated property issues,¹⁸¹ but state law claims can also provide prospective relief, unlike CERCLA.¹⁸² Additionally, parties do not have to worry about the delays of fulfilling NCP requirements.¹⁸³

The biggest drawback to state law contribution claims is the heightened burden that the parties must carry with respect to causation in order to obtain contribution under state law claims. Under CERCLA, parties seeking contribution bear “a minimal causation burden, if any.”¹⁸⁴ State law contribution causation requirements are generally stricter, requiring that the plaintiff establish that the defendant actually and legally caused the hazardous waste spill.¹⁸⁵

With respect to the moving party, the Third Circuit’s approach is preferable, as it is easier to prove contribution under CERCLA. On the other hand, if the Third Circuit’s reasoning is followed, parties could escape the onerous burden of complying with the NCP, could then bring a cause of action under a preferable state law, and could skip right to the benefits of contribution under CERCLA: a minimal causation burden.¹⁸⁶

177. Gessner Harley Harrison, *‘A House Divided’: The Structure of U.S. Environmental Law After PMC, Inc. v. Sherwin-Williams Co.*, 28 REAL EST. L.J. 122, 135 (1999).

178. *Id.*

179. Ronald G. Aronovsky, *Back from the Margins: An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes*, 84 DENV. U. L. REV. 395, 418 (2006).

180. *Id.* (“To the contrary, state law remedies, in many ways, could be superior to CERCLA.”).

181. Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225, 264 (2008) (noting “state law claims can provide a common body of law (e.g., private nuisance) applicable to all contaminated property dispute issues, including claims for property damages and petroleum cleanup costs that are unavailable under CERCLA.”).

182. *Id.*

183. *Id.* at 268–70. (“For example, the NCP requires preparation of a feasibility study on alternative remedial approaches before undertaking remedial action. The time and expense for an environmental consultant to study and document a range of remediation alternatives as the NCP requires is justified in settings such as a large site presenting complicated groundwater remediation problems affecting the community; it is not justified when dealing with a small brownfield site facing a discrete, commonplace remediation issue.”).

184. Harrison, *supra* note 177, at 154 (“As a result, it is usually a relatively simple matter for a party to determine who may be liable to it for contribution under CERCLA.”).

185. *Id.*

186. See *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (“We therefore agree with Trinity and the United States that § 113(f)(3)(B) does not require that a party have settled its liability under CERCLA *in particular* to be eligible for contribution.”) (emphasis added).

Effectively, parties to a lawsuit, not the legal system, would be in charge of the lawsuit, cherry picking which cause of action works best at what time depending upon the party.

In addition, by allowing private parties to pick which system they feel is best, the Third Circuit's approach ignores a very important distinction. Pursuant to section 104, "before a state can enter into a CERCLA settlement, it must receive authorization from the EPA."¹⁸⁷ Courts have noticed the inequality that the Third Circuit's approach proposes, observing that "an agreement between a state and a private entity that lacks EPA backing to serve as a basis for a CERCLA contribution claim would effectively circumvent the requirement that states need to seek authorization from the EPA in order to participate in the CERCLA process."¹⁸⁸

This grant of power to the plaintiff would leave the defendant at a huge disadvantage, as plaintiffs could use whatever system most beneficial to them at any particular time, leaving the defendant with the short end of the stick every step of the way. Granting such power to one of the parties is not only wholly unfair, but putting one party at such an obvious disadvantage at each junction in the lawsuit is inconsistent with our legal system. If courts adopted the Third Circuit's reasoning, defendants would have little more than a fighting chance to escape liability.

B. The Second Circuit's Reasoning is Grounded in Textual and Legislative History

The Second Circuit faced a section 113(f)(3)(B) contribution claim issue in *Consolidated Edison*.¹⁸⁹ In *Consolidated Edison*, the plaintiff entered into a voluntary cleanup agreement with the New York State Department of Environmental Conservation to clean up more than 100 sites that the plaintiff or the plaintiff's predecessors "might have formerly owned or operated manufactured gas plants."¹⁹⁰ The Second Circuit rejected the plaintiff's argument that resolving their liability with a fit under section 113(f)(3)(B) and held that "section 113(f)(3)(B) [] create[s] a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved."¹⁹¹

1. The Supreme Court's Interpretations of Section 113 Support the Second Circuit

The Supreme Court's previous holdings regarding section 113 demonstrate that the Second Circuit's holding allowing CERCLA con-

187. ASARCO, Inc. v. Union Pac. R.R., No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *7 (D. Ariz. Jan. 24, 2006) (citing 42 U.S.C. § 9604(d)(1)(A) (2012)).

188. *Id.*

189. *Consol. Edison Co. of New York v. UGI Utils. Inc.*, 423 F.3d 90 (2d Cir. 2005).

190. *Id.* at 93.

191. *Id.* at 95.

tribution only when parties have settled under CERCLA is sound. In *Cooper Industries*, when faced with a party seeking contribution under section 113(f)(1),¹⁹² after settling liability under state law,¹⁹³ the Court cautioned against allowing any party contribution under section 113, noting that “reading § 113(f)(1) to authorize contribution actions at any time . . . would render entirely superfluous the section’s . . . condition, as well as § 113(f)(3)(B), which permits contribution actions after the settlement.”¹⁹⁴ The Court was quite adamant in its warning against extending contribution.¹⁹⁵

The Court’s concern about extending contribution demonstrates two things. First, because the section at issue in *Cooper Industries* is the same section addressed in this Note,¹⁹⁶ the Court’s reluctance to open the contribution floodgates suggests that the Court would likely agree with the Second Circuit’s CERCLA interpretation. Second, because the unsuccessful party relied on an interpretative language argument¹⁹⁷ which was unsuccessful,¹⁹⁸ the Third Circuit’s similar argument that section 113(f)(3)(B) provides contribution to those who have resolved liability “to the United States or a State,”¹⁹⁹ would likely be rejected by the Court.²⁰⁰

