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William D. Araiza
Brooklyn Law School, bill.araiza@brooklaw.edu

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*William D. Araiza**

A long-abandoned landfill is discovered to be the source of toxic contamination of surrounding agricultural and residential property, and is deemed to be a threat to the health and safety of the community. The United States Environmental Protection Agency (EPA) steps in and declares the site to be covered under the Superfund Law.[1] The EPA begins an investigation and discovers evidence that during the landfill's operating life General Motors (GM) sent large quantities of waste oil, paint and solvents to the landfill. Pursuant to its Superfund authority the EPA negotiates a consent decree with GM in which GM, while denying that it is a liable party under the statute, nevertheless agrees to undertake a multi-million dollar cleanup. During its own investigation GM discovers that Ford and Chrysler disposed of similar materials at the landfill. GM also discovers that significant contamination at the site was caused by Eastern Airlines, Smith-Corona and Studebaker, all of whom have gone bankrupt, as well as by several corporations that cannot be identified. Again pursuant to the Superfund law, GM sues Ford and Chrysler, seeking 100% reimbursement of the costs GM incurred. What result?

The Superfund Law, more formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[2] enacted in 1980 and substantially amended in 1986,[3] provides the mechanism for the identification and cleanup of hazardous waste sites like the one described in the above hypothetical. Among other features, CERCLA provides that a broad class of parties may be held liable for the costs of such cleanups (known as "response costs") whether such costs are incurred by a governmental entity or "any other person."[4] This liability scheme is found

* Associate Professor of Law, Loyola Law School, Los Angeles. B.A. Columbia University 1983; M.S. Georgetown University 1985; J.D. Yale University 1990. I wish to thank Ellen Aprill, Daniel Farber, Roger Findley, Catherine Fisk, David Leonard, Dan Selmi, Larry Solum and Georgene Vairo for their assistance and helpful comments on earlier drafts of this paper. Thanks also to Dora Lopez for fine research assistance. Any shortcomings remain, of course, my sole responsibility.

1 The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

2 *Id.*

3 Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at various places in 42 U.S.C. §§ 9601-9675).

4 CERCLA § 107(a) (codified at 42 U.S.C. § 9607(a)). The relevant parts of § 107 read as follows:

> Notwithstanding any other provision . . . [any person within the class of liable persons] shall be liable for— (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) *any other necessary costs of response incurred by any other person consistent with the national contingency plan* . . . .

Id. (emphasis added).

in CERCLA § 107; such "cost recovery" liability is usually, but not always, joint and several.[5]

As part of the 1986 amendments, however, Congress added to CERCLA a provision, codified at CERCLA § 113, authorizing "any person" to "seek contribution from any other person who is liable or potentially liable under [§ 107]."[6] Applying traditional rules of contribution borrowed from tort law, some courts have held that § 113 contribution liability is not joint and several, but merely several.[7] Several other differences also distinguish this contribution liability from § 107 cost recovery liability,[8] and generally make contribution suits less desirable from the point of view of the party that has incurred response costs and is searching for other parties onto which it can shift either some or all of those costs.[9]

The presence of these two, "somewhat overlapping"[10] causes of action has introduced a great deal of uncertainty into CERCLA litigation in which private parties that have incurred cleanup costs seek reimbursement from other private parties.[11] This uncertainty is especially acute when the plaintiff in such litigation is itself potentially CERCLA-liable (also known as a "potentially responsible party" (PRP)).[12] Courts are badly split on the

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As suggested by the above quotation from the statute, an important difference between the ability of a federal or state government or Indian tribe to recover costs, and the ability of "any other party" to do so is the degree of consistency with the federal government's hazardous waste cleanup plan that the party seeking response costs must show. In order to recover their response costs, the enumerated governmental parties must show that their expenditures were not inconsistent with the federal cleanup plan (known as the National Contingency Plan (NCP)). By contrast, a private party seeking to recover its response costs must meet the higher standard of showing that the costs it incurred were affirmatively consistent with the NCP. The NCP is reprinted at 40 C.F.R. pt. 300 (1995).

5 This section is codified at 42 U.S.C. § 9607 (1994). Joint and several liability allows the total cost of cleanup to be placed on one responsible party. Several liability allows placing on a liable party only that share of the total cleanup costs attributable to that party. On the issue of § 107's liability rule, compare *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1535 (10th Cir. 1995) ("It is . . . well settled that § 107 imposes joint and several liability on PRPs regardless of fault.") with *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (stating that imposition of joint and several liability in § 107 action depends on analysis of equitable factors). Despite the statement in *Allied*, the general consensus appears to be that § 107 liability is necessarily joint and several unless a § 107 defendant can prove that the harm it caused at the site is divisible in terms of the costs. *See, e.g.*, 1 ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 4.4(H) at 388 (1992) ("[It is] firmly established that liability under Section 107(a) of CERCLA is joint and several, unless a defendant can prove that the environmental injury is divisible and there is a reasonable basis for apportioning the harm . . . .").

6 SARA § 113(b) (codified at 42 U.S.C. § 9613(f)(1)).

7 *See* TOPOL, *supra* note 5, § 4.4(F) (noting split on issue of nature of contribution liability under CERCLA).

8 This article will use the terms "cost recovery" and "contribution" to refer to the types of suits authorized under, respectively, § 107 and § 113.

9 *See infra* Part I.C.

10 Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966 (1994).

11 Thus, this situation is different from one in which a private party that has incurred cleanup costs seeks reimbursement from the federal hazardous waste cleanup fund, literally, the "Superfund" which supplies the popular name for the entire statute. *See* 42 U.S.C. § 9612 (1994) (setting forth the procedure for making reimbursement claims to the federal government).

12 The problem created by the existence of two causes of action is especially acute in these cases because, when the plaintiff is not potentially CERCLA-liable, § 107 is generally considered to be the appropriate cause of action. The conflict between § 107 and § 113 arises with plaintiffs who are PRPs because § 113's use of the term "contribution" suggests that it is the appropriate cause of action when the plaintiff is liable or potentially liable. *See infra* note 193 (citing cases that have adopted this reasoning).

question whether a PRP may bring a § 107 cause of action, with no strong decisional trend emerging. The stakes are high: cleanup costs for a site often run into the tens of millions of dollars,[13] and these two causes of action either clearly or arguably provide different answers to crucial questions such as the amount of liability a plaintiff can shift,[14] the burden of proving the costs that may be shifted,[15] the limitations period,[16] and the standard of liability and availability of defenses.[17] For all of these issues § 107 provides a rule more favorable to third-party plaintiffs; thus, a PRP third-party plaintiff will often attempt to sue under § 107, while the third-party defendant will argue that the PRP third-party plaintiff must be relegated to bringing a § 113 suit.

This Article examines whether and when PRPs should be allowed to bring cost recovery suits under § 107, and, conversely, when such parties should be limited to suing for contribution under § 113. Part I of this Article provides the necessary background. First, it sets forth the statutory background of CERCLA as enacted in 1980. It then discusses the judicial response to PRPs' claims that imposition of joint and several liability on them was unfair unless courts construed CERCLA to authorize those parties to sue other PRPs for all or a portion of that joint and several liability. Part I concludes by setting forth the relevant provisions of the 1986

For the most part, a suit brought by a private party seeking reimbursement for response costs will feature a plaintiff who is a PRP, since CERCLA's broad liability includes most private persons that have any incentive to incur response costs. *See, e.g.*, Reynolds Metals Co. v. Arkansas Power & Light, 920 F. Supp. 991, 995 n.6 (E.D. Ark. 1996) ("CERCLA . . . only recognizes a very small class of truly 'innocent' PRPs"); Kaufman & Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1216 (N.D. Cal. 1994) ("CERCLA imposes liability on virtually every private party who would have a reason to recoup cleanup costs."). Still, this is not always the case. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311, 317-18 (6th Cir. 1985) (allowing homeowners living adjacent to Superfund site to recover response costs arising out of contamination from site); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515 (D. Mass. 1983) (allowing landowner adjacent to contaminated site to recover costs of clean up of contaminated groundwater migrating from site).

13 *See, e.g.*, Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1151 (9th Cir. 1986) (estimating cleanup of property to cost over $250,000,000).

14 Liability under § 107 is usually joint and several, while liability for contribution may be merely several. *Compare, e.g.*, United States v. Colorado & E. R.R., 50 F.3d 1530, 1535 (10th Cir. 1995) (noting that it is "well settled" that liability under § 107 is joint and several) *with* TOPOL, *supra* note 5, § 4.4(F) (noting a split on the issue of nature of contribution liability under CERCLA).

15 *See, e.g.*, United States v. Taylor, 909 F. Supp. 355, 360-61 (M.D.N.C. 1995) (finding that in a § 107 action, the burden is on the defendant to show divisibility of harm in order to escape joint and several liability, while in a § 113 action, the burden is on the plaintiff to show the amount of damages for which defendant is responsible).

16 CERCLA provides different limitations periods for cost recovery actions and for contribution actions. *Compare* 42 U.S.C. § 9613(g)(2) (1994) (limitations period for cost recovery action may be as long as six years) *with id.* § 9613(g)(3) (1994) (limitations period for contribution action is three years).

17 Liability under § 107 is strict, in the sense that a fault determination is not necessary. Moreover, the causation requirement under § 107 is generally held to require only that the plaintiff show that there was a release or threatened release of hazardous materials from the waste site that caused the incurrence of response costs. Finally, defenses to § 107 liability are restricted to those very limited ones enumerated in § 107(b), 42 U.S.C. § 9607(b). By contrast, in contribution cases, equitable factors, such as the defendant's degree of fault, mitigate the defendant's liability and may even absolve it completely. In addition, a recent appellate case has suggested the existence of a stricter causation test in contribution cases. *See Colorado & E. R.R.*, 50 F.3d at 1534.

Superfund Amendments and Reauthorization Act (SARA),[18] which codified the third party right of action that courts had found in response to the third-party plaintiffs' unfairness argument. Thus, Part I sets the stage for the conflict courts were to confront in the post-SARA period, where two statutory provisions, § 107 and § 113, each authorized PRPs to bring third party suits for either all or part of the costs incurred by the third-party plaintiff.

Part II of this Article examines the analytical methods courts have used to decide the PRP-as-plaintiff issue. Courts have employed three general approaches to this issue. First, some courts have relied primarily on a reading of the statutory text. This sort of heavy reliance on the statutory text as the source of the statute's meaning reflects recent academic and judicial interest in "textualist" approaches to statutory interpretation. In turn, this renewed interest derives in large part from a reaction against the traditional view that a court should interpret a statute by reference to either the enacting legislature's intent or some policy goal underlying the statute. Use of these more traditional reference points has come under attack as scholars and courts have expressed doubt about the discoverability of a legislature's intent or a statute's purpose, and have come to question the very coherence of those concepts.

In the PRP-as-plaintiff context, however, this textualist approach has led to divergent results. Focusing on the text, some courts have concluded that the answer to this issue turns on § 107's provision that "any . . . person" other than the enumerated governmental entities may recover the cleanup costs that person has incurred. Focusing on what they consider to be the "plain meaning" of the statute, most of these courts have decided that any private party, including a PRP, may sue under § 107.[19] Other courts, however, have reached the opposite result by relying on canons of statutory interpretation. Thus, one court has held that the "plain meaning" approach noted above would have the effect of reducing § 113's contribution provision to a nullity, as no PRP would choose to sue for contribution if it also had the right to sue for cost recovery under § 107.[20] Other courts have reached the same result by reading the relevant provisions of § 107 and § 113 not as offering two competing means of recovery, but rather as providing different parts of a single cause of action.[21] While reaching a result at odds with the presumptive "plain meaning" of the statute, these cases nevertheless reflect a textualist approach, as they base their conclusions on the statutory text, as understood by reference to interpretive canons.

The Article then evaluates and critiques this "textualist" approach to the PRP-as-plaintiff issue.[22] It suggests that the decisions that rely solely on § 107's "any other person" language, while at first blush clear reflections of a textualist approach, nevertheless employ a superficial analysis that ignores fundamental textualist canons. Most notably, reliance on § 107's

18 Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at various places in 42 U.S.C. §§ 9601-9675).

19 *See infra* Part II.A.2.

20 *See* United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101 (1st Cir. 1994).

21 *See infra* note 98.

22 *See infra* Part II.A.3-4.

"any other person" language ignores the interpretive canon requiring that a statute be read so as to provide meaning to each of its provisions. This canon has special relevance to textualists, as it supports their claims of deference to the legislature by finding significance in every legislative enactment, in contrast to intentionalist and purposivist approaches which allegedly entail extra-textual judicial legislating. Employing this canon in the PRP-as-plaintiff context leads to the conclusion that § 107 must be read so as to apply only in a limited category of situations, so that a PRP will sometimes be required to sue under the less plaintiff-favorable provisions of § 113.

Ultimately, a textualist approach to the PRP-as-plaintiff issue proves untenable. A textualist reading is unable truly to integrate a statutory amendment into the structure of the preexisting statute, since the effect of the preexisting statute derives not just from the statutory text, but also from subsequent judicial interpretations of that text, which a textualist would not consult. This problem arises in the PRP-as-plaintiff context, since § 113 was added six years after the enactment of the original statute and after courts had interpreted § 107 as providing a third party cause of action. Because of this history, a court seeking the proper understanding of the relationship between § 107 and § 113 must inquire into how the amending Congress intended to reply to the earlier judicial interpretations that found a third party right of action in § 107. The problem is compounded by the fact that the statutory amendment—here, § 113—did not simply overrule judicial interpretations of a previously enacted provision—here, § 107. That fact leaves courts with the difficult task of determining the exact relationship between those two provisions. The point is that courts confronted with the PRP-as-plaintiff issue must consider extra-textual sources of meaning, regardless of whether that inquiry is described as a search for "the legislature's intent" or "the statute's purpose." Recourse to text alone is insufficient.