2. *The Second Circuit Points to CERCLA-Authorized Terms*

Part of the Second Circuit’s reasoning in limiting CERCLA contribution to parties who have settled under CERCLA was that the statute requires resolution of liability for a “response action,” which is a CERCLA-specific term.²⁰¹ Some have criticized the Second Circuit for putting too much emphasis on the term “response action.”²⁰² The legislative history of the Superfund Amendments and Reauthorization Act (“SARA”), however, “which enacted Section 113 of CERCLA, provides further support for the conclusion that CERCLA liability is a prerequisite to Section 113(f)(3)(B) contribution.”²⁰³ Specifically, the House Committee on Energy and Commerce report regarding SARA “states

192. Section 113(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following a civil action under section 9606 of this title or under section 9607(a) of this title.” 42 U.S.C. § 9613(f)(1) (2012).

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

194. *Id.* at 158.

195. *Id.* (“This Court is loath to allow such a reading.”).

196. *Id.* at 160.

197. *Id.* at 158 (“The Court disagrees with Aviall’s argument that the word ‘may’ in § 113(f)(1)’s enabling clause should be read permissively, such that ‘during or following’ a civil action is one, but not the exclusive, instance in which a person may seek contribution.”).

198. *Id.* at 165–67.

199. 42 U.S.C. § 9613(f)(3)(B) (2012).

200. *Cf. Cooper Indus., Inc.*, 543 U.S. at 158.

201. *Consol. Edison Co. of New York v. UGI Utils., Inc.*, 423 F.3d 90, 95–96 (2d Cir. 2005).

202. Craig N. Johnston, *United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA*, 22 J. ENVTL. L. & LITIG. 313, 337 (2007).

203. Amy Luria, *CERCLA Contribution: An Inquiry Into What Constitutes an Administrative Settlement*, 84 N.D. L. REV. 333, 342 (2008).

that Section 113 ‘clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.’²⁰⁴ Congress, therefore, makes clear that the purpose of section 113(f)(3)(B) is to grant contribution to those who have settled *under* CERCLA.²⁰⁵

3. *The Second Circuit has Judicial History on its Side*

The Second Circuit’s approach to contribution is consistent with views of courts around the nation.²⁰⁶ Section 113 (f)(3)(B) is widely interpreted as applying only to those who have settled liability under CERCLA, with varying yet convincing reasons for support. For example, the Eastern District of Wisconsin was faced with a plaintiff who had settled with the Wisconsin Department of Natural Resources and then sought contribution under CERCLA.²⁰⁷ The court reasoned that because “section 113(f)(3)(B) creates a CERCLA contribution right only where a party resolves some or all of its liability for a ‘response action,’ resolving liability with respect to non-CERCLA claims, *such as claims arising under state environmental statutes*, does not create a CERCLA contribution right under section 113(f)(3)(B).”²⁰⁸ In Massachusetts, the court relied both on the fact that the plaintiff did not resolve its liability to CERCLA and the fact that so many other district courts had “found that a settlement with a state agency that did not resolve CERCLA liability is not a basis for a CERCLA contribution claim.”²⁰⁹ A final example comes from Arizona, where the court reasoned that it made “little sense that an agreement with a state agency based on state law without any authorization from federal authorities could serve as a springboard for a CERCLA contribution claim.”²¹⁰

Courts have consistently relied on the Second Circuit’s reasoning in only extending contribution to those who have settled under CERCLA.²¹¹ The courts relying on the Second Circuit’s reasoning are not necessarily in the Second Circuit, which demonstrates that these courts agree with and support the Second Circuit, despite not being bound by its precedent.²¹² Whether the courts point to the fact that the language

204. *Id.*

205. *See id.* (emphasis added).

206. Sarah M. Gordon, *Positive Contribution: Why the Second Circuit’s Understanding of CERCLA § 113 Should Make Way for the Third Circuit’s Pro-Settlement Holding in Trinity Industries*, 42 B.C. ENVTL. AFF. L. REV. 41, 43 (2015), available at http://ealr.bclawreview.org/files/2015/04/04_gordon.pdf.

207. *City of Waukesha v. Viacom Int’l Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2008).

208. *Id.* (emphasis added).

209. *BASF Catalysts L.L.C. v. United States*, 479 F. Supp. 2d 214, 219–20 (D. Mass. 2007).

210. *ASARCO, Inc. v. Union Pac. R.R.*, No. 04-2144, 2006 WL 173662, at *7 (D. Ariz. Jan. 24, 2006).

211. *See, e.g., id.* at *7 (“Just as to receive CERCLA contribution protection, one must comply with CERCLA settlement procedures and resolve CERCLA liability, to initiate a CERCLA contribution claim, one must do the same.”).

212. *See supra* notes 207–210 and accompanying text.

calls for a CERCLA-specific action,²¹³ the preference for settling a CERCLA action across the country,²¹⁴ or the fact that a CERCLA contribution claim after settlement of state law liability would catapult the plaintiff to a more favorable position,²¹⁵ it is clear that the Second Circuit's reasoning is persuasive throughout the country.²¹⁶

C. *The Third Circuit's Reasoning is Unavailing*

In *Trinity Industries*, the Third Circuit considered “the extent to which a settlement of state liability for environmental contamination affects the contribution scheme provided by CERCLA.”²¹⁷ There, the plaintiff settled its liability under Pennsylvania's Hazardous Sites Cleanup Act through a consent order²¹⁸ and sought contribution under CERCLA.²¹⁹ The Third Circuit held that because CERCLA's section 113(f)(3)(B) required settlement resolving liability “to a state,” section 113(f)(3)(B) does “not require resolution of CERCLA liability in particular.”²²⁰

1. *The Third Circuit's Plain Language Argument*

When holding that parties should be able to recover contribution under CERCLA after settling only state law liability, the Third Circuit relied on the plain language of statute. Specifically, the court was “persuaded by the lack of any indication to the contrary in the plain language of the statute itself.”²²¹ This argument is concerning for a few reasons.

a. *Incorrectly Relying on a Confusing Statute*

First, the Supreme Court, as mentioned, has demonstrated its true feelings about CERCLA, stating that the statute is “at best inartful” and “not a model of legislative draftsmanship.”²²² In fact, the Third Circuit itself criticized CERCLA for its “inartful drafting.”²²³ It seems, therefore, that if this issue were to go to the Supreme Court, the Court would be unlikely to agree with an argument contending that the plain language of

213. *City of Waukesha v. Viacom Int'l Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2008).

214. *BASF Catalysts*, 479 F. Supp. 2d at 219–20.

215. See *ASARCO, Inc.*, 2006 WL 173662, at *7.

216. See, e.g., *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 152 (W.D.N.Y. 2003) (stating that Section 113(f)(3)(B) “authorizes a PRP who has administratively settled its liability under CERCLA . . . to seek contribution.”) (emphasis added); *Cadlerock Props. Joint Venture v. Schilberg*, No. 3:01CV896, 2005 WL 1683494, at *4 n.3 (D. Conn. July 19, 2005) (doubting that “the settlement of state environmental law obligations could . . . be considered equivalent to a judicially-approved federal settlement triggering contribution rights under § 113(f)(3)(B).”).

217. *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 133 (3d Cir. 2013).

218. *Id.*

219. *Id.* at 135.

220. *Id.* at 136.

221. *Id.*

222. *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986).

223. *Artesian Water Co. v. New Castle Cnty.*, 851 F.2d 643, 648 (3d Cir. 1988).

the statute should be taken on its face without any additional insight into the meaning of the statute.

The Third Circuit was persuaded by a lack of indication to the contrary,²²⁴ reasoning that because Congress did not expressly prohibit allowing state settlements and CERCLA contribution, Congress must have implicitly allowed state settlements and CERCLA contribution.²²⁵ The Third Circuit relied on a case where they could locate “no support in the text or legislative history of CERCLA for the suggestion that identical oversight activity on the part of the government should be considered a removal if the government invokes CERCLA, but not a removal if other statutory authority is invoked.”²²⁶

This quote to which the Third Circuit points, in *United States v. Rohm and Haas Co.*, however, refers to instances in which the government invokes the responsibility of cleanup, not private parties.²²⁷ *Rohm* makes that abundantly clear, pointing to section 107(a) for the language “all costs of removal . . . incurred by the United States Government.”²²⁸ It is well known that there are inherent differences between private parties initiating a cleanup and the government initiating cleanup proceedings.²²⁹ Private cleanups “require less total cost per site and is thus more efficient than an EPA cleanup.”²³⁰ Specifically, private cleanups avoid the administrative costs “inherent to any large scale governmental action,” incentivizing the plaintiff to choose cost-effective response actions because plaintiffs must bear the costs of cleanup initially, and because of the “expertise of private parties [,] may allow private cleanups to be conducted more cost-effectively than government cleanups.”²³¹

The differences between a private cleanup and a government cleanup demonstrate how courts should not equate the two by arguing that what works for one will work for the other. Their differences are too numerous and apparent.²³² Specifically, the Supreme Court has already distinguished between the joint and several liability claim under section 107 and the contribution claim under section 113, pointing out that “the remedies available in [sections] 107(a) and 113(f) complement each other by providing causes of action ‘to persons in different procedural circumstances.’”²³³ The quotation on which the Third Circuit relies, therefore, is

224. *Trinity Indus., Inc.*, 735 F.3d at 136.

225. *See id.*

226. *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1275 (3d Cir. 1993), *overruled on other grounds by* *United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161, 162–63 (3d Cir. 2005).

227. *Id.*

228. *Id.* at 1274.

229. Joseph A. Fischer, *All CERCLA Plaintiffs are not Created Equal: Private Parties, Settlements, and the UCATA*, 30 HOUS. L. REV. 1979, 1991–92 (1994); *supra* Part II.D.1.

230. Fischer, *supra* note 229, at 1991.

231. *Id.* at 1991–99.

232. *Id.*

233. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 139 (2007) (quoting *Consol. Edison Co. of New York v. UGI Utils., Inc.*, 423 F.3d 90, 99 (2d Cir 2005)).

not applicable to a private party seeking contribution, a crucial part of section 113.

Additionally, the case on which the Third Circuit relies, *Rohm*, focuses only on CERCLA and a consent order that was entered into under the Resources Conservation and Recovery Act (“RCRA”).²³⁴ Put simply, this case has nothing to do with the Pennsylvania superfund statute. Accordingly, what is at issue in *Rohm* is only the applicability of a federal statute.²³⁵ *Rohm* mentions in passing “other statutory authority”²³⁶ which qualifies as removal; however, that court declined to address the applicability of its own state’s statute.

b. Previous Court Cases Go Beyond Plain Language

Second, this seems like an unusual time to take CERCLA at face value. The meaning of CERCLA is hotly debated, and more often than not, courts do not rely solely on the statute’s plain text. While the Supreme Court has relied on the text of CERCLA in the past,²³⁷ the most recent Court case involving CERCLA also dealt with, in part, the textual definitions of the statute.²³⁸ The Court distinguished between statutes of limitations and statutes of repose.²³⁹ To do so, the Court noted that the statute used “statute of limitations” four times in the particular CERCLA section, stating that its use was “instructive, but it is not dispositive.”²⁴⁰ The Court emphasized that while statute of limitations has a primary meaning, it “must be acknowledge that the term ‘statute of limitations’ is sometimes used in a less formal way.”²⁴¹ This demonstrates that while the Court will look to the plain meaning of the statute, the analysis does not stop there. In fact, the Court next went on to look at the legal definition of the term, and then looked at previous Court decisions.²⁴² To limit the analysis to only the statute’s “plain text,” as the Third Circuit proposes, would be to exclude thirty-five years of CERCLA litigation history.