Investigation into Congress's intent in enacting § 113 indicates that § 113's contribution provision was designed as a codification, with changes, of the implied third party right of action pre-SARA courts had found in § 107. The committee reports that discussed § 113 in the greatest detail expressed approval of court decisions that found an implied right of action, and stated that § 113 was intended to "clarify and confirm"[23] that right. These reports thus suggest that § 113's contribution right of action should be seen as having supplanted the implied right in § 107. However, this insight, while helpful, does not fully resolve the PRP-as-plaintiff issue. After SARA, § 107 still allowed "any . . . person" to recover its response costs. Any reasonable interpretation of CERCLA must therefore conclude that a class of private parties could continue to sue under § 107. The legislative history's suggestion that § 113 was intended to supplant the pre-SARA implied third party right of action does not answer the question whether PRPs not yet adjudged CERCLA-liable are members of that class. The pre-SARA case law that Congress appears to have intended to codify is not completely clear on this issue. At any rate, the fact that Congress ex-

23 *See infra* note 151.

pressed some intent to "clarify" that preexisting right suggests that even had pre-SARA courts found a clear answer to this question, Congress may not have intended to codify that exact rule. Thus, while the legislative history provides an important insight into the relationship between § 107 and § 113, it does not provide the full answer to the PRP-as-plaintiff problem.

This conclusion indicates that resolution of the PRP-as-plaintiff issue requires examination of other interpretive criteria. Courts have, in practice, employed two other methods. Some courts have inquired into whether allowing PRPs to sue under § 107 promotes or impedes CERCLA's underlying policies. Other courts have examined whether allowing PRPs to sue under § 113 would be consistent with the common law understanding of the term "contribution."

The Article next turns to the cases considering CERCLA's underlying policies,[24] and more generally to the interpretive approach that seeks meaning in a statute's purpose.[25] This discussion reveals that, like the courts that have employed a textualist approach, the courts relying on policy promotion have found that this approach does not provide a determinate result. Specifically, courts have found that this issue implicates two policies: first, ensuring speedy and voluntary private cleanup actions; and second, promoting quick settlement of private parties' CERCLA liability to the government. Focusing on the first of these policies, some courts have held that allowing PRPs to sue under § 107 would induce them to undertake rapid cleanup actions by ensuring that they would be able to recover their costs from other parties. Other courts, focusing on the second of these policies, have not allowed PRPs to bring § 107 cost recovery suits against parties that have settled their liability with the government, on the theory that allowing such suits would effectively circumvent CERCLA's bar on contribution suits against settling parties, thus making settlement less attractive.

These cases illustrate the difficulty of attempting to resolve the PRP-as-plaintiff issue by recourse to CERCLA's underlying purpose. The problem is that CERCLA arguably seeks to accomplish two goals that suggest contradictory resolutions of this issue. This does not mean that statutory purpose should play no role in resolving this interpretive question. It does mean, however, that a court, when engaging in purpose analysis, should seek to promote CERCLA's goals as those goals apply to the factual context of the particular case in front of it. CERCLA is a complicated statute that applies to a wide variety of factual situations. Courts can coherently further its goals only when they consciously consider the results a particular interpretation would have on the facts before it.

Finally, a few courts have decided this issue based on general principles of contribution law.[26] The principle most often invoked is the common law rule that a suit between liable parties as to the appropriate division of responsibility for a single liability is by definition a suit for contribution. Most courts adopting this approach have determined that a

24 *See infra* Part II.B.1.
25 *See infra* Part II.B.2.
26 *See infra* Part II.C.

third party suit in which a PRP seeks to recover from another allegedly liable party should be considered a contribution suit, and thus a suit under § 113, with all of § 113's prerequisites and limitations. On the other hand, at least one court has employed the language of contribution law to hold that a PRP's suit against other PRPs cannot be considered a suit for contribution, in light of the fact that the PRP third-party plaintiff had neither admitted nor been formally adjudged liable.[27]

This Article argues that a full understanding of the relationship between CERCLA and common law contribution principles requires an appreciation for the unique aspects of CERCLA's liability scheme. In particular, it is crucial to realize that CERCLA, via the mechanism of a § 107 cost recovery suit, allows a non-liable party to seek cleanup cost reimbursement from liable parties. This feature substantially reduces the relevance of tort law's concern that a contribution suit be brought only after some determination is made of the contribution plaintiff's own liability.

The role of common law principles in the PRP-as-plaintiff issue illustrates again the importance of context. Just as the earlier discussion of textualism led to the conclusion that a full understanding of the statutory text required an understanding of the legal and historical context surrounding the amending Congress's enactment of § 113, so too a full understanding of the role of common law contribution principles requires an understanding of the legal context (i.e., CERCLA's liability scheme) to which those principles are to be applied. Analogously, the earlier discussion of the role of statutory purpose in resolving the PRP-as-plaintiff issue reflected the importance of the factual context of the particular case in determining how CERCLA's purposes could best be furthered in that case.

In an attempt to find an interpretive approach that can accommodate legal and factual context, Part III examines the approach known as practical reasoning. Practical reasoning is an approach that values above all a flexible attitude toward interpretation. It stresses that statutory meaning should be constructed based on a variety of factors, including the text as understood through intrinsic construction aids such as interpretive canons, as well as through the legislature's intent and the purpose of the statute. Practical reasoning is also distinguished by its stress on the factual context of the case in which the interpretation is made. This part of the Article illustrates the practical reasoning approach through a case, *United States v. SCA Services of Indiana*,[28] which reflects many of the characteristics of practical reasoning in the course of resolving a particular PRP-as-plaintiff claim.[29] *SCA Services* is in many ways a model of how such a difficult interpretive issue should be resolved. Most importantly, the opinion considers a variety of interpretive sources, is skeptical of a conclusive reliance on any one of them, and resolves the issue with an understanding of both the facts of the particular case before it and the effects its interpretation would have on the operation of the statutory scheme in future cases. Nevertheless, the *SCA Services* analysis remains vulnerable to a criticism often leveled at practical

27 *See* United States v. SCA Servs., 849 F. Supp. 1264, 1283 (N.D. Ind. 1994).
28 *Id.*
29 *See infra* Part III.C.

reasoning: namely, that it leads to ad hoc decisionmaking providing little predictability or certainty for future litigants.[30]

Part IV of the Article attempts to address this criticism, by proposing a modified practical reasoning approach to the PRP-as-plaintiff issue. The Article proposes a two-part interpretation of the relationship between § 107 and § 113. First, any PRP should have the choice of suing for cost recovery under § 107 or contribution under § 113. Should the PRP sue for cost recovery, the court, in conformance with general principles of contribution law as relevant to CERCLA, should make an authoritative determination of the PRP-plaintiff's CERCLA liability. Should the third-party plaintiff be found not CERCLA-liable, its cost recovery suit could continue. However, should the PRP be found CERCLA-liable, its suit would be transformed into a § 113 contribution suit, and it would have to deal with any collateral consequences that might arise from the court's determination of the third-party plaintiff's own liability. By contrast, a PRP who decided to sue under § 113 initially would not be required to litigate the issue of its own CERCLA liability.

In addition to setting forth the circumstances under which a PRP would be allowed to sue under § 107, the proposed rule also offers guidance for liability and cost allocations in a § 113 contribution suit. First, the court should have the discretion to impose on the defendants joint and several liability for any portion of the total cleanup costs found to be unattributable to the plaintiff. This approach represents a modification of the joint and several liability available under § 107, in that it would make each defendant jointly and severally liable, but only for the share of the total costs for which the plaintiff is not held equitably responsible. This liability rule thus strikes a middle ground between § 107's brand of joint and several liability and the merely several liability that might attach as a result of a "pure" contribution action. Second, the court, in allocating costs between the parties, should employ its authority to give credit to a § 113 plaintiff that actually performed cleanup activities at the site. CERCLA explicitly provides courts with the power to take such equitable factors into account when allocating costs between parties in contribution actions.[31] The Article proposes merely that "credit for cleanup" become a standard component of courts' equitable allocation calculus.

This proposal incorporates the insights offered by courts that have attempted to resolve the PRP-as-plaintiff issue. First, it gives full effect to both statutory sections, by limiting certain plaintiffs to a § 113 contribution action instead of the more plaintiff-favorable § 107 action. Second, it balances CERCLA's sometimes conflicting policy goals. It promotes private party initiated cleanups by ensuring, via its modified joint and several liability rule, that such a party will have access to a more secure source of funding from which it can recoup cleanup expenses not fairly attributable to that party. At the same time, it helps to promote settlement of parties'

30 *See infra* Part III.D.

31 *See* 42 U.S.C. § 9613(f)(1) (1994) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

CERCLA liability to the government by ensuring that settlors not be subject to lawsuits by parties that are CERCLA-liable. Finally, this rule is consistent with principles of common law contribution that Congress seems to have expected courts to embrace and refine when interpreting CERCLA's liability scheme.

The proposal also goes some distance towards harmonizing the insights of practical reasoning and textualism. It attempts to vindicate practical reasoning's insight that interpretation requires investigation of a variety of sources of meaning and a sensitivity to the facts of the case before it. At the same time, the proposal seeks to achieve the predictability and certainty of a rule that might be produced by a textualist analysis. At some point, the values promoted by these two approaches are simply incompatible. However, the interpretation of CERCLA proposed in Part IV attempts to minimize this incompatibility by providing judges with maximum discretion to consider the facts of the case before them when allocating cleanup costs, but within a framework that cabins that discretion within predictable liability rules.

I. PRIVATE PARTY SUITS UNDER THE ORIGINAL VERSION OF CERCLA AND AFTER SARA

A. *CERCLA's Background and Enacting Process*

Enacted in 1980, CERCLA was the last major environmental statute of a decade that witnessed an explosion of federal measures designed to safeguard or improve the environment.[32] As with many of the other environmental statutes enacted during the era, CERCLA was Congress's response to a problem that had gained national attention through stark and compelling media coverage of a particular type of environmental degradation. In the case of CERCLA, the problem was the careless disposal of toxic wastes by industry. By the late 1970s, extensive media coverage of the egregious effects of such disposal in locations throughout the nation[33] had made it

32 *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631 (1986) ("The last fifteen years [1970-1985] have witnessed a fantastic effort to develop a framework of legal rules reflecting this nation's awareness of the adverse impacts of environmental pollution and degradation."). Among the more significant environmental statutes enacted or substantially strengthened during the 1970s are the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1994); the Endangered Species Act, Pub. L. No. 97-304, 96 Stat. 1411 (codified as amended in scattered sections of 16 U.S.C.); the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.); the Solid Waste Disposal Act and the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795-2839 (codified as amended in scattered sections of 42 U.S.C.); the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1994); the Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 91-452, 84 Stat. 928 (codified as amended in scattered sections of 7 U.S.C.); and the Safe Drinking Water Act, Pub. L. No. 95-190, 91 Stat. 1393 (codified as amended in scattered sections of 42 U.S.C.). The 1970s also saw the creation of the Environmental Protection Agency, in 1970. *See* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 32-33 (1994).

33 *See* H.R. REP. No. 96-1016, pt. 1, at 18-20 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6121-23 (discussing sites throughout the country); HAROLD C. BARNETT, TOXIC DEBTS AND THE SUPERFUND DILEMMA 25 (1994) (discussing findings of groundwater contamination in California and Massachusetts); *id.* at 62 (discussing 1980 explosion of chemical facility in New Jersey); 1

impossible for Congress to ignore the problem of careless toxic waste disposal. Most notably, revelations of the toxic contamination at the Love Canal site in Niagara Falls, New York shocked the nation, with news reports relating stories of children sickened by toxic contaminants, women giving birth to deformed and mentally retarded children, and toxic sludge seeping through the basement walls of private homes.[34] The fact that Hooker Chemical Company, which caused the contamination, had transferred the waste disposal site to the local government for use as a school and playground only served to increase the outrage and amplify the calls for tough federal cleanup laws requiring the parties responsible for the contamination to pay for the cleanup. The political effect of these particular catastrophes was further heightened by studies indicating the widespread nature of the problem of unsafe disposal of hazardous wastes.[35]

The result was CERCLA. Despite the pressure that Congress felt to enact a law dealing with the hazardous waste problem, however, a great deal of controversy attended CERCLA's journey through Congress. Much of the controversy centered on the scope of the liability that would be imposed,[36] the classes of parties that would be held liable,[37] and the mechanism for funding the "Superfund," the actual federal fund that would finance cleanups when private parties were unavailable.[38] The result was a last-second compromise by which the bill that eventually became CERCLA was significantly changed after the relevant committees had examined it. Thus, CERCLA has always been dogged with the criticism that it was hastily crafted and left unanswered important questions about its operation.[39]

B. Liabilty Under the Original CERCLA Statute

CERCLA can be thought of as having two fundamental goals: the cleanup of the nation's hazardous waste sites, and the placing of the cleanup costs on a class of parties that Congress deemed responsible.[40]

TOPOL, *supra* note 5, § 1.1 (discussing revelations during late 1970s of toxic waste contamination in New York, Kentucky, and Iowa).

34 *See* BARNETT, *supra* note 33, at 57-58.

35 *See, e.g.*, H.R. REP. No. 96-1016, pt. 1, at 21 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6124 (EPA study indicates that only 10 percent of waste generated is disposed of in environmentally sound manner).

36 For example, several of the bills considered by Congress would have provided a federal cause of action to individuals who had suffered personal damage or injury due to waste disposal activities. For details on this and other provisions that did not become part of CERCLA, see BARNETT, *supra* note 33, at 59-67.

37 *See id.*

38 *See id.*

39 *See, e.g.*, United States v. USX Corp., 68 F.3d 811, 824 n.26 (3d Cir. 1995) ("CERCLA is 'notorious for its lack of clarity and poor draftsmanship.'") (quoting Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993)).

40 *See, e.g.*, Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) ("CERCLA's dual goals are to encourage quick response and to place the cost of that response on those responsible for the hazardous condition."); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994) (identifying CERCLA's goals as giving federal government "the tools necessary for a prompt and effective response to the problems . . . resulting from hazardous waste disposal" and ensuring "that those responsible for [the] problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created") (quoting John Boyd Co. v. Boston Gas Co., 775 F. Supp. 435 (D. Mass. 1991)); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

Nearly all of CERCLA's provisions ultimately seek to promote one or both of these goals.