Even if the Court were to take the language of the statute at face value, the Third Circuit’s argument is still unavailing. The Third Circuit pointed to language in the statute that parties could resolve liability to “a State” as indication that parties may settle their state law liability before seeking contribution under CERCLA.²⁴³ The statute continues, though, providing that parties may seek contribution from a “person who has resolved its liability to the United States or a State for some or all of a re-

234. *United States v. Rohm & Hags Co.*, 2 F.3d 1265, 1267–68 (3d Cir. 1993).

235. *Id.* at 1275.

236. *Id.*

237. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 158 (2004).

238. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 138 (3d Cir. 2013).

sponse action.”²⁴⁴ Congress knew that states would bring actions under CERCLA, thus, the inclusion of “or a state” in the language.²⁴⁵ Reading the rest of the phrase, the statute is clear that the party must first have settled its liability for a “response action.”²⁴⁶ It is true that some have criticized the emphasis on “response action,”²⁴⁷ but, one look at the definition demonstrates just how insightful this phrase is to this contribution issue. A response action is defined as a “CERCLA-authorized action involving either a short-term removal action or a long-term removal process.”²⁴⁸ The EPA makes very clear that a response action is CERCLA authorized.²⁴⁹ Because the Third Circuit aims to include any state superfund, not only those that are CERCLA-authorized, the Third Circuit’s plain language argument would likely fail.

Additionally, going beyond the plain text of the statute proves unsuccessful for the Third Circuit. One of the primary purposes of SARA, under which Section 113(f)(3)(B) was codified,²⁵⁰ was to clarify contribution rights under CERCLA.²⁵¹ Specifically, Congress aimed to remedy inconsistent approaches to contribution in the circuit courts.²⁵² Congress, therefore, does not favor inconsistency in the circuit courts with respect to contribution.²⁵³ The Third Circuit’s reasoning, however, ignores the intent of SARA completely.²⁵⁴ If courts applied the Third Circuit’s reasoning more consistently, history would repeat itself in the form of varying approaches to contribution by the circuit courts. While the Second and Third Circuits have addressed this Section 113(f)(3)(B) issue specifically, there are nine other circuits that could potentially adopt either circuit’s reasoning, or, even more concerning, come up with their own interpretation of Section 113(f)(3)(B). As more circuits take notice of the Third Circuit’s holding and begin to vary in their approaches to contribution, the unpredictable applications would clearly frustrate the simple Congressional intent behind codifying section 113: consistent circuit court contribution actions.

2. *The Second Circuit’s Post-W.R. Grace Cases*

The Third Circuit also incorrectly interpreted a recent Second Circuit case, *Niagara Mohawk Power Corp.*, to mean that the Second Circuit

244. 42 U.S.C. § 9613(f)(3)(B) (2012).

245. See 42 U.S.C. § 9604(d)(1)(A) (2012) (“A State or political subdivision thereof or Indian tribe may apply to the President to carry out actions authorized in this section.”).

246. 42 U.S.C. § 9613(f)(3)(B) (2012).

247. Craig N. Johnston, *United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA*, 22 J. ENVTL. L. & LITIG. 313, 337 (2007).

248. *Glossary*, *supra* note 84.

249. *Id.*

250. See *Navigating the CERCLA Contribution Landscape*, *supra* note 66.

251. *Id.*

252. *Id.*

253. *Id.*

254. See generally *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013).

backpedaled on its contribution views.²⁵⁵ In *W.R. Grace*, the Second Circuit held that parties must have settled under CERCLA to receive contribution under CERCLA.²⁵⁶ The Third Circuit, in *Trinity Industries*, relied on Second Circuit dicta in *Niagara Mohawk Power Corp.*,²⁵⁷ which, at first glance, could be construed to support the Third Circuit's argument that the Second Circuit backpedaled on its contribution views.²⁵⁸

The Third Circuit incorrectly reasoned that because the Second Circuit pointed out that "states play a critical role in effectuating the purposes of CERCLA,"²⁵⁹ the Second Circuit must have wanted to extend contribution under CERCLA to those who have settled under state law.²⁶⁰ This was not the Second Circuit's language, but rather it was language from an EPA amicus brief.²⁶¹

Substantively speaking, this argument ignores the fact that *Niagara Mohawk* dealt with an entirely different situation. Namely, the question in *Niagara Mohawk* involved a state consent order that resolved CERCLA liability.²⁶² The Second Circuit clarified in *Consolidated Edison* and *W.R. Grace* that the state entities were "without authority to settle CERCLA claims nor did either case conclude that CERCLA settlement authority required explicit authorization from the EPA."²⁶³ Basically, the consent orders in *Consolidated Edison* and *W.R. Grace* did not qualify as an administrative settlement because they did not resolve CERCLA liability, meaning that the parties potentially could bring CERCLA claims in the future.²⁶⁴ In *Niagara Mohawk*, however, the plaintiff entered into a consent order that "specifically released NiMo [Plaintiff] from CERCLA liability," therefore, the consent order qualified as an administrative settlement under section 113(f)(3)(B).²⁶⁵ Thus, to say that the Second Circuit backpedaled on its holdings prohibiting claims seeking contribution that had not resolved liability under CERCLA, is a gross overstatement. The Third Circuit completely ignores the fact that the Second Circuit dealt with entirely different questions in both *Consolidated Edison* and *W.R. Grace* than it faced later in *Niagara Mohawk*. If anything, the Second Circuit clarified that what it found to be the important precursor to CERCLA contribution is settling CERCLA liability.²⁶⁶

255. *Id.* at 137 ("We note, finally, the Court of Appeals for the Second Circuit appears to have begun to retreat from its holding in *Consolidated Edison* and *W.R. Grace* . . .").