In furtherance of the basic goal of cleaning up the nation's hazardous waste sites, CERCLA authorized the President[41] to direct federal cleanups of such sites.[42] To prioritize cleanup efforts, the statute required the EPA to compile the "National Priorities List," a list of the hazardous waste sites that required relatively quicker attention due to their potential threat to public health or the environment.[43] To pay for such cleanups, the statute established a fund—the "Superfund"—into which flowed the proceeds from a special corporate excise tax.[44] Despite the creation of a federal fund to pay for cleanups, Congress envisioned that private parties should be directly responsible for a significant share of hazardous waste cleanup costs.[45] In enacting CERCLA, Congress made it clear that it was embracing the principle that parties that caused and benefited from the disposal activities that created the problem should in turn be responsible for solving the problem.[46] This principle finds expression in CERCLA § 106, which authorizes the EPA to require that private parties potentially liable under the statute undertake cleanups in cases of "imminent and substantial endangerment to the public health or welfare or the environment,"[47] and imposes severe penalties for failure to comply.[48]

Congress also provided that the same class of parties susceptible to § 106 orders would be liable for cleanup costs incurred by either the federal government, a state government or native tribe, or a private party. This liability rule is found in § 107.[49] Under § 107, an owner or operator of a site from which there has been a release or threatened release of a hazardous material, or any person who transported or arranged for the

41 Section 115 of CERCLA authorizes the President to delegate any of the authority delegated to him under CERCLA. *See* 42 U.S.C. § 9615 (1994). The President delegated his CERCLA enforcement authority to the Administrator of the EPA. *See* Exec. Order No. 12,580, 3 C.F.R. 193 (1987), *reprinted in* 42 U.S.C. § 9615 (1994) (powers under SARA), *revoking* 3 C.F.R. 168 (1981) (powers under CERCLA).

42 *See* 42 U.S.C. § 9604 (1994).

43 *See id.* § 9605(a)(8).

44 *See id.* § 9611(a). Originally this tax was levied only on petroleum products and chemical feedstocks. However, the 1986 SARA amendments broadened the tax to all corporations having annual taxable incomes over $2 million. *See generally* TOPOL, *supra* note 5, §§ 1.2-.4 (1992).

45 The chemical feedstock tax that was originally the sole funding mechanism for the Superfund also reflected Congress's embrace of the "polluter pays" principle, albeit in a more indirect form.

46 *See, e.g.*, Reilly Tar & Chem. Corp., 546 F. Supp. at 1112 ("A review of the statute and the Committee Reports reveals at least two Congressional concerns that survived the final amendments to [CERCLA]. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

47 42 U.S.C. § 9606(a) (1994). Section 106's "imminent and substantial endangerment" standard is tighter than CERCLA's general liability standard. *Compare id.* § 9607(a)(4) (requiring for liability that the site be one "from which there is a release, or a threatened release . . . of a hazardous substance.").

48 42 U.S.C. § 9606(b)(1) (1994) (providing for fine of up to $25,000 for every day recipient of § 106 cleanup order fails to comply); *id.* § 9607(c)(3) (providing for treble damages against recipient of § 106 order if recipient does not comply and government is forced to incur costs to perform cleanup).

49 42 U.S.C. § 9607 (1994).

transport of such a substance to the site for disposal or treatment, is liable for such response costs, to the extent such costs are not inconsistent with the National Contingency Plan (NCP)[50] or, in the case of a private party-plaintiff, to the extent such costs are consistent with the NCP.[51]

Section 107 liability is extremely broad. It does not require a showing of fault on the part of the defendants. Moreover, courts have interpreted § 107 to impose, in most cases, joint and several liability[52] and to admit of no defenses except the very limited ones enumerated in subsection (b), namely, that the release was caused solely by an act of God,[53] an act of war,[54] or to a limited extent, an act or omission of a third party not occurring in the course of a contractual relationship with the allegedly liable party.[55]

C. The Evolution of CERCLA Liability

In the years immediately following CERCLA's enactment, it became clear that at least in some cases cleanup costs for a site were being borne by less than all of the parties that could be held legally liable for those costs and that still existed and were solvent. In large part this was due to the logistical difficulty of obtaining the information necessary to identify potentially responsible parties and prove their CERCLA liability, especially at sites where record keeping was inadequate or where disposal activities took place many years, or even decades, ago.[56] Even more importantly, by the early 1980s courts had begun holding that § 107 authorized courts to impose joint and several liability on CERCLA-liable parties.[57] The prospect of joint and several liability reduced the pressure on the EPA to identify every responsible party, especially if one or two large corporate defendants were easily available. For these reasons, some have argued that the EPA's practice in CERCLA's early years was to pursue only a few of the often many PRPs at a given site.[58]

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50 The NCP is codified at 40 C.F.R. §§ 300.1-.920. The NCP describes methods of responding to hazardous waste releases or threatened releases, and sets out, among other things, the methods and criteria for determining the appropriate responses authorized by CERCLA to hazardous material releases. *See, e.g.*, Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 891 (9th Cir. 1986); Walls v. Waste Resource Corp., 761 F.2d 311, 318 n.5 (6th Cir. 1985).

51 *See* 42 U.S.C. § 9607(a) (1994).

52 *See supra* note 5.

53 *See* 42 U.S.C. § 9607(b)(1) (1994).

54 *See id.* § 9607(b)(2).

55 *See id.* § 9607(b)(3). On § 107(b)'s defenses to CERCLA liability, see generally United States v. Price, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983); United States v. Marisol, 725 F. Supp. 833, 837-39 (M.D. Pa. 1978).

56 Some CERCLA sites, for example, were used as industrial or disposal areas up to a century ago. *See, e.g.*, Reichhold Chemicals, Inc. v. Textron, Inc., 888 F. Supp. 1116, 1119 (N.D. Fla. 1995) (involving site in operation since 1916 and used "by many former owners"); United States v. ASARCO, Inc., 814 F. Supp. 951, 954 (D. Colo. 1993) (regarding mining site in use for over 100 years).

57 *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) (holding CERCLA liability to be joint and several except where defendants can prove divisibility of harm).

58 *See* BARNETT, *supra* note 33, at 178 (recounting argument); *see also* 2 TOPOL, *supra* note 5, § 10.1 (1992); William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,413, 10,417 (July 1991); Robert W. McGee, *Should Superfund Be Wasted? The Case to Trash the Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA)*, 11 GLENDALE L. REV. 120, 131-33 (1992); *cf.* United

By the early 1980s CERCLA defendants were arguing to courts that the imposition of joint and several liability on the particular defendants targeted by the EPA would be inequitable unless those defendants had a right to seek some degree of reimbursement from other parties that also might fall within CERCLA's wide liability net. The government, in its position as the enforcer of CERCLA, also argued for a such a right, which would reinforce its argument in favor of joint and several liability.[59] Courts generally, though not unanimously, found such a right.[60]

SARA removed all doubt about the issue, as it explicitly provided a right of contribution.[61] In enacting that right, Congress made it clear that it had accepted the appropriateness of allowing a CERCLA-liable party to seek reimbursement from other private parties as an integral part of a liability scheme in which the third-party plaintiff was itself jointly and severally liable to the government for all cleanup costs at a site.[62]

Thus, with SARA's provision of a right to contribution and the courts' consensus that § 107 imposed joint and several liability, CERCLA's liability scheme assumed the shape that has persisted to the present. It is the shape of this liability scheme, specifically, the provision of two, partially overlapping[63] causes of action, that gives rise to the doctrinal issue that is the focus of this Article. However, before examining litigants' and courts' analyses of the availability of these two rights of action, it may be helpful to examine the uses and limitations of § 107 and § 113 actions.

States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990) ("joint and several liability allows the governments to sue a manageable number of parties and to collect the entire amount of response costs from those defendants"). Despite this argument, one analyst has concluded that the EPA did not in fact target wealthy corporations for disproportional CERCLA liability. *See* BARNETT, *supra* note 33, at 180, 183. On the other hand, at least one practitioner has maintained that the EPA has continued this practice to the present day. *See* Bob Sablatura, *Superfund Fueled Boom for Lawyers*, L.A. DAILY J., Nov. 1, 1995, at 4 (quoting Thomas F. Harrison).

59 *See* Alfred R. Light, *Superfund's Second Master: The Uneasy Fit of Private Cost Recovery Within CERCLA*, ST. THOMAS L. REV. 97, 105 (1993).

60 *Compare, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1265-69 (D. Del. 1986) *and* United States v. Conservation Chem. Co., 628 F. Supp. 391, 404 (W.D. Mo. 1985), *modified*, 681 F. Supp. 1394 (W.D. Mo. 1988) *and* Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) (all finding right of third party action) *with, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1058 (D. Ariz. 1984) (finding private right of action in § 107 but holding such an action barred by doctrine of unclean hands), *aff'd*, 804 F.2d 1454 (9th Cir. 1986) *and* United States v. Westinghouse Elec. Corp., 14 Envtl. L. Rep. 20483, 20485 (S.D. Ind. 1983) *and* D'Imperio v. United States, 575 F. Supp. 248, 253 (D.N.J. 1983) (requiring private plaintiff in § 107 action to prove its CERCLA innocence before its suit could proceed). *See also* 1 TOPOL *supra* note 5, § 1.3 (1992) (SARA's provision of right to contribution made explicit what courts had already found implicit in the original statute).

61 The contribution provision reads as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

42 U.S.C. § 9613(f)(1) (1994).

62 *See, e.g.*, S. REP. No. 99-11, at 44 (1985) (stating that third party contribution right was designed to come into play when third party plaintiff was held jointly and severally liable); H.R. REP. No. 99-253, pt. 1, at 79-80 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2861-62.

63 Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

For a variety of reasons dealing with either the statutory scheme or the nature of contribution actions as interpreted by the courts, the right to contribution is somewhat limited. First, contribution liability under CERCLA is usually held to be several, as opposed to joint and several; thus, a party suing in contribution may only be able to shift to the contribution defendant the share of the joint liability fairly allocable to that defendant.[64] This limitation is especially significant at sites where a large share of the overall liability is fairly allocable to non-viable parties, for example, bankrupt companies, or where the entities responsible for a large portion of the contamination cannot be located. Defendants in a contribution suit may possibly avoid responsibility for such "orphan shares" of the overall cost. For example, recall the hypothetical at the beginning of this article, where three solvent PRPs, GM, Ford and Chrysler, have been identified. Assume now that, as between themselves, each of them is thought to have contributed equally to the problem, but that the majority of the total responsibility lies elsewhere, either based on records that implicate currently insolvent parties or because the three identified parties simply could not have contributed the types of waste comprising the primary contamination. If GM has incurred all of the cleanup costs at the site, under § 113 it could conceivably recover from Ford and Chrysler only the costs that could be attributed to those two parties' waste disposal activities. In that case, GM could be left with sole responsibility for the orphan shares.[65] The contrast with § 107 is clear, as § 107 liability is usually held to be joint and several, unless the defendant can surmount the very high barrier of proving that the harm it caused is divisible from the rest of the harm at the site.[66] Thus, in contrast to § 113, under § 107 in the above example GM could shift to Ford and Chrysler 100% of the costs GM incurred, regardless of the relative blameworthiness of the three parties.[67]

64 *See, e.g.*, Saco Steel Co. v. Saco Defense, Inc., 910 F. Supp. 803, 809 (D. Me. 1995) ("Liability under § 107(a) is joint and several unless a defendant carries the 'especially heavy burden' of showing that liability is divisible, *i.e.*, that there is a reasonable basis for apportioning the harm .... Liability for contribution under § 113(f) is not joint, but several."). *But see* 1 TOPOL, *supra* note 5, § 4.4(F) (1992) (noting disagreement among courts as to the nature of contribution liability).

65 *See, e.g.*, Gould Inc. v. A & M Battery and Tire Serv., 901 F. Supp. 906, 913 (M.D. Pa. 1995) (holding defendants in § 113 contribution suit responsible only for the share of the cleanup costs caused by their own waste contribution, and explicitly holding that contribution defendants are not responsible for orphan shares); B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960, 973 (D. Conn. 1991) (holding that defendant municipalities' degree of liability should be determined by "the extent of their contribution to the problem" and "limited to a share based on the amount of disposition shown to have contributed to the damage" at the site), *aff'd*, 958 F.2d 1192 (2d Cir. 1992); *see also* 2 TOPOL, *supra* note 5, § 10.1(c) (1992) (suggesting that this could be the result in a contribution suit). However, other courts have held that orphan shares could be allocated even in a contribution suit. *See infra* note 170 (citing cases allowing allocation of orphan shares in contribution suit).

66 *See, e.g.*, United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992). These are distinct cases, despite their identical names. The *Alcan* cases, and the nature of joint and several liability under § 107, have engendered much commentary. *See, e.g.*, Linda L. Rockwood & James L. Harrison, *The* Alcan *Decisions: Causation Through the Back Door*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10542 (1993); *see also* John Copeland Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493, 1495 n.14 (citing commentary on *Alcan* cases).

67 In this situation, Ford and Chrysler might then be able to bring a § 113 contribution suit against GM, seeking to place on GM its equitable share of the cleanup costs. *See, e.g.*, Pinal Creek

Second, under another of the SARA amendments, a contribution suit may not be brought against parties that have settled their liability with the federal government.[68] Congress enacted this "contribution protection" provision in order to encourage PRPs to settle by allowing them to avoid future liability related to the site.[69] However, for non-settling PRP third-party plaintiffs facing the prospect of joint and several liability, this provision reduces the number of parties that could possibly be made to share the cleanup costs. Thus, again using the introductory hypothetical, if Ford and Chrysler had settled their liability to the government growing out of their conduct at the site, GM, if relegated to a § 113 contribution suit, would be unable to sue any party to recoup any of its cleanup expenses.[70] This disadvantage may not attend PRP third-party plaintiffs who sue under § 107, however, since at least arguably the contribution protection provision does not immunize settlors from liability from a § 107 action.

Third, under CERCLA, standards of liability, and defenses thereto, may well be different for contribution actions than for cost recovery actions. Liability in a cost recovery action is strict, in the sense that it is no-fault and that causation generally need not be shown.[71] Moreover, courts have generally held that defenses to a cost recovery action are limited to the very narrow defenses set forth in the statute.[72] On the other hand, some courts have suggested that a different liability standard applies in

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Group v. Newmont Mining Corp., 926 F. Supp. 1400, 1405-14 (D. Ariz. 1996) (noting that CERCLA envisions this two-step process). *But see infra* note 173 (If third-party plaintiff settles with government, it becomes immune from contribution counterclaims brought by third-party defendants.).

68 *See* 42 U.S.C. § 9613(f)(2) (1994). A provision similar in all relevant respects immunizes PRPs who reach settlements with the government based on their de minimis contributions of hazardous waste to the site. *See id.* § 9622(g)(5).

69 Contribution protection extends only to matters "addressed in the settlement." 42 U.S.C. § 9613(f)(2) (1994); *id.* § 9622(g)(5) (same limitation for de minimis settlors). Thus, the settling party remains potentially liable for matters outside the scope of the settlement. The scope of CERCLA settlements is a much debated and litigated topic that is outside the scope of this article. *See generally* Michael V. Sucaet, *Contribution Protection Under CERCLA: What Have You Settled and Not Settled?*, 40 WAYNE L. REV. 1477 (1994).

70 Of course, the fact that Ford and Chrysler had settled would also benefit GM, since the total cleanup costs for which the non-settling party (here, GM) is responsible would be reduced. The amount by which a non-settling party's liability would be reduced is a hotly contested issue. The text of the contribution protection provision states that a party's settlement "reduces the potential liability of the others by the amount of the settlement," 42 U.S.C. § 9613(f)(2) (1994); *see also id.* § 9622(g)(5) (same text for de minimis settlors). Nevertheless, some courts have instead adopted the rule found in the Uniform Comparative Fault Act (U.C.F.A.), under which the amount by which the total liability is reduced is equal not to the amount of the settlement, but rather to the settlor's proportionate share of the total liability. Thus, under this latter approach the other liable parties either reap the benefit of a settlor's payment of more than its share of the total liability, or bear the burden of a settlor's payment of less than its share. Further discussion of this issue is beyond the scope of this Article. A great deal of literature discusses it, however, both from a CERCLA perspective, see, e.g., Lynette Boomgaarden & Charles Breer, *Surveying the Superfund Settlement Dilemma*, 27 LAND & WATER L. REV. 83 (1992), and from a more abstract one, see, e.g., Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427 (1993).

71 Causation is required only in the limited sense that the plaintiff in a § 107 action must prove that an actual or threatened release of hazardous substances caused the plaintiff to incur response costs. *See, e.g.*, General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1417 (8th Cir. 1990) ("In order for a private party to recover [response] costs from the responsible party, the release of hazardous substances must have 'caused' the incurrence of the costs.").

72 *See supra* notes 53-55.

contribution actions,[73] while other courts have been willing to consider equitable defenses to contribution liability.[74]

II. CHARACTERIZATIONS OF THE ISSUE

Courts have employed three approaches to the PRP-as-plaintiff issue. These approaches are not mutually incompatible, and indeed, many courts have utilized more than one in the course of explaining their decisions. This Part of the Article reviews and evaluates these approaches.

A. Textualist Interpretations

1. The Theory and Promise of Textualism

Many courts have resolved this issue by relying on the text of the statutory provisions. As an approach to statutory interpretation, "textualism" attaches overriding importance to the statutory text, that is, its words or internal structure, as illuminated by interpretive aids (such as dictionaries, grammar rules and interpretive canons) that provide the "rules" by which the text is to be understood.[75] Of course, any court faced with an issue of statutory interpretation must consider the statutory text. Textualism's stress on the text can best be understood in contrast to an approach that views the statutory text not as the source of the statute's meaning, but merely as a clue to the meaning that is to be found in the legislature's intent or the statute's underlying purpose. Textualists critique "intentionalism" by arguing that a legislative "intent" is either empirically undiscoverable or an incoherent concept, since a large group of individuals performing a concerted action like enacting a statute cannot be said to have one "intent."[76] They also critique "purposivism" on the somewhat analogous ground that legislation is not always the product of a single, public-regarding purpose to which the court can refer in construing statutory ambiguities. Under these critics' reading of the legislative process, a statute is often simply a power-based compromise among conflicting private interest groups, and should not be read as embodying a single underlying purpose that all of its provisions seek to promote.[77] Textualists use these claims to argue that an approach focusing on the actual enacted text is

73 *See, e.g.*, United States v. Colorado & E. R.R., 50 F.3d 1530, 1534 (10th Cir. 1995).

74 *See, e.g.*, United States v. Hardage, 116 F.R.D. 460, 466-67 (W.D. Okla. 1987) (noting that unclean hands is a potential defense to CERCLA contribution liability); United States v. Ward, No. 83-63-CIV-5, 1984 WL 15710, at *3-4 (E.D.N.C. 1984) (finding that contribution plaintiff's criminal activity is a defense to CERCLA contribution liability); *cf.* Westfarm Assocs. Ltd. Partnership v. International Fabricare Inst., 846 F. Supp. 422, 433-34 (D. Md. 1993) (holding equitable defenses in contribution actions are not defenses to liability but merely serve to mitigate amount that should be allocated to contribution defendant). *But see* W. Charles Ehlers, Note, *Who Pays? PRP Liability for CERCLA Investigations*, 56 OHIO ST. L.J. 259, 262 n.32, 275 (1995) (reporting that some courts accept equitable defenses to § 107 claims).

75 The following discussion provides only the barest of summaries of textualism. For in-depth descriptions, see the sources cited *infra* note 85.

76 *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-46 (1990) (noting these objections to intentionalism).

77 *See, e.g.*, William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 702-10 (1987).

most faithful to a court's role in a statutory interpretation case—to interpret the statute—and not to rewrite it to fit the judge's idea of what the law should be.[78]

As might be expected given this critique, textualists strongly oppose the use of legislative history, which, after all, speaks only to what the members of the legislature purportedly intended in enacting a particular statute, or alternately, to the statute's purpose.[79] Further, by suggesting that a statute's meaning should be found primarily in the words and structure of the statute itself, textualists take issue with interpretive schools arguing that meaning depends in part on the identity and position of the reader.[80]

Textualists' criticisms of intentionalist and purposivist approaches have some resonance in the debate over CERCLA's interpretation. For example, it is generally accepted that the legislative history of the original CERCLA statute is of little use, since the enacted text was the product of a last-second compromise that differed in significant ways from the House and Senate bills on which most of the legislative history had commented.[81] Moreover, since the distinction between a cost recovery and a contribution action has significant liability consequences, legislators and interest groups may have had significant incentive to engage in the strategic "planting" of legislative history in the hope of influencing later judicial interpretation.[82] Even more profoundly, the public choice theory based argument that it is

78 *See, e.g.*, Eskridge, *supra* note 76, at 654.

79 A purposivist approach is just as likely as an intentionalist one to value recourse to legislative history. *See, e.g.*, Eskridge & Frickey, *supra* note 77, at 699 (noting scholarly interest in use of legislative history to illuminate legislative purpose in enacting a statute).

80 *See, e.g.*, Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329 (1995) (discussing "reader centered approaches" to statutes and contrasting them with textualism).

81 *See, e.g.*, City of New York v. Exxon Corp., 633 F. Supp. 609, 613-14 n.2 (S.D.N.Y. 1986); *see also* 1 TOPOL, *supra* note 5, § 1.1.

82 *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment). In his concurring opinion, Justice Scalia wrote:

> As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references [to cases in a committee report that the report described as having correctly applied previously enacted statute] were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.

Id.; *see also* William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327-29 (1990) (noting concern about "packing" legislative history).

In the CERCLA context, it could be argued that, while CERCLA and SARA had significant consequences for parties that might find themselves CERCLA-liable, it was impossible for any group of parties to predict whether it would more frequently be a third-party defendant or a third-party plaintiff, and that, therefore, it would be useless to attempt to "plant" legislative history relevant to the PRP-as-plaintiff issue. However, certain industries might have reasoned that they would more often be on one side or another of a third-party CERCLA suit. For example, parties that tended to own real estate may have reasoned that they would be more likely to be third-party plaintiffs, either because they would be more easily identifiable by the EPA, and thus more likely to be the subject of a government enforcement action, or because, as current owners of the contaminated property, they would have more incentive to undertake cleanups, in order to restore the property to salable condition. Financial institutions, caught up in CERCLA by means of lender liability rules applied to lenders that foreclose on contaminated property, might find themselves in a similar situation. These types of parties, to the extent they could predict their more likely status as third-party plaintiffs or defendants, would have a motivation to "plant" legislative history on PRPs' ability to bring cost recovery suits.

impossible to know how legislators would have voted on an issue never explicitly considered[83] has some force in the CERCLA context, where the two provisions at issue arguably conflict.[84] This latter problem is especially acute in the CERCLA context due to the fact that § 107 and § 113 were enacted by two Congresses sitting six years apart. This fact removes the legislative purpose inquiry even further from reality.

In light of these concerns casting doubt on an intentionalist or purposivist analysis in general, and of CERCLA in particular, textualism appears to offer an attractive alternative interpretive methodology. Aside from the fact that this methodology has received renewed scholarly[85] and judicial[86] interest, a simple, text-based solution would clearly be attractive in a situation like this, where a major liability scheme turns on the meaning of two statutory provisions. The major cost shifting among private parties that is possible under CERCLA makes it even more important than usual that any interpretation of § 107 and § 113 track the actual enacted language as closely as possible. This concern is only heightened by the existence of § 107's apparently clear "any other person" language,[87] which appears to offer just such a text-based solution that may avoid the indeterminacy of a solution found in expressions of the legislature's intent or purpose. For these reasons, a textualist analysis of this issue deserves a close look.

2. Applying Textualism to the PRP-as-Plaintiff Issue

Several of the courts allowing a PRP third-party plaintiff to sue other PRPs under § 107 have relied in large part on what they considered § 107's "plain meaning." Specifically, these courts relied on § 107(a)'s provision that liable parties were responsible for, among other costs, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan,"[88] and "*any other necessary costs of response incurred by any other person* consistent with the national contingency plan."[89]

For these courts, this latter provision simply means what it says, that is, that *any* person (other than the federal government, a state government or

83 *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

84 Of course, § 107 and § 113 do not explicitly contradict each other. However, since § 107 at least arguably covers all the ground covered by § 113, it could be said that they conflict in the sense that one (very plausible) reading of § 107 essentially renders § 113 surplusage.

85 *See, e.g.*, Eskridge, *supra* note 76; Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 1 (1995); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992); Steven A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93 (1995); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994).

86 Most notably, the ascension to the Supreme Court of Antonin Scalia has given new prestige to textualist statutory interpretation. *See generally* Eskridge, *supra* note 76, at 621-30 (noting reappearance of textualist approach in United States Supreme Court decisions after ascension of Justice Scalia). Other notable judicial exponents of textualism include Judge Kozinski of the Ninth Circuit, Judge Starr of the D.C. Circuit, and Judge Easterbrook of the Seventh Circuit. *See, e.g., id.* at 646-47; Frickey, *supra* note 85, at 252.

87 *See supra* note 4.

88 42 U.S.C. § 9607(a)(4)(A) (1994).

89 *Id.* § 9607(a)(4)(B) (emphasis added).

an Indian tribe) may recover response costs under § 107, as long as those costs were consistent with the NCP. Thus, these courts have allowed PRP third-party plaintiffs to sue other potentially liable parties under § 107.[90] These courts' analyses of the issue are usually quite straightforward: in most cases the court simply quotes § 107's "any other person" language and concludes that on its face it covers a PRP that has incurred response costs.[91]

Other courts have rejected this "plain meaning" argument, while still adhering to an overall textualist approach. First, at least one court has simply read § 107's text as suggesting the opposite result, that is, as not allowing a PRP to bring a § 107 suit. In *Kelley v. Thomas Solvent Co.*,[92] the court ultimately allowed the PRP to bring a § 107 suit, but stated, without further explanation, that § 107's "any other person" language "seems to imply that only those other than owners/operators at the time of the hazardous contamination have standing to assert a claim for response costs under [§ 107]."[93] Thus, even the "plain meaning" of this language does not appear to be so plain.

Other courts have rejected the "plain meaning" argument based on competing principles of textual interpretation. For example, in *United*

90 *See, e.g.*, General Elec. Corp. v. Litton Indus. Automation Sys. Inc., 920 F.2d 1415, 1418 (8th Cir. 1990); Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., 891 F. Supp. 221, 225 (E.D. Pa. 1995); Mead Corp. v. United States, No. C-2-92-326, 1994 WL 733567, at *7-8 (S.D. Ohio Jan. 14, 1994); Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575, 579 (D. Conn. 1994); Township of Oshtemo v. American Cyanamid Co., No. 1:92:CV:843, 1993 WL 561814, at *1 (W.D. Mich. Aug. 19, 1993); Barton Solvents, Inc. v. Southwest Petro-Chem, No. Civ.A.91-2382-GTV, 1993 WL 382047, at *5 (D. Kan. Sept. 14, 1993); Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1277 (E.D. Va. 1992); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1119 (N.D. Ill. 1988); Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1292 (E.D. Pa. 1987); *see also* United States v. Conservation Chem. Co., 628 F. Supp. 391, 404 (W.D. Mo. 1986); City of Phila. v. Stepan Chem. Co., 544 F. Supp. 1135, 1141, 1143 (E.D. Pa 1982) (pre-SARA cases citing plain meaning); Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Right of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 216 (1986).

> Section 107 seems to provide a cause of action to anyone who has expended money on a hazardous waste cleanup. Section 107(a)(4)(A) authorizes recovery by the federal government and the states; section 107(a)(4)(B) authorizes recovery by 'any other person.' 'Person' is broadly defined in the Act to include virtually any individual, corporation, association, or government body.

Id.

91 *See, e.g., Bethlehem Iron Works*, 891 F. Supp. at 225; *Mead Corp.*, 1994 WL 733567, at *7; *Companies for Fair Allocation*, 853 F. Supp. at 579; *Township of Oshtemo*, 1993 WL 561814, at *1; *Chesapeake and Potomac Tel. Co.*, 814 F. Supp. at 1277; *Allied Corp.*, 691 F. Supp. at 1119; *Conservation Chemical Co.*, 628 F. Supp. at 404; *City of Phila.*, 544 F. Supp. at 1141.

92 790 F. Supp. 710 (W.D. Mich. 1990).

93 *Id.* at 717. The courts focused on the "owner/operator" category of liable parties since the parties seeking to sue under § 107 were owners or operators of the sites in question. *See id.* at 714. The *Kelley* court, like others, used the term "standing" to characterize the third-party plaintiff's ability to sue under § 107. Use of this term should not be taken to suggest that the court was inquiring into traditional standing criteria, that is, whether the third-party plaintiff suffered an injury caused by the defendant and redressable by the court, or whether prudential factors counseled against allowing the plaintiffs to sue. *Cf.* Warth v. Seldin, 422 U.S. 490 (1975). Instead, courts' use of the term "standing" in the PRP-as-plaintiff cases appears to speak to the question whether CERCLA provides a cost recovery cause of action to PRPs. *Cf.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding that only purchasers who dealt directly with an alleged overcharger could bring a Clayton Act antitrust suit rather than those who bought products later in the chain of manufacturing or distribution).