256. *W.R. Grace & Co. Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 89 (2d Cir. 2009).

257. *Trinity Indus.*, 735 F.3d at 137–38.

258. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124 (2d Cir. 2010).

259. *Trinity Indus.*, 735 F.3d at 138.

260. *Id.*

261. *Niagara Mohawk Power Corp.*, 596 F.3d at 126.

262. *Id.* at 119 ("Under the terms of the agreement, NiMo [Plaintiff] 'resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2).'"").

263. *Id.* at 125.

264. *Id.*

265. *Id.*

266. *Id.* at 126 ("Once NiMo [Plaintiff] completed the Consent Order responsibilities, NiMo was 'deemed to have resolved its liability to the state for purposes of contribution protection provided by CERCLA Section 113(f)(2)' and thus was 'entitled to seek contribution.'").

Additionally, other circuits are wary of mixing state law liability and CERCLA contribution. As the Seventh Circuit correctly pointed out, “allowing one party to successfully sue another on a contribution claim under state law when CERCLA had denied the same type of claim could ‘gut’ CERCLA’s own provisions.”²⁶⁷ While not identical to the focus of this Note, this is a similar issue in the sense that parties would be able to settle without conforming to the CERCLA requirements, per their state statute. Then, parties could seek contribution claims under CERCLA without actually settling any CERCLA liability. As the Seventh Circuit highlighted, it would be “gutting” CERCLA’s provisions if it allowed parties to sue under state contribution claims. This weakening of CERCLA is a real threat if courts were to accept the Third Circuit’s extension of contribution to state law settlements.²⁶⁸

3. *All State Superfunds are not Created Equal*

The Third Circuit relied on the fact that Pennsylvania’s superfund is nearly identical to CERCLA. The Third Circuit pointed out that the defendant’s liability under CERCLA “is neither greater nor lesser than the HSCA [Pennsylvania superfund].”²⁶⁹ The Third Circuit’s emphasis on Pennsylvania’s superfund and its similarities to CERCLA demonstrates various flaws in their holding.

a. Not all State Law Mirrors CERCLA as Pennsylvania’s Superfund Does

First, the Third Circuit’s decision in *Trinity Industries* narrowly focused on one state—Pennsylvania. As previously mentioned, Pennsylvania has a sophisticated state superfund that mirrors CERCLA.²⁷⁰ The court relied on the fact that resolving a claim under Pennsylvania’s statute necessarily resolved a CERCLA claim.²⁷¹ The court held that “under Pennsylvania law, remediation pursuant to the LRA [Pennsylvania’s statute] is remediation under CERCLA.”²⁷² The Third Circuit reasoned that because the Pennsylvania statute was equivalent to CERCLA, resolving Pennsylvania state claims “alleviat[es] the concern[s]” expressed by the Second Circuit that “at some future point, [parties may] assert CERCLA or other claims.”²⁷³

267. Gessner Harley Harrison, ‘A House Divided’: *The Structure of U.S. Environmental Law After PMC, Inc. v. Sherwin-Williams Co.*, 28 REAL EST. L.J. 122, 134 (1999).

268. *Id.* at 136.

269. *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 137–38 (3d Cir. 2013). (quoting *Agere Sys., Inc. v. Advanced Emtl. Tech. Corp.*, 602 F.3d 204, 236 (3d Cir. 2010)) (quotation marks omitted).

270. Zuckerman et al., *supra* note 112 (“[T]he states which have set the regulatory standard with the broadest and most sophisticated state superfunds are California, New Jersey, and Pennsylvania.”).

271. *Trinity Indus.*, 735 F.3d at 137.

272. *Id.*

273. *Id.*

Thus, the Third Circuit essentially purported to resolve the issues that the Second Circuit found with contribution under CERCLA by using one state's superfund to do so. The Third Circuit's reliance on the similarity to CERCLA emphasizes the fact that their holding may work in Pennsylvania's case, because it is such a sophisticated superfund.²⁷⁴ This approach, however, will not necessarily work outside of the Third Circuit, the circuit with two of the "broadest and most sophisticated [state] environmental superfund statutes."²⁷⁵ The Second Circuit considered the implications of opening-up CERCLA contribution to all state laws, namely, that parties could be subject to CERCLA liability even after settling their state law claims for the same hazardous spill.²⁷⁶ The Third Circuit's focus was much narrower. The Third Circuit focused on its precedent, justifiably so, however, expanding that reasoning to the other circuits will not work as more diverse state settlements are brought into play, state settlements that do not necessarily resolve CERCLA liability and thus expose the "settling" parties to future CERCLA claims that the parties thought they resolved.

b. The Third Circuit's Outcome Would be Different if it Dealt With a Different State Statute

The Third Circuit's reliance on the similarities between Pennsylvania's superfund and CERCLA illustrates an additional point: that the outcome in *Trinity Industries* would likely have been different if the court was faced with a state superfund settlement from a different state. For example, the two circuits discussed in this Note considered state superfunds.²⁷⁷ But not all state statutes are the same. New Mexico, for instance, does not have a state superfund.²⁷⁸ Under the Third Circuit's holding, a party from New Mexico could resolve its liability under a general environmental law from New Mexico and then seek contribution under CERCLA. This moving party's position, based on the amount of money that the party expended, the burden level in proving the underlying cause of action, the remedies available under state law, etc., would vary substantially from someone who settled their liability under a state superfund or CERCLA.