Technologies Corp. v. Browning-Ferris Industries,[94] the First Circuit, in the course of deciding whether the longer limitations period for a § 107 cost recovery action or the shorter period for a § 113 contribution action applied to a third-party suit brought by a PRP, characterized the plain meaning argument as "[an] expansive reading of section [107]"[95] and rejected it. The court's concern was that "carried to its logical extreme, [reading § 107 to authorize cost recovery suits by PRPs] would completely swallow [CERCLA's shorter] statute of limitations associated with actions for contribution."[96] Thus, for the *United Technologies* court, the "plain meaning" rationale was unacceptable precisely because it conflicted with another guide to textual interpretation, specifically, the canon requiring that a statute be read so that all of its parts have meaning.[97]

Finally, other cases have approached the issue by attempting to read the cost recovery and contribution provisions as complementary components of an integrated statutory scheme. Most notably, several courts have concluded that, where a PRP seeks to bring a third party suit, § 107 should be read as setting forth the standards for liability while § 113 should be read as providing the PRP's right of action.[98] Some courts adopting this analysis have done so explicitly to reject the argument that these two sections provide competing avenues of recovery for PRPs.[99] Thus, these cases can be read as attempts to answer the question by reference to the same interpretive canon motivating the court in *United Technologies*: namely, that a statute be read to give harmonious effect to all its provisions.[100]

3. Understanding a Textualist Reading

The opinions discussed above illustrate the steps a textualist might take when confronting an interpretive question such as the PRP-as-plaintiff issue. For any textualist, the first resort would be to the statutory text, in order to determine whether it provided an unambiguous answer to the question. In this case, the subject of this inquiry would be § 107's "any other person" language. As noted above, a great many courts have concluded that this language conclusively answered the question.[101]

At first blush this seems a reasonable analysis. Section 107 clearly allows "any . . . person" (other than a governmental entity) who has incurred cleanup costs to sue. But this analysis runs into problems almost immediately. First, at least one court has interpreted this text to mean the opposite of the "plain meaning" ascribed to it by the other courts doing a "plain

94 33 F.3d 96 (1st Cir. 1994).

95 *Id.* at 101.

96 *Id.*

97 *Id.* at 101-03; *see also* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992).

98 *See, e.g.*, Town of Munster v. Sherwin-Williams Co., 27 F.3d 1268, 1270 (7th Cir. 1994); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1139-40 (D.R.I. 1992); Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086 (D.N.J. 1992).

99 *See, e.g.*, *Avnet*, 825 F. Supp. at 1139-40; *Transtech*, 798 F. Supp. at 1086.

100 *See supra* note 97.

101 *See supra* note 90.

meaning" analysis.[102] More significantly, however, the most likely result of a plain meaning analysis that starts and stops with the bare words themselves—that a PRP could sue under § 107[103]—would read § 113 out of the statute, since, as noted above,[104] from a plaintiff's perspective a § 107 cost recovery cause of action is much more favorable than a § 113 contribution action.[105] The conclusion that a provision specifically inserted as an amendment to the original statute has no effect should be highly suspect under textualist premises. It violates the interpretive canon requiring that a statute be read so as to give effect to all of its provisions.[106] Moreover, it would fly in the face of textualism's claim to vindicate legislative power as expressed through the enacted text (and, conversely, to cabin de facto judicial legislating) by relying heavily on that text and disclaiming reliance on unenacted legislative history or vague statements about a statute's underlying purpose.[107] By contrast, a court's conclusion that one portion of the enacted text—here, § 113—adds nothing to the statute strongly suggests judicial willfulness, not judicial rectitude.[108]

In cases like this, where the words themselves suggest an extremely problematic result, textualism allows use of other interpretive aids, including the "fit" of a particular interpretation with the rest of the statute within which the interpreted provision or term is enmeshed. For example, Justice Scalia, probably the most prominent judicial proponent of a textualist approach, has stated that in such a case a statute should be interpreted based on a meaning "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind."[109] Significantly, he followed this statement—made in a concurrence in a case interpreting a Federal Rule of Evidence—by arguing against the majority's use of other

102 *Compare* Kelley v. Thomas Solvent Co., 790 F. Supp. 710 (W.D. Mich. 1990) *with* cases cited *supra* note 90.

103 This is considered the most likely result of a plain meaning analysis of § 107 because this reading appears clear from the face of the statute: "any person [who satisfies CERCLA's liability criteria] shall be liable for . . . (B) any other necessary costs of response *incurred by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4) (1994) (emphasis added). This is also the reading adopted by the majority of courts employing a plain meaning analysis. *See supra* Part II.A.2.

104 *See supra* Part I.C (discussing relative benefits and limitations to litigants of causes of action under § 107 and § 113).

105 *See, e.g.*, United Techns. Corp. v. Browning-Ferris Indus., 33 F.3d 96 (1st Cir. 1994).

106 *See* 2A SINGER, *supra* note 97, § 46.05.

107 *See, e.g.*, ESKRIDGE, *supra* note 76, at 648; ESKRIDGE & FRICKEY, *supra* note 82, at 334 (arguing that attempts to find overriding public purpose in statutes may constitute judicial interference with primarily non-public-minded rent-seeking deals between competing interest groups); Mertens v. Hewitt Assocs., 503 U.S. 248, 261-62 (1993) (Scalia, J.) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration. . . . This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.").

108 *Cf.* Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1452 (1995) (Scalia, J.) ("To avoid a constitutional question by holding that Congress enacted and the President approved [a statutory provision that had no effect] would indeed constitute 'disingenuous evasion.'").

109 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment); *see also* Arcadia v. Ohio Power Co., 498 U.S. 73, 79-80 (1990) (Scalia, J.) (choosing one interpretation of a statute based in part on the logical coherence it allows the statute to have); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 669-73 (1990) (Scalia, J.) (same).

nontextual materials to determine the meaning of the term at issue.[110] Thus, while Justice Scalia was willing to depart from the text when its plain meaning led to a result he characterized as "absurd, and perhaps unconstitutional,"[111] even in such a case he still distinguished between nontextual cues on which he was willing to rely (i.e., the structure of the statute) and others on which he refused to rely (i.e., the legislative history discussed by the majority). Academic commentators describing textualism draw similar distinctions.[112]

So understood, a textualist approach to the PRP-as-plaintiff issue might reject a plain meaning interpretation of CERCLA allowing PRPs unfettered access to a § 107 cause of action, on the grounds that such a reading would drain any significance from § 113's contribution cause of action. This rationale can be expressed in a variety of ways: as an interpretive canon requiring that a statute be read to make each provision "compatible with the surrounding body of law into which [it] must be integrated;"[113] as a canon requiring that a statutory provision be read so as to avoid rendering another provision surplusage,[114] and as an approach attempting to harmonize otherwise competing statutory provisions.[115] However expressed, a sophisticated textualist approach, that is, one that did not automatically stop after examination of the words themselves, might conclude that a PRP should not have unlimited access to a § 107 cause of action.

4. Critiquing a Textualist Reading

Before continuing, however, it may be useful to stop and consider the path by which textualism would bring a judge to this conclusion. Under the reasoning sketched out above, the conclusion that § 107 should not be given a broad reading is based not on the plain meaning of that section, but rather on an approach requiring that a statute be read as an integrated whole. This approach is sufficiently broad to account for the analysis in both *United Technologies*, that § 107 should be read so as to give some effect to § 113,[116] and cases such as *Town of Munster*, that § 107 and § 113 not be read as providing separate and competing causes of action.[117] As suggested by Justice Scalia in *Green*, this approach is based on an assumption that

110 *See Green*, 490 U.S. at 528 (Scalia, J., concurring). Specifically, the majority had considered, among other materials, the historical evolution of the enactment in question (Federal Rule of Evidence 609), congressional committee reports, and floor debates. *See id.* at 512-24 (majority opinion). It should be noted that Justice Scalia endorsed use of these legislative materials for the more limited purpose of justifying a departure from the "absurd" result generated by a plain meaning analysis. *See id.* at 527 (Scalia, J., concurring in the judgment).

111 *Id.* (Scalia, J., concurring in the judgment). While Justice Scalia's suggestion that the text's plain meaning might be unconstitutional suggests an *Ashwander*-type rationale for examining other sources of meaning, it may be significant that he does not develop this point. There is every reason to believe that Justice Scalia would stand by this statement even if the plain meaning interpretation of the statute was merely absurd, but not potentially unconstitutional. *Cf.* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

112 *See, e.g.*, ESKRIDGE, *supra* note 76, at 623-24.

113 *Green*, 490 U.S. at 528 (Scalia, J., concurring).

114 *See, e.g.*, United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101 (1st Cir. 1994).

115 *See* cases cited *supra* note 98.

116 *See supra* note 97.

117 *See supra* note 98.

Congress intends statutes to be internally compatible. This assumption seems uncontroversial enough; at its base, it reflects an underlying assumption that Congress acts rationally.[118] If Justice Scalia's assumption really is about legislative rationality, however, then we can make a further assumption about how to read statutes; namely, that Congress intends a statutory enactment to have some effect. This assumption is closely related to Justice Scalia's compatibility assumption in *Green*: if Congress is presumed to have intended to create a coherent statutory scheme (i.e., one in which all of the scheme's parts fit into an interlocking, internally-consistent whole) then surely it should be presumed to have enacted a statute in which each provision has meaning.[119]

If this assumption is acceptable to a textualist, then the question becomes how to implement it, that is, how to interpret § 107 and § 113 to make them consistent with the rest of the statutory scheme and allow the interpreted section to have some effect given the rest of the scheme. Presumably, in going about this task a textualist judge would focus on the statutory text itself, attempting to fit the ambiguous provision into a coherent reading of the entire scheme. In undertaking this effort, the textualist would use the standard tools in her arsenal, including, in addition to the words of the particular provision, grammar rules,[120] interpretive canons[121]

118 This assumption is different from the purposivist assumption that courts should seek a statute's underlying purpose and interpret statutory ambiguities by reference to such a purpose. Justice Scalia's assumption in *Green* appears to be much more limited, namely, that even though a statute may well represent an unprincipled compromise among competing interest groups and thus fail to reflect a single underlying policy purpose, the provisions of a statute are nonetheless capable of fitting together rationally.

119 Indeed, Justice Scalia appears to have embraced a version of this assumption in *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995). The issue in *Plaut* was the effect of a federal statute that purported to direct courts to reopen federal securities fraud cases that had been dismissed as untimely because they had been pending at the moment the Supreme Court issued a decision on the limitations period for such cases that rendered those pending cases untimely. The statute directed the courts to reopen those cases and to apply the limitations period "provided by the laws applicable in the jurisdiction . . . as such laws existed [on the day before the Supreme Court's limitations period decision]." *Id.* at 1451. In considering that statute, the Court first rejected the argument that the statute's reference to "laws applicable in the jurisdiction [as of the day before the Supreme Court's limitations period decision]" actually referred to the rule determined by the Court in its limitations period decision. As the Court (quite rightly) pointed out, that reading would mean that Congress had enacted a statute directing courts to reopen cases and apply the same limitations rule that those courts had employed in dismissing the cases initially. As Justice Scalia noted:

> [i]f the statute referred to the law enunciated in [the Supreme Court's limitations period decision] it is utterly without effect, a result to be avoided if possible. It would say . . . that the limitation period is what the Supreme Court has held to be the limitation period; and . . . that suits dismissed as untimely under [the Court's limitations period decision] which were timely under [that decision] shall be reinstated. To avoid a constitutional question by holding that Congress enacted and the President approved a blank sheet of paper would indeed constitute disingenuous evasion.

Id. at 1452 (citations omitted). Justice Scalia's point is that Congress should not be presumed to have intended a statute to be without any effect. In the PRP-as-plaintiff context, that same principle would suggest that § 107 should be given a limited reading, so as to give some effect to Congress's enactment of § 113. Otherwise, § 113, like the statute in *Plaut* under the reading the Court rejected, would have no effect. Admittedly, *Plaut* is an extreme case, as the interpretation the Court rejected seems completely unacceptable. Nevertheless, the principle Justice Scalia employed in that case applies also to the relationship between § 107 and § 113.

120 *See, e.g.*, Asgrow Seed Co. v. Winterboer, 115 S. Ct. 788, 794 (1995) (Scalia, J.) (basing choice between two possible readings of statutory provision in part on placement of comma);

and similar words or terms that appear either elsewhere in the same statute[122] or in other statutes.[123] For a textualist, we would expect this endeavor to lead to consistent results across time (assuming no intervening amendments), since the content of these tools would normally remain the same. For example, in one statutory interpretation opinion, Justice Scalia, writing for the Court, sought the plain meaning of a term used in a statute enacted in 1934 by consulting dictionaries of that vintage.[124] Thus, in our situation a textualist judge attempting to interpret § 113 would examine that provision against the backdrop of the rest of CERCLA (as amended by SARA), attempting to fit § 113's contribution cause of action into a statutory scheme already containing a more plaintiff-favorable cause of action (in § 107) so as to give meaning to both. Since this judge is a textualist, she would not examine legislative history unless (perhaps) that was the only way to avoid an absurdity.[125]

The problem with this methodology, at least in a situation (like ours) where the contested provision is an amendment to a preexisting statute, lies in its failure to take account of statutory evolution, particularly in the form of judicial interpretations of the original statute. In other words, the "rational fit" assumption employed by Justice Scalia in *Green* requires that the preexisting statutory scheme into which an amendment (like § 113) is fitted be defined not as the statute as written, but as the statute as interpreted up to the point of the amendment's enactment.[126] Consideration

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Arcadia v. Ohio Power Co., 498 U.S. 73, 78-79 (1990) (Scalia, J.) (embracing one interpretation of statutory provision based on grammatical imprecision of competing interpretation).

121 *See, e.g., Plaut*, 115 S. Ct. at 1451 (Scalia, J.) (basing interpretation of statute in part on interpretive canon that statute should be read to have some effect); *Asgrow Seed*, 115 S. Ct. at 794 (Scalia, J.) (stating that the statutory phrase "Provided, that" may be used as prologue to statutory addition rather than an exception).

122 *See, e.g.*, Mertens v. Hewitt Assocs., 508 U.S. 248, 257-61 (1993) (Scalia, J.) (interpreting the phrase "equitable relief" as used in one section of ERISA statute based on meaning of that same term in other parts of same statute).

123 *See, e.g., id.* at 255-56 (basing interpretation of ERISA statute in part on interpretation of analogous provision in Civil Rights Act of 1964).

124 *See* MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994) (Scalia, J.) (consulting dictionaries published in 1934 to determine meaning of term "modify" as used in Communications Act of 1934). This is a different situation than one in which a judge determines that the actual statutory term to be interpreted was enacted into law "with its dynamic potential." Business Elecs. v. Sharp Elecs., 485 U.S. 717, 732 (1988) (Scalia, J.). In such a case, that is, when a judge concludes that a statutory term includes within it an evolutionary potential, even a textualist judge might well be willing to interpret the statute as having a meaning that changes with, say, the common law term it enacted. For example, in *Business Elecs.*, Justice Scalia, writing for the court, construed the term "restraint of trade" as used in the federal antitrust laws as incorporating the common law evolution of that term. *See id.*

125 *Cf.* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (refusing to use legislative history in analogous situation except to confirm rejection of absurd result generated by textualist reading).

126 Thus, this idea is distinct, though closely related to, the concept of "dynamic statutory interpretation," according to which courts should interpret statutes "dynamically," that is, with regard to changing social, political and cultural contexts. *See, e.g.*, William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). The point here is that the statutory amendment would have to be interpreted against the backdrop of the statute as it existed at the time of the amendment's enactment.

This point is also analogous to the point made in several Supreme Court cases considering the existence of implied causes of action in federal securities laws. In a number of these cases the Court faced a situation in which courts had found such a right prior to a congressional rewrite of the statute which did not explicitly codify such a cause of action. *See, e.g.*, Musick, Peeler &

of such judicial gloss seems necessary when the interpreting judge assumes, as Justice Scalia in *Green* suggests she should, that Congress intended to fit the ambiguous provision rationally into the existing statutory scheme. Thus, when a court interprets § 113, a provision enacted in the 1986 SARA amendments to CERCLA, it should treat as the background statutory scheme not merely the words of the preexisting statute, but those words as they have been interpreted by courts.[127] That conclusion, however, has significant implications for a textualist methodology. First, it requires that when interpreting a statutory provision like § 113 a judge consider an extra-textual factor—the judicial interpretations of the original statute.[128] Including those interpretations as part of the landscape into which the statutory amendment must be fitted introduces something of a wild card into the analysis. For how can a judge attempting to interpret a statutory amendment settle on a meaning that best harmonizes that amendment with a related provision in the original statute that had been interpreted before the amendment was enacted without determining how Congress felt about that earlier interpretation? The point here is simply that the introduction of an extra-textual element—here, judicial constructions of the original statute—makes it impossible for a textualist to rely solely on cues

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Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). In those cases the question for the Court was the effect of those amendments on the existence of the previously found implied cause of action. The Court interpreted the congressional action by reference to "the contemporary legal context" in which Congress legislated. *Curran*, 456 U.S. at 379 (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 698-99 (1979)). Specifically, the Court examined the statutory language against the backdrop of the previously found implied cause of action, essentially fitting the statutory amendments into the statutory scheme as interpreted by the courts. For example, in *Musick, Peeler*, the Court noted that Congress's 1991 amendments to the 1934 Securities and Exchange Act referred to the implied right of action courts had previously found under Rule 10b-5 of the Securities and Exchange Commission and concluded from that reference that Congress had acknowledged the existence of that implied right of action. *Musick, Peeler*, 508 U.S. at 292-93. Similarly, in *Curran*, the Court reaffirmed lower court decisions finding an implied cause of action in the Commodities Exchange Act in large part because Congress, which amended part of that statute after the lower court decisions, left intact the provisions which the lower courts had found as the bases for the implied cause of action. *Curran*, 456 U.S. at 378-82; *see also Herman & MacLean*, 459 U.S. at 384-86 (holding that the fact that comprehensive congressional amendments to 1934 Securities Exchange Act left Section 10(b) intact after consistent line of cases had found implied cause of action based on that section suggests that Congress ratified that cause of action).

As in these cases, in our situation the task for the court must be to interpret the legislature's action in light of the earlier judicial glosses on the original version of the statute. However, while in the securities law cases cited above the amending Congress either left intact the provision that formed the basis of the implied cause of action (*Curran* and *Herman & MacLean*) or acknowledged the implied cause of action in the course of limiting it (*Musick, Peeler*), in our situation the amending Congress explicitly addressed the same issue addressed by the prior court decisions. Thus, even more than in the securities law cases, in our situation Congress's action can only be understood by examining how it intended to reply to the earlier judicial action, since only then can it be understood whether Congress wished to ratify, limit, or expand the cause of action courts had previously implied.

127 A further problem here is whether the background statutory scheme should be considered to be the preexisting statute as interpreted by courts or the preexisting statute as interpreted by courts, *as those interpretations were understood by Congress*. This latter possibility suggests that an even more profound level of intentionalism is required. In order to retain its focus on the basic issues presented by a textualist approach, this Article does not assume that this deeper level of intentionalism is necessary in order to reach a satisfactory resolution of the PRP-as-plaintiff issue.

128 *Cf.* Eisenberg, *supra* note 85, at 24 (arguing that textualism fails coherently to identify the text to be interpreted when a statutory text has previously been interpreted by courts).

internal to the statute when attempting to interpret a subsequent amendment relevant to those constructions, at least when a textualist bases an interpretive choice on an assumption of legislative rationality.

This point is illustrated by the PRP-as-plaintiff issue. A textualist judge applying the "rational fit" assumption to § 113 would attempt to fit that provision into the rest of the statutory scheme. That scheme would have to include judicial interpretations that found in § 107 an implied third party cause of action.[129] The judge would not merely have to interpret § 113's grant of a contribution right of action so as to harmonize it with the text and structure of the rest of the statute, but would also have to interpret § 113 against a statutory background indicating that some version of the right § 113 sought to confer already existed.

How could a court make sense of—interpret so that the entire scheme formed a coherent whole—an amendment purporting to confer something that already existed in the statute? Certainly, an obvious way would be to conclude that Congress must have meant simply to reply to the court decisions finding in § 107 a third party cause of action. Indeed, it is not at all remarkable that Congress may have enacted a vague liability scheme in the original statute, then observed the subsequent judicial interpretations of that scheme, and at some later point, approved, disapproved, or qualified such interpretations by means of explicit statutory commands.[130] At least under one view, this response makes interpretation a matter of divining what Congress "must have intended" by examining the legislative intent or the overall purpose of the amendments. One court faced with the PRP-as-plaintiff issue hints at this approach, concluding that "Congress'[ ] decision [in SARA] to enact § 113(f) could be viewed as suggesting that the courts' prior interpretation of § 107(a) [as providing a third party right of action] was too broad."[131] By seeking statutory meaning in Congress's intent, this approach would be unacceptable to a textualist seeking to interpret the statute without recourse to that sort of archeology.[132]

129 *See supra* note 60 (by the time of SARA's enactment most courts faced with the issue had found an implicit third-party cause of action in CERCLA).

130 *Compare, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3), 105 Stat. 1071 (1991) (providing additional employment discrimination remedies by modifying *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989), and overruling *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)) *with* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (clarifying dates and definitions concerning voting rights by modifying Supreme Court precedent construing original version of statute).

131 Reynolds Metals Co. v. Arkansas Power & Light Co., 920 F. Supp. 991, 997 n.10 (E.D. Ark. 1996).

132 It has been observed that in interpreting statutes even Justice Scalia sometimes examines Congress's underlying policy purposes. *See* Bradley C. Karkkainen, *'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 410-11 (1994). This raises the question of whether Justice Scalia's interpretive method can even be described as textualism. *See generally id.* (arguing that Justice Scalia's methodology is more complex than simple textualism). But even if Justice Scalia is willing to consider purpose, the fact remains that, for a variety of reasons, he generally refuses to consider legislative history. *See, e.g., id.* at 414-32. For purposes of the PRP-as-plaintiff issue, the practical distinction between legislative purpose and legislative history may be one without a difference. As explained later in the Article, examination of any overall legislative purpose motivating CERCLA and/or SARA will fail to provide a satisfactory resolution to the PRP-as-plaintiff issue. *See infra* Part II.C. Thus, the inquiry into what Congress "must have intended" when enacting § 113 requires examination of legislative motivations far more detailed than the statute's overall purpose. Rather, any attempt to answer the PRP-as-

Of course, another way of making sense of such a scheme would be simply to read and attempt to make sense of the resulting scheme as it exists in the statute books, without resort to conclusions about what the Congress enacting SARA "must have intended" regarding the implied third party recovery right found in the pre-SARA version of the statute. Justice Scalia has endorsed this approach. In *Pennsylvania v. Union Gas Co.*,[133] a case dealing with an unrelated CERCLA issue, Justice Scalia agreed with the Court's holding that CERCLA, as amended by SARA, did purport to hold states liable for money damages in private party suits brought in federal court. He criticized the opposing view, adopted by Justice White,[134] which Justice Scalia characterized as analyzing the intentions of the two enacting Congresses—the one that passed CERCLA in 1980 and the one that passed SARA in 1986—and finding in neither the required clear legislative intention to abrogate state sovereign immunity.[135] For Justice Scalia, the question of either Congress's intent was irrelevant; all that mattered was what the resulting statutory scheme provided:

> It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.[136]

Under this analysis, Justice Scalia would not approach the PRP-as-plaintiff problem by attempting to discern what the SARA Congress intended by explicitly providing a contribution right in § 113 when an analogous right had already been found to exist under § 107. Instead, he would simply interpret the resulting scheme including both § 107 and § 113, attempting "to give fair and reasonable meaning to the text"[137] of both provisions.

Even more to the point is Justice Scalia's analysis, for the Court, in *United States v. Fausto*.[138] In *Fausto*, the Court considered the relationship between two federal statutes dealing with Civil Service employees: the Back Pay Act,[139] which had previously been interpreted to allow the class of civil service employees to which Fausto belonged to bring back pay suits in the United States Court of Claims, and the later-enacted Civil Service Reform Act (CSRA),[140] which provided judicial review of personnel decisions for

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plaintiff issue by recourse to legislative motivations will require examination of detailed legislative history reflecting Congress's intention regarding PRP actions implied under § 107. *See infra* Part II.B. The level of detail thus required may be contrasted with cases in which Justice Scalia based a statutory interpretation on Congress's overall purpose in enacting the statute. *Cf., e.g.*, United States v. Fausto, 484 U.S. 439 (1988) (Scalia, J.) (overall purpose of later-enacted statute subjecting certain government action to judicial review supports decision that judicial review of other governmental action was meant to be precluded).

133 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part), *overruled on other grounds*, Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996).

134 *See id.* at 27 (White, J., concurring in part and dissenting in part).

135 *Id.* at 29 (Scalia, J., concurring in part and dissenting in part).

136 *Id.* at 30 (Scalia, J., concurring in part and dissenting in part).

137 *Id.* (Scalia, J., concurring in part and dissenting in part).

138 484 U.S. 439 (1988).

139 Back Pay Act of 1966, Pub. L. No. 89-380, 80 Stat. 94 (1966).

140 Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

only certain groups and did not confer that benefit on Fausto's class (known as "nonpreference employees"). The later-enacted CSRA did not explicitly state whether nonpreference employees such as Fausto could have judicial review of their personnel decisions, and thus did not explicitly reaffirm or overrule cases under the Back Pay Act allowing such employees to seek review. Justice Scalia, writing for the Court, nevertheless held that the CSRA impliedly repealed the judicial interpretations of the Back Pay Act allowing nonpreference employees like Fausto to sue in federal court. He based his opinion in part on the statutory language[141] but also on two features of the statute's structure: first, the favored position it accorded "preference" employees, which would be reversed if nonpreference employees were allowed to sue under the Back Pay Act;[142] and, second, the primacy of the administrative dispute-resolution scheme set up by the CSRA, which would be undermined by allowing nonpreference employees the same rights to sue that they enjoyed prior to the CSRA.[143] The Court concluded its analysis by rejecting the argument that its reading of the CSRA violated the canon against finding repeals by implication.[144] The Court distinguished that canon by stating that its holding did not effectively repeal the Back Pay Act, but only judicial interpretations thereof.[145] The Court stated:

> [W]e agree with the principle [against finding implied repeals], but do not find it applicable here. Repeal by implication of an express statutory text is one thing; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. But repeal by implication of a legal disposition implied by a statutory text is something else. The courts frequently find Congress to have done this—whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. And that is what we have here. By reason of the interpretation we adopt today, the Back Pay Act does not stand repealed, but remains an operative part of the integrated statutory scheme set up by Congress to protect civil servants. All that we find to have been "repealed" by the CSRA is the judicial interpretation of the Back Pay Act—or, if you will, the Back Pay Act's implication—allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay."[146]

141 *See Fausto*, 484 U.S. at 447-49 (Scalia, J.) (inferring congressional intent to deny judicial review to employees in Fausto's class from fact that Fausto's class was mentioned elsewhere in statutory scheme so that exclusion from judicial review provisions could be considered intentional).

142 *See id.* at 449-50.

143 *See id.* at 451.

144 *See, e.g.*, United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976) ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.").

145 *See Fausto*, 484 U.S. at 452-53.

146 *Id.* at 453 (citation omitted).

Thus, Justice Scalia suggests that a judicial interpretation of a statute will not stand in the way of a court's interpretation of a later-enacted statute; if the two interpretations conflict, Justice Scalia has no problem finding an implied repeal. The similarity between *Fausto* and the PRP-as-plaintiff problem is clear: a later-enacted statute (§ 113) speaks to the same general issue as judicial interpretations governing an existing provision (§ 107), but does not expressly repeal the existing provision. Nevertheless, the analogy is not complete, for it is quite arguable that § 113 (the later-enacted provision) does not conflict with the pre-SARA interpretations of § 107. In fact, it is quite easy to read § 113 as an endorsement of the earlier case law providing PRPs with a third-party right of action.[147] This latter scenario raises again the question *Fausto* does not answer: what interpretive approach allows a court to make sense of a later-enacted statutory provision that may actually reaffirm all or a part of a judicial interpretation of an earlier-enacted provision? *Fausto* not only does not deal with this situation, but its undercurrent of deference to the legislature (at the expense of prior judicial statutory interpretations) does not even apply when Congress seems to *reaffirm* the judicial interpretation of the preexisting statute.