Additionally, the Third Circuit has yet to be tested on the negative implications of its holding. In *Trinity Industries, Inc. v. Greenlease Holding Co.*, the plaintiff entered into a consent order under the Pennsylvania

274. Zuckerman et al., *supra* note 112 (commenting on the sophistication of California, New Jersey, and Pennsylvania).

275. *Id.*

276. See *Consol. Edison Co. of New York v. UGI Utils. Inc.*, 423 F.3d 90, 95 (2d Cir. 2005).

277. See discussion *supra* Part II.E.

278. Kathleen Chandler Schmid, Note, *The Depletion of the Superfund and Natural Resource Damages*, 16 N.Y.U. ENVTL. L.J. 483, 510 (2008) ("For example, because New Mexico does not have a state Superfund, it is reliant on CERCLA to provide not only funding for remediation efforts, but also for a statutory structure for remediation.").

Hazardous Sites Cleanup Act, resolving its liability to the state.²⁷⁹ After settling, the plaintiff sought contribution under CERCLA.²⁸⁰ The court pointed to the Third Circuit's holding that claims for contribution under section 113(f)(3)(B) do not have to be preceded by a section 106 or section 107 claim, stating the state law claims remain viable for contribution nonetheless.²⁸¹ While this could have been a groundbreaking moment for the Third Circuit to realize the repercussions of such a vast extension of contribution, that was not the case because Pennsylvania's statute was written to conform directly to CERCLA's requirements.²⁸² The Third Circuit avoided addressing their previous holding by pointing out that the plaintiff, although it did not have to, had complied with the NCP.²⁸³ Thus, we have not seen the broad implications of the Third Circuit's extension of contribution to everyone. The Third Circuit may not face this inevitable issue of a state statute not resolving CERCLA claims due to the sophistication of the state superfunds in the Third Circuit,²⁸⁴ but it would not be audacious to assume that the court would pause to think twice about the implications of granting the moving party the power to pick what claim works best under which system.

c. CERCLA: Backup Plan?

If courts apply the Third Circuit's reasoning, CERCLA would act as a catchall. For example, in *Ford Motor Co. v. Michigan Consolidated Gas Co.*, the court equated the plaintiff's assertion for common law indemnification as a "fallback in the event their CERCLA claims are dismissed as improper or untimely. However, the state law claims cannot be asserted to circumvent CERCLA's statutory requirements."²⁸⁵ Much like the situation in *Ford Motor Co.*, parties seeking contribution under CERCLA after settling under state law would be bringing the contribution claim as a fallback. Specifically, parties could settle their liability under their state statute and then realize that they face proving something more than minimal causation to obtain contribution under state law. Upon realizing that, parties could move for CERCLA contribution, after not complying with the NCP or the intricacies of CERCLA. Congress enacted CERCLA to deal with environmental hazardous and public health,²⁸⁶ not as a way for parties to avoid the burden of proof associated

279. *Trinity Indus., Inc. v. Greenlease Holding Co.*, 35 F. Supp. 3d 698, 706 (W.D. Pa. 2014).

280. *Id.*

281. *Id.* at 714 (reasoning that "[s]ection 9613(f)(3)(B) makes the settlement itself, rather than any party's compliance with the national contingency plan, the applicable predicate for contribution.>").

282. *Id.*

283. *Id.*

284. Zuckerman et al., *supra* note 112, § 1:24.

285. *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-CV-13503-DT, 2009 WL 3190418, at *18 (E.D. Mich. Sept. 29, 2009).

286. *Superfund History*, *supra* note 18 ("This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases . . . of hazardous substances that may endanger public health or the environment.").

with state law contribution knowing that they can rely on an easier route to contribution.²⁸⁷ Downgrading the importance of CERCLA is just one additional way in which the Third Circuit misreads the purpose of CERCLA.

d. The Third Circuit Ignores CERCLA's Preference for Federal Law

Additionally, it is well established that “[f]ederal, and not state law governs CERCLA contribution claims.”²⁸⁸ Historically, environmental jurisprudence relied on the assumption that state and federal governments operate independently of one another.²⁸⁹ While that approach has been criticized as the more static option,²⁹⁰ this traditional approach is consistent and it does not allow parties to choose which claims they settle under state law and which claims they would like to have resolved under federal law.

Opponents of such an approach have cited the “rigid separation of state and federal power” as “going against the grain of the political dynamics at work in our federal structure.”²⁹¹ These arguments, however, focus on claims as a whole, and not on a lawsuit that has been pulled apart, as is the situation at issue in this Note. Allowing parties to bring contribution claims interchangeably under state law for their convenience and ease is an argument that has been constantly denied by courts.²⁹² To follow the Third Circuit's reasoning and allow parties to bring contribution claims under whichever system they feel is more beneficial would be to disregard judicial processes and rules.

D. State Environmental Laws and Procedures are too Inconsistent to Follow the Third Circuit's Approach

States have varying laws and regulations relating to environmental matters. These differences are so vast and numerous that a study focusing on state superfunds was unable to compare them, stating “differences in state program technology, administrative procedures, and accounting procedures, as well as in the detail of information provided by states, limit the comparability of programs. Variation among state cleanup programs should be expected because there is no national standard.”²⁹³ Scholars have noted that the vast differences in organization of cleanups

287. *Id.*

288. James T. O'Reilly, *How Is the Plaintiff's Case Pleaded?*, 1 TOXIC TORTS PRAC. GUIDE § 13:9 (Westlaw 2015).

289. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 161 (2006).

290. *Id.*

291. *Id.* at 174.

292. *See, e.g.*, Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 SW. U. L. REV. 679, 701 n.109 (2012).