5. The Challenge of Dynamism

The problem with a textualist approach to a problem such as the PRP-as-plaintiff issue is that the statutory scheme to be interpreted is not a closed system, in the sense that its meaning could be derived solely by recourse to internal cues (such as its text and structure), as informed by interpretive aids (such as interpretive canons and dictionaries). Instead, it reflects a dialogue between three parties: the Congress that enacted the original statute, the courts that interpreted the original statute, and the amending Congress. This dialogue is not completely reflected in the statute's text or structure since the judicial interpretations did not actually change the text and structure (indeed, presumably they were meant to reflect them). Thus, a textualist attempting to employ Justice Scalia's "rational fit" assumption simply doesn't consider all of the "statute" into which the amendment is assumed to fit.[148]

147 Whether § 113 is in fact such an endorsement is unclear. The pre-SARA cases allowing PRPs to sue under § 107 generally did not explicitly decide whether a PRP could sue for complete recovery or (as later provided in § 113) merely for the defendant's equitable share of cleanup costs. At least one pre-SARA case implied that the PRP third-party plaintiff could in fact recover all of its response costs. *See* City of Phila. v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982). Thus, it is possible that the analogy to *Fausto* is in fact quite close, since SARA, like the CSRA as interpreted in *Fausto*, may in fact have impliedly repealed a judicial construction of a prior statute by setting up a new statutory scheme with different rights. On the other hand, if the pre-SARA cases simply provided PRPs with a right to contribution, then the analogy is not as clear: In this case, the later-enacted statute impliedly repealed nothing, but rather simply reaffirmed the preexisting judicial interpretation. A number of cases suggest that this latter reading is more accurate. *See, e.g.*, Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985) (characterizing PRP third-party plaintiff's implied right under § 107 as one for contribution).

148 It might be argued that the rational fit assumption is not valid in this sort of case, because, with the prior judicial interpretation in place, there would be no rational reason to reiterate that interpretation in the statute's text by means of an amendment. This response ignores the possibility that the amending Congress might wish to limit or qualify the rule expressed in the inter-

The problem becomes clearer when this situation is contrasted to one in which a court attempts to interpret an amendment to a statute that had not previously received significant judicial interpretation on the issue the amendment addresses. In that case, the interpretive challenge is relatively easy for a textualist, who can examine the text and structure of the resulting statutory language to determine what parts of the original legislature's work remain and what parts were limited or repealed. The resulting product—the statute as amended—can be considered a coherent statement of the law after the most recent legislative action. To some degree this description fits the situation faced by the Supreme Court in *Union Gas*, where, at least for Justice Scalia, the interpretive question boiled down to whether there existed a clearly-stated abrogation of state sovereign immunity in CERCLA, as amended by SARA, with the result read as a single statutory scheme. By contrast, a decision by an amending Congress to overturn, limit, or ratify prior judicial interpretations of the original statute may not be apparent from the statute's text and structure, since those interpretations never formally made it into the statute books. At best, a court might be comfortable holding that the later-enacted statute impliedly repealed (as opposed to limited, expanded, or ratified) an interpretation of a preexisting statute, by concluding, as in *Fausto*, that the new statutory structure was simply inconsistent with the previous interpretation of the pre-amendment statutory scheme. But when there is no necessary inconsistency, the coherent structure of the statutory scheme—including the newly-enacted provision—must be determined by examining the relationship of the new provision to the entire scheme, including interpretations of the preexisting provision.

B. The Legislative History

This analysis suggests that, when dealing with the type of interpretive problem illustrated by the PRP-as-plaintiff issue, a court attempting to find a coherent statutory meaning must broaden its search beyond the statute's text and structure. More specifically, a court must consider some version of congressional intent. Only by examining the amending Congress's intent could a court come to understand the relationship of its amendment to judicial interpretations of the original statute. The court need not give dispositive weight to that intent; however, it would be a necessary part of any attempt to read the statute as a coherent whole, with each part fitting in rationally with the rest.

The legislative history relevant to § 113's contribution right suggests that § 113 reflected a legislative intent to reaffirm, in a modified form, the third party right of action that courts had previously found implicit in § 107. The most prominent discussions of § 113's contribution provision are found in two committee reports, one issued by the Senate Environment

pretation. Indeed, SARA's legislative history indicates an intention to "confirm," but also to "clarify," the prior judicial interpretations. *See infra* note 151. Here again, a complete understanding of the fabric of the statute requires an understanding of how Congress wished to reply to the judicial interpretation.

and Public Works Committee[149] and the other by the House Committee on Energy and Commerce.[150] These reports used almost identical language in describing the relationship of the proposed explicit contribution right to the third-party right of action that courts had previously found in § 107. The following is the key language, which is exactly identical in both reports:

> It has been held that, when joint and several liability is imposed under § 106 or § 107 of [the original version of CERCLA], a concomitant right of contribution exists under CERCLA. United States v. Ward, 8 Chem. & Rad. Waste Litig. Rep. 484, 487-88 (D.N.C. May 14, 1984). Other courts have recognized that a right to contribution exists without squarely addressing the issue. *See, e.g.*, United States v. South Carolina Recycling and Disposal, Inc., 7 Chem. & Rad. Waste Litig. Rep. 674, 677 (D.S.C. February 23, 1984). This amendment clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.[151]

The two reports continued, again using nearly identical language to express the hope that § 113 would encourage both private party settlements and voluntary cleanups.[152] What is significant here is the sense, shared by the two committee reports that gave the contribution provision significant consideration, that the provision was designed to give overall approval to, while "clarifying," the judiciary's interpretation of CERCLA's liability scheme. The committees' views in turn suggest that § 113's contribution cause of action should be interpreted as the codification of, and thus the substitution for, the implied third-party cause of action pre-SARA courts had found in § 107.

It should be pointed out that these two reports were commenting on slightly different versions of what eventually became § 113. Most importantly, under the Senate version, the contribution plaintiff would need to have been held liable in a § 106 or § 107 action before it could sue for contribution,[153] while the House version reflected a more lenient rule allowing the contribution plaintiff to sue before it was formally held liable.[154]

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149 S. REP. No. 99-11 (1985) (Senate Environment Committee Report).

150 H.R. REP. No. 99-253, pt. 1 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (House Energy Committee Report).

151 *Id.* at 79; S. REP. No. 99-11, at 44 (1985) (Senate Environment Committee Report).

152 *See* H.R. REP. No. 99-253, pt. 1, at 80 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (House Energy Committee Report); S. REP. No. 99-11, at 44 (1985) (Senate Environment Committee Report).

153 The contribution provision under consideration at this time by the Senate Environment Committee read as follows: "After judgment in any civil action under section 106 or [§ 107(a)], any defendant held liable in the action may bring a separate action for contribution against any other person liable or potentially liable under [§ 107(a)]." S. REP. No. 99-11, at 103 (1985) (Senate Environment Committee Report). The Reagan Administration's CERCLA amendment proposal included this same language. *See* H.R. DOC. No. 99-32, at 23 (1985) (Administration proposal).

154 The contribution provision under consideration at this time by the House Energy Committee read as follows: "[A]ny defendant alleged or held to be liable in an action under section 106 or section 107 may bring an action for contribution or indemnity against any other person

This is a major difference, since under the Senate version a PRP that had not been found liable would have a strong argument that it could not sue under § 113, and thus should be allowed to sue under § 107, since it might not ever admit liability or be formally adjudged liable. The differences, of course, were ultimately harmonized, with the final statutory language allowing "any person" to bring a contribution suit.[155]

Nevertheless, the existence of two different versions of the proposed contribution provision and the ultimate enactment of a third version illustrate a problem that limits the usefulness of the legislative history. First, there remains the problem of the text. Specifically, even after SARA, § 107 still states that "any . . . person" may recover "any . . . necessary costs of response."[156] Thus, the statutory text now includes what the Supreme Court has described as two "somewhat overlapping" causes of action.[157] The continued existence of § 107's "any . . . person" language suggests that some class of private parties still must be able to sue under § 107. Combining this insight with the conclusion, based on the legislative history, that Congress in § 113 intended to codify the judicially implied contribution right of action, leads directly back to the PRP-as-plaintiff issue, slightly restated: what types of parties are appropriate contribution plaintiffs, and what types are appropriate plaintiffs in a cost recovery action?

Here, the legislative history provides little help. All it does is indicate overall, though not complete, approval of the courts' pre-SARA decisions, and Congress's intent to codify those decisions by means of an explicit right to contribution. Those decisions, however, do not appear to have fully mapped the contours of the third-party suits they allowed PRPs to bring. For example, there appeared to be at least some question as to whether a PRP could shift all of its costs onto a third-party defendant,[158] or whether that question turned on the character of the costs it incurred.[159] Indeed, some pre-SARA courts finding a right of contribution did not even locate the source of that right in § 107(a).[160]

To add to the confusion, Congress's stated desire to "clarify," as well as to "confirm," the third-party right courts had found before SARA suggests

liable to [sic] potentially liable." H.R. REP. No. 99-253, pt. 1, at 188 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (House Energy Committee Report).

155 42 U.S.C. § 9613(f)(1) (1994).

156 *Id.* § 9607(a)(4)(B).

157 Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966 (1994).

158 *See supra* note 147.

159 *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1264-65 (D. Del. 1986) (distinguishing between a PRP's attempts to recover voluntarily incurred costs and a PRP's attempts to recover costs incurred under compulsion of litigation in a pre-SARA case); *cf.* United States v. Hardage, 19 Hazardous Waste Litig. Rep. 18,307, 18,314 (W.D. Okla., Dec. 4, 1989) (allowing non-settling PRPs to sue settling parties for certain types of costs but not others, despite CERCLA's immunization of settling parties from contribution claims, based on the difference between the types of costs).

160 *See, e.g.*, *New Castle County*, 642 F. Supp. at 1265-68 (relying on general principles of contribution law and explicitly rejecting § 107(a) as a source of the contribution right); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) (relying on CERCLA § 107(e)(2)); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985) (relying on both § 107(e)(2) and general principles of contribution law). Section 107(e)(2) provides in relevant part as follows: "Nothing in [CERCLA] . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section . . . has or would have . . . against any person." 42 U.S.C. § 9607(e)(2) (1994).

that even were it possible to find a definitive answer to the scope of a PRP's third-party right of action before SARA, that answer may not have survived Congress's "clarification" of that right.[161] The language Congress ultimately enacted into § 113, that "[a]ny person may seek contribution,"[162] does not help answer the question, since, by its permissive terms, it does nothing to establish a distinction between parties that may seek cost recovery under § 107 and those that are limited to seeking contribution under § 113. The legislative history does not fully explain the change to this more permissive language from the more restrictive language under consideration earlier in SARA's enactment process.[163] The House Judiciary Committee issued a report[164] proposing as a "technical" change that the language from the House Energy Committee bill (stating that any "defendant alleged or held to be liable" may sue for contribution) be amended to read that "any . . . person potentially liable or held to be liable" could seek contribution.[165] The committee stated that this change "simply clarifies and emphasizes that persons who settle with the EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties."[166] While somewhat helpful, this statement does not shed light on the status of settlors whose decrees include an explicit liability disclaimer.[167] The final change to the enacted language (stating that "any person" could sue for contribution) is not specifically discussed in the conference report, the only possible reference being to "technical and clarifying changes" made to the House language that was otherwise accepted.[168]

Thus, SARA's legislative history suggests that § 113 reflected Congress's qualified approval of pre-SARA courts' interpretation of § 107. However, this conclusion provides only part of the answer to the PRP-as-plaintiff issue. In brief, the retention of § 107's "any . . . person" language suggests that Congress's intent was not to do away with all private party cost recovery suits, thus raising the question of the boundary between the newly enacted contribution provision and the existing cost recovery provision. Inquiry into legislative intent does not shed much light on this latter issue,

161 *Cf.* Reynolds Metals Co. v. Arkansas Power & Light Co., 920 F. Supp. 991, 997 n.10 (E.D. Ark. 1996) (concluding that SARA's provision of contribution right reflects a congressional intent to limit the scope of implied third party right that courts had found before SARA).

162 42 U.S.C. § 9613(f)(1) (1994).

163 *See supra* notes 153-154 (quoting language from earlier versions of the bill that eventually became SARA).

164 H.R. REP. No. 99-253, pt. 3 (1985) *reprinted in* 1986 U.S.C.C.A.N. 3038 (House Judiciary Committee Report).

165 *Id.* at 18, 43.

166 *Id.* at 18. This focus on settling parties' ability to sue for contribution is also reflected in the conference report, which adopted the House version of § 113 and described the contribution provision as "a new section 113(f) for authority by settling parties to seek contribution from non-settlors." H.R. REP. No. 99-962, at 222 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3276, 3315 (Conference Report).

167 *Cf.* United States v. SCA Servs., 849 F. Supp. 1264, 1283 (N.D. Ind. 1994) (citing 42 U.S.C. § 9622(d)(1)(B)-(C) (1994) in allowing settling party to sue other parties under § 107 in part because settlor's consent decree included liability disclaimer and because CERCLA allowed such settlements to be structured so as to not be construed as admission of liability for any purpose).

168 *See* H.R. REP. No. 99-962, at 222 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3276, 3315 (Conference Report).

since the legislative history does not express much more than an intent to codify (again, with qualifications) previous judicial practice that was itself vague on the character of the PRP-as-plaintiff suits allowed. With vague legislative history commenting on an ambiguous text purporting to codify an unclear line of precedent, courts grappling with the PRP-as-plaintiff problem must consult sources of meaning beyond the text and legislative history.

C. Policy Promotion

In fact, some courts dealing with the PRP-as-plaintiff issue have gone beyond the text and the legislative history. These courts have interpreted CERCLA based on a consideration one step removed from the actual text; namely, the promotion of what they perceived to be the statute's underlying policies. As noted below, however, reliance on this method of deciding the issue has not led to uniform results, given the sometimes conflicting goals CERCLA seeks to achieve.