293. Filbey et al., *supra* note 118, at 12.

varies so substantially that it is “difficult to generalize about program administration.”²⁹⁴

Most states have superfunds,²⁹⁵ and some have added provisions that address state-specific concerns.²⁹⁶ Some states have no superfund to pay for cleanup activities, while others have more than one fund.²⁹⁷ States run their cleanup programs through the health department, while others have joint agencies that focus on the environment.²⁹⁸ A number of states provide statutory authority for voluntary cleanup, while others rely on policy for such actions.²⁹⁹ These are just a few differences found amongst the states.

Take, for example, the tiered system found in some states.³⁰⁰ This tiered system offers “at least two and as many as four options for the party conducting the cleanup to choose from. Tiered systems allow the party remediating the site to select the option that will minimize transaction and other costs.”³⁰¹ These tiered systems can vary substantially.³⁰² For instance, the tiered system in Oklahoma includes comparing screening levels, developing risk-based default cleanup levels, and “implementation of a site-specific Risk Assessment.”³⁰³ Missouri’s tiered system, on the other hand, is divided by type of site—residential, commercial, or industrial.³⁰⁴ This snapshot view of one component of dozens of varying state statutes illustrates the differing hurdles parties face in one component of a state law cause of action—which must be done before seeking CERCLA contribution.

If courts adopt the Third Circuit’s holding, anyone who has settled a state superfund claim could receive CERCLA contribution.³⁰⁵ Thus, parties, like those in Oklahoma who are required to go through a three-step process before bringing an action, and parties from Missouri, who are not subject to the same three-step process, would each receive contribution under CERCLA despite proving very different things. This process of allowing parties who have potentially gone through fifty different processes to seek contribution through a statute under which they did not face liability is inherently unfair.

294. *Id.* at 17.

295. Caroline N. Broun & James T. O’Reilly, *Introduction to State “Superfund” Statutes— Statute Types*, 2 RCRA AND SUPERFUND: A PRACTICE GUIDE, § 15:16 (Westlaw 3d ed. 2015).

296. *Id.*

297. Filbey et al., *supra* note 118, at 19.

298. *Id.* at 17.

299. *Id.* at 14.

300. *Id.* at 29.

301. *Id.*

302. *Id.*

303. *Id.* at 29.

304. *Id.*

305. See *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (“Notwithstanding the rule adopted by the Court of Appeals for the Second Circuit and by various district courts, we hold that § 113(f)(3)(B) does not require resolution of CERCLA liability *in particular*.” (emphasis added)).

Particularly, the Third Circuit's approach would also be unfair to those who brought their original cause of action under CERCLA. For example, a party resolving liability under CERCLA must deal with the nine-step cleanup process and compliance with the NCP. This is a much different process than a party that quickly resolves liability and settles under state law without going through the nine-step CERCLA cleanup process or complying with the NCP. Thus, it is manifestly unfair that both parties should reap the benefits of CERCLA contribution, which requires only a minimal causation burden.

IV. RECOMMENDATION

This Note proposes that courts depart from the Second Circuit's holding in *Consolidated Edison*—just by a bit. Specifically, courts should allow CERCLA contribution if parties have settled their CERCLA liability, regardless of whether the parties have settled CERCLA liability under a state law or CERCLA itself. This approach to contribution is beneficial for a variety of reasons.

First, the Second Circuit appears to be heading this way, as evidenced in *Niagara Mohawk*, the most recent circuit court to examine the section 113(f)(3)(B) issue.³⁰⁶ For example, *Niagara Mohawk* pointed to the autonomous role that states play in CERCLA, noting “the EPA is expressly authorized to enter into contracts or agreements with states to carry out CERCLA response actions.”³⁰⁷ *Niagara Mohawk* even specified that *Consolidated Edison* and *W.R. Grace* did not hold that the state lacked authority to settle CERCLA claims, further specifying that neither case held that the EPA must explicitly authorize settlements.³⁰⁸ Eventually, *Niagara Mohawk* decided that the consent order at issue, entered under state law but that *expressly* resolved Plaintiff of its CERCLA liability,³⁰⁹ qualified as an administrative settlement, thereby allowing the Plaintiff to seek contribution under section 113(f)(3)(B).³¹⁰

The *Niagara Mohawk* court did not go as far as to overrule *Consolidated Edison*, however, the Second Circuit's reasoning in *Niagara Mohawk* was the same as their reasoning in *Consolidated Edison*, in that it cautioned against settlements that did not expressly resolve CERCLA claims.³¹¹ *Niagara Mohawk*, however, with its dicta focusing on the role of states in resolving CERCLA liability, hinted at the possibility that a

306. See *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124–27 (2d Cir. 2010).

307. *Id.* at 126 (citing 40 C.F.R. § 300.515(a)(1) (2015)).

308. *Id.* at 125. (“In each case, the consent order at issue did not purport to resolve CERCLA liability and hence, in the panel's view, did not qualify as an administrative settlement under § 113.”)

309. *Id.* at 119 (“In 2003, NiMo [Plaintiff] and the DEC [New York State Department of Environmental Conservation] executed an amended Order on Consent under which NiMo incurred additional costs while obtaining a specific release of CERCLA liability upon meeting certain conditions.”)

310. *Id.* at 126 (“Our interpretation of the Consent Order fits squarely within the type of contribution claims contemplated by § 113.”)

311. See *id.*; *Consol. Edison Co. of New York v. UGI Utils., Inc.*, 423 F.3d 90, 96 (2d Cir. 2005).

change may soon come to the Second Circuit, but not the radical change that the Third Circuit proposes. That is, the Second Circuit alludes to the fact that resolving CERCLA liability is its biggest concern, not whether the claim was necessarily originally brought under CERCLA.

Additionally, the Second Circuit was wary about extending CERCLA contribution after only settling state law liability without any mention of CERCLA. This was due to the possibility that parties could then later bring CERCLA claims.³¹² If parties must settle their CERCLA liability first, this problem is alleviated. Establishing settlement of CERCLA liability will also alleviate the Court's fears of opening contribution up to anyone.

Second, allowing CERCLA contribution is appropriate because state superfunds are increasingly competent in the area of hazardous waste spills; in fact, in some instances, state superfunds are more sophisticated than CERCLA.³¹³ CERCLA is a frequently criticized statute, not only for its contribution issues,³¹⁴ while state superfunds may be criticized as being inconsistent,³¹⁵ allowing CERCLA contribution would encourage states to refine their statutes to explicitly resolve CERCLA liability, at a minimum. This would be an excellent opportunity for states without superfunds to establish superfunds by looking to those states with sophisticated statutes for guidance. As more states enact better superfunds, and each resolving CERCLA liability through compliance with the NCP, settlement procedures will become more uniform across the country. Section 113 was enacted in order to provide more consistent contribution options, thus, this approach would be well within the Congressional intent of SARA.³¹⁶

Third, this approach is more consistent with Congressional intent. The argument that "response action" is a CERCLA-specific term is not entirely convincing, because the definition points out that "response action" is a CERCLA-authorized action.³¹⁷ Thus, it appears that Congress did not intend to specify this term only to CERCLA but instead to actions authorized under CERCLA.³¹⁸ Because states may initiate CERCLA proceedings,³¹⁹ including state law claims that conform to CERCLA requirements, this would be a correct reading of the statute.

312. *Niagara Mohawk Power Corp.*, 596 F.3d at 125 (noting that in *W.R. Grace*, the Second Circuit held that because the "DEC settlement 'ma[de] no reference to CERCLA, [and] establishe[d] that the DEC settled only its state law claims against [the PRP], leaving open the possibility that the DEC or the EPA could, at some future point, assert CERCLA or other claims,'" a PRP could not bring a contribution action under CERCLA).

313. *See supra* Part III(A)(1).

314. *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) ("It has become de rigueur to criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity.").

315. *See supra* Part III.D.

316. *Navigating the CERCLA Contribution Landscape*, *supra* note 66, at 2–35.

317. *Glossary*, *supra* note 84 (emphasis added).

318. *See id.*

319. 42 U.S.C. § 9604(d)(1)(A) (2012).

Additionally, the language of “settling to a state” for a “response action” demonstrates that the intended interpretation of the language was likely to allow for contribution if a party has completed a CERCLA authorized action, or a response action, to a state.³²⁰ For example, a party that has incurred cleanup costs for something that is not covered by CERCLA would not be the intended beneficiary of contribution under CERCLA. This, however, is the approach advocated for by the Third Circuit. A more realistic approach is a situation in which a party enters into an agreement with the state, but follows the National Contingency Plan, and then seeks contribution under CERCLA. In the second example, it is more logical to award CERCLA contribution, as the party has completed the necessary CERCLA settling requirements.

Fourth, the Third Circuit’s approach would prove to be much too inconsistent to be a realistic option. Environmental contamination statutes vary widely³²¹ and the Third Circuit’s proposition that parties do not have to settle their CERCLA liability suggests that parties can avoid the NCP standard and skip right to the beneficial aspect of CERCLA: contribution with a low burden of causation. This is especially concerning because the party can essentially divide the proceedings, settling under a lenient state law and seeking contribution under a lenient federal statute. The NCP process is tedious and there is no wonder why parties would look for a way around it. Mandating that parties meet the NCP requirements, however, is the only way to provide uniform conditions. Simply put, if courts were to disregard the NCP and state settlements as the basis for CERCLA contribution claims, there are too many different routes under which parties could have settled to justify the uniform contribution approach that the Third Circuit proposes.

A contribution scheme that allows parties to settle their CERCLA liability, even if that CERCLA liability is under a state law, is the best option in the present situation. Instead of grossly expanding CERCLA’s contribution provision, the scheme requiring settlement of CERCLA liability is consistent with the direction that circuit courts are headed, the language of the statute, and the intent of the Amendment under which section 113(f)(3)(B) was codified. The scheme allows parties the flexibility of dealing with state authorities and better known state laws, while keeping the parties accountable to CERCLA standards, eventually rewarding them with the opportunity for contribution.

V. CONCLUSION

The issues surrounding CERCLA are not new and CERCLA again finds itself at a crossroads. On the one hand, courts may stick to what has been the prevailing standard for ten years now by requiring parties to resolve CERCLA liability before seeking CERCLA contribution. On the

320. See 42 U.S.C. § 9613(f)(3)(B) (2012).

321. See *supra* Part III.D.

other hand, courts may wish to expand, and greatly increase, the power of state laws by extending CERCLA contribution to those who have not settled their CERCLA liability.

This Note has discussed the varying issues with the Third Circuit's radical extension of CERCLA from a Congressional intent and policy perspective and has pointed out the wide variance of state superfunds found throughout the country; variances that would make application of the Third Circuit extremely difficult and inconsistent. Thus, courts should require parties to specifically settle their CERCLA liability. This approach is applied by an overwhelming majority of the circuits, finds the most judicial and legislative support, and is most consistent with the purpose of the Amendments. Additionally, it solves another issue: the headache of adding another wrinkle under CERCLA, a statute that is already convoluted and confusing.

CERCLA's reputation is less than stellar. If courts accept the Third Circuit's radical extension of contribution, CERCLA will become not only confusing and poorly written, but also severely weakened and used as a catchall for state environmental claims. There is an obvious remedy to this complex problem: make CERCLA contribution dependent on settling CERCLA liability.