1. The Case Law

a. Encouraging Cleanups of Hazardous Waste Sites

Some courts taking a policy approach have allowed PRPs to sue under § 107 based on CERCLA's policy of encouraging rapid cleanups of hazardous waste sites. These courts have reasoned that allowing a PRP that has incurred cleanup costs to bring a § 107 suit will encourage PRPs to shoulder the burden of initiating cleanups, since PRPs that do so would be able to recover the costs they thereby incurred. Some courts adopting this analysis have cited a need to make funds immediately available to parties who are actually performing a site cleanup.[169] Others have expressed concern that were PRP third-party plaintiffs limited to § 113 actions they might be unable to shift any costs attributable to orphan shares, given the nature of CERCLA contribution actions.[170] Finally, others have not specified their

169 *See, e.g.*, Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545, 552 (N.D. Ind. 1992), *aff'd in part and rev'd in part*, 2 F.3d 746 (7th Cir. 1993); O'Neil v. Picillo, 682 F. Supp. 706, 725-26 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989); City of Phila. v. Stepan Chem. Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

170 *See, e.g.*, Barton Solvents v. Southwest Petro-Chem, No. 91-2382-GTV, 1993 WL 382047, at *45 (D. Kan. Sept. 14, 1993); Allied Corp. v. Acme Solvents Reclaiming, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988); *see also* 1 TOPOL, *supra* note 5, § 4.4(F) (noting judicial disagreement on scope of contribution liability under CERCLA); 2 *id.* § 10.1 at 261-63. Indeed, some courts hearing contribution claims have expressly refused to allocate orphan share costs to the contribution defendants. *See, e.g.*, Gould, Inc. v. A&M Battery and Tire Serv., 901 F. Supp. 906, 913 (M.D. Pa. 1995) (holding defendants in § 113 contribution suit responsible only for the share of the cleanup costs caused by their own waste contribution, and explicitly holding that contribution defendants are not responsible for orphan shares); B.F. Goodrich v. Murtha, 754 F. Supp. 960, 973 (D. Conn. 1991) (holding that contribution defendants' degree of liability to be determined by "the extent of their contribution to the problem" and "limited to a share based on the amount of disposition shown to have contributed to the damage" at the site), *aff'd*, 958 F.2d 1192 (2d Cir. 1992); *see also* 2 TOPOL, *supra* note 5, § 10.1 (expressing concern that imposition of several, as opposed to joint and several, liability in contribution cases would leave PRP third-party plaintiff solely responsible for orphan shares); James Rogers & P. Kathleen Wells, *Contribution and Cost Recovery Actions Under CERCLA* 35 (A.L.I.-A.B.A. Course of Study, Feb. 15, 1995) (in Westlaw C981 A.L.I.-A.B.A. 1). On the other hand, a number of courts have determined that their broad equitable power to allocate

policy preferences any more than to state a general concern that PRPs be encouraged to perform actual cleanups.[171]

On the other hand, at least two courts have concluded that the goal of encouraging cleanups would not be served by allowing a PRP to sue under § 107.[172] One of these opinions described the advantage enjoyed by a PRP allowed to sue under § 107 as "ephemeral and provid[ing] no real incentive [to clean up the site]," since the third-party defendant could counterclaim for contribution.[173] Courts have even questioned whether a party's willingness to undertake an expeditious cleanup should qualify it for any legal advantage at all in pursuing other potentially liable parties.[174]

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response costs—a power expressly granted in § 113 of CERCLA—includes the power to spread the costs of orphan shares among both the contribution plaintiff and defendants. *See* 42 U.S.C. § 9613(f)(1) (1994); Town of New Windsor v. TESA Tuck, Inc., 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (§ 113(f)(1)'s grant of equitable power to a court in contribution actions authorizes the court to allocate orphan shares among contribution plaintiff and defendants); United States v. J.B. Stringfellow, No. CV-83-2501, 1995 WL 450856, at *6 (C.D. Cal. Jan. 24, 1995) (allocating responsibility for orphan shares in same proportion as each party's responsibility for shares attributable to solvent and identified parties); T H Agric. & Nutrition Co. v. Aceto Chem. Co., 884 F. Supp. 357, 362 (E.D. Cal. 1995) (indicating its intention to apportion orphan shares among both contribution plaintiff and defendants); *see also* Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal, 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992) (allowing PRP plaintiff to sue under § 107 but restricting plaintiff's recovery to defendants' equitable share of responsibility, for which defendants as a group would be jointly and severally liable). At least one of the courts to so hold did so while also indicating that it considered the defendants to be merely severally, not jointly and severally, liable. *See T H Agric. & Nutrition Co.*, 884 F. Supp. at 362 (framing question as whether a PRP third-party plaintiff could "pursue a contribution action against other PRPs" or if instead the PRP "may pursue joint and several liability" and holding that PRP's action was for contribution, but nevertheless indicating that orphan shares would be allocated both to contribution plaintiff and contribution defendants).

171 *See, e.g.*, Township of Oshtemo v. American Cyanamid Corp., No. 1:92:CV:843, 1993 WL 561814, at *1 (W.D. Mich. Aug. 19, 1993); Kelley v. Thomas Solvent Co., 790 F. Supp. 710, 717 (W.D. Mich. 1990); United States v. Hardage, 32 Env't Rep. Cas. (BNA) 1061 (W.D. Okla. Dec. 8, 1989); New York v. Exxon Corp., 633 F. Supp. 609, 617 (S.D.N.Y. 1986) (noting that CERCLA's private recovery provisions "assure an incentive for private parties, including those who may themselves be subject to liability under the statute, to take a leading role in cleaning up hazardous waste facilities as rapidly and completely as possible"); *see also* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990) (rejecting defendant's claim that non-PRP third-party plaintiff should not be allowed to bring § 107 suit because it allegedly performed the cleanup in response to a possible lawsuit by another private party). The court stated:

> [T]he motives of the private party attempting to recoup response costs under 42 U.S.C. § 9607(a)(4)(B) are irrelevant. The purpose of allowing a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites. This purpose would be frustrated if a plaintiff's motives were subject to question. We will not look at the impetus behind a plaintiff's decision to begin the cleanup process; we will look only to see if there has been a release or threatened release for which the defendant is responsible.

Id. at 1418.

172 *See* Kaufman & Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212 (N.D. Cal. 1994); United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991).

173 *Kaufman & Broad*, 868 F. Supp. at 1215 n.2. This analysis may be open to question in a case where the PRP third-party plaintiff has itself settled with the government. In that case the third-party plaintiff may be able to use § 113(f)(2)'s contribution protection to defend against any contribution claims brought in response to the third-party plaintiff's § 107 cost recovery claim. In such a case the PRP third-party plaintiff's ability to sue under § 107 provides it with much more than the "temporary" windfall described in *Kramer*, 757 F. Supp. at 417 (D.N.J. 1991), and is most definitely not "ephemeral," as described in *Kaufman & Broad*.

174 *See Chesapeake & Potomac Tel. Co.*, 814 F. Supp. at 1277; *T H Agric. & Nutrition Co.*, 884 F. Supp. at 361-62.

b. Encouraging PRPs to Settle

Other courts have focused on another policy issue: namely, the effect the PRP-as-plaintiff issue has on would-be third-party defendants' incentives to settle their liability to the government. These cases deal with situations in which the third-party defendants had previously settled their liability to the government, and had in turn received the benefit of § 113(f)(2),[175] which immunizes settling parties from contribution liability. The concern here is that allowing PRPs to sue settling parties for § 107 cost recovery would frustrate § 113(f)(2)'s underlying purpose of encouraging PRPs to settle with the government. Thus, some courts faced with this factual situation have cited CERCLA's settlement promotion policy in refusing to allow the third-party plaintiff to sue under § 107.[176] Indeed, one court that reviewed other courts' decisions on the PRP-as-plaintiff issue concluded that most judicial decisions on whether to allow PRPs to sue other parties under § 107 were explainable based on whether the defendant had settled its liability to the government before being sued.[177]

However, in at least two cases courts have allowed a PRP third-party plaintiff to bring a § 107 suit against settling defendants, despite the defendants' claim that CERCLA's contribution protection provision barred such suits. In *United States v. Hardage*,[178] the court held, in the course of approving a consent decree between the government and several PRPs, that the settling PRPs would nevertheless be subject to non-settlors' "independent response cost claims,"[179] which the court held were distinct from the contribution claims against which the decree could provide immunity.[180] In *Key Tronic Corp. v. United States*,[181] the court also rejected a

175 42 U.S.C. § 9613(f)(2) (1994) ("A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.").

176 *See, e.g.*, City of Denver v. Adolph Coors Co., 829 F. Supp. 340, 346 (D. Colo. 1993) ("Holding response costs subject to a [§ 113(f)(2)] contribution bar is . . . consistent with CERCLA's encouragement of settlements."); United States v. ASARCO, Inc., 814 F. Supp. 951, 956-57 (D. Colo. 1993) (casting PRP third-party plaintiff's claim against settling PRPs as claim for cost recovery rather than for contribution would result in "far less incentive for . . . defendants to expediently settle the claims against them"); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1138-39 (D.R.I. 1992) (rejecting PRP third-party plaintiff's attempt to sue settling PRPs under § 107, noting that SARA's contribution protection provisions "are meant to encourage settlements and to provide settling parties with a measure of finality in return for their willingness to settle") (internal quotation omitted); Dravo Corp. v. Zuber, 804 F. Supp. 1182, 1189 (D. Neb. 1992) ("the words of the contribution bar of CERCLA were intended to foreclose [PRPs' claims against settling PRPs] no matter what they are called"), *aff'd*, 13 F.3d 1222 (8th Cir. 1994); Transtech Inc. v. A & Z Septic Clean, 798 F. Supp. 1079 (D.N.J. 1992) (rejecting PRP's attempt to sue settling PRPs under § 107); *see also* Gregory J. Walch, Note, Burlington Northern Railroad v. Time Oil; *Contribution Protection Under the 1986 Superfund Amendments*, 22 ENVTL. L. 757, 777-82 (1992) (criticizing cases allowing PRP third-party plaintiffs to sue settling PRPs under § 107, as frustrating congressional policy of encouraging settlements).

177 *See* United States v. SCA Servs., 849 F. Supp. 1264, 1270-81 (N.D. Ind. 1994).

178 19 Hazardous Waste Litig. Rep. 18,307, 18,314 (W.D. Okla., Dec. 4, 1989).

179 *Id.* at 18,314.

180 The *Hardage* court characterized an "independent response cost claim" as "an original claim to recovery [sic] money that private party defendants have spent for their own response measures, such as fence construction and alternative water supplies." *Id.* By contrast, the court characterized a contribution claim as "a derivative claim in which a defendant attempts to transfer to a third party some of the liability asserted against it by the plaintiff." *Id.* Thus, the court does not appear to have based its decision on a determination that the third-party plaintiff's

settlor's argument that CERCLA's contribution protection immunized it from a PRP's cost recovery suit. The court reasoned that in light of the joint and several nature of the § 107 liability the EPA could place responsibility on the PRP third-party plaintiff, precluding a PRP from bringing a § 107 suit would generally discourage PRPs from agreeing to undertake cleanups, since it would not be able to sue settling PRPs to recover any incurred costs. Instead, the court predicted that relegating PRP third-party plaintiffs to a § 113 suit would encourage PRPs *not* to undertake cleanups for which the PRP could find no source for reimbursement, but instead merely to settle with the EPA, thus requiring the EPA to undertake the actual cleanup itself.[182]

2. The Theory

The cases discussed above illustrate some of the limitations of basing an interpretive decision on the statute's overall purpose. This approach, generally associated with the legal process methodology developed by Henry Hart and Albert Sacks,[183] has been subjected to much academic criticism in the last decade. The criticism is based on the argument that, in contrast to legal process assumptions, there need not be a public purpose underlying every legislative action. Thus, according to this criticism, a methodology that attempts to ground interpretive decisions on the statute's underlying purpose is nothing more than judicial legislating.[184]

Even assuming that it is theoretically possible to identify a legislative purpose, however, the problem with purposivism in the PRP-as-plaintiff context is that there is no overall legislative purpose that points toward a clear answer to the interpretive question. Instead, CERCLA attempts to achieve two, sometimes conflicting, goals relevant to this issue: quick cleanup of hazardous waste sites, and settlement (rather than litigation) of parties' liability to fund such cleanups. Some courts have cited the "cleanup" goal in decisions allowing the PRP third-party plaintiff to sue under § 107, on the theory that § 107's more plaintiff-favorable liability rules would encourage PRPs to perform cleanups.[185] Conversely, other courts have cited the "settlement" goal, reflected in CERCLA's contribution protection provision,[186] in prohibiting PRPs from circumventing that provision by casting the suit as one for cost recovery rather than contribution.[187] Thus, the problem in the PRP-as-plaintiff context is not the lack of a discernible purpose underlying CERCLA, but instead the existence of

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claims would relate to matters not addressed in the settlement, a determination that would have explained the result in a way consistent with the majority view on this issue. *See also supra* note 69 (discussing issue of "matters addressed in the settlement").

181 No. C-89-694-JLQ (E.D. Wash., Aug. 9, 1990).

182 *Id.* at 10-11.

183 *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994).

184 For a more complete description of this, and other, criticisms of the legal process theory, see Eskridge & Frickey, *supra* note 77, at 702-10.

185 *See supra* Part II.C.1.a.

186 42 U.S.C. § 9613(f)(2) (1994).

187 *See supra* Part II.C.1.b.

two, sometimes inconsistent, purposes reflected in different parts of the statute.

The point here is not that courts should find a rigid hierarchy between these two purposes, or alternatively, that they should abandon all attempts to base an answer to the PRP-as-plaintiff issue on CERCLA's purposes. Instead, the point is that a broad regulatory or liability statute such as CERCLA often features a variety of incentive-creating provisions that all tend to support the overall statutory goal but that may conflict among themselves. This situation may arise for any number of reasons, including legislative compromise between positions taken by competing interest groups, the complexity of the underlying issue, and simple legislative sloppiness or inattention. In this sort of situation, a satisfactory resolution of an interpretive problem must do more than simply recite one goal or another that would be served by the court's decision. As suggested by the cases noted above, there is little persuasive value in broad statements that allowing a PRP to sue under § 107 or relegating it to a contribution suit under § 113 is necessary in order to further CERCLA's "purposes."

Critics of legal process purposivism go farther, arguing that a statute cannot coherently be said to reflect an overall purpose, and that such purposes should not be imputed and then employed in support of an interpretive decision.[188] Evaluation of that claim is well beyond the scope of this Article. Instead, this Article advances the more modest proposition that courts' use of legislative purpose analysis in resolving the PRP-as-plaintiff issue must be more focused. Specifically, courts must consider a particular legislative purpose only in relevant factual contexts. For example, there may be cases in which the "settlement" goal would be irrelevant to a court's decision on the PRP-as-plaintiff issue, because none of the third-party defendants has settled with the government. In that situation, a court's decision to allow a PRP to sue under § 107 would not frustrate that goal, since the third-party defendants could not have invoked § 113(f)(2)'s contribution protection. Nor would the court's decision frustrate that goal in future cases, if the first court explained that the factual context of the case before it rendered that goal irrelevant. On the other hand, a decision in a case involving settlor defendants that cited the settlement goal without recourse to the case's factual context could end up influencing other litigants (and courts) even in cases where that goal was irrelevant. In this latter situation, the first court's pronouncement on the meaning of § 107 and § 113 would be presented as the resolution of a legal issue, that is, as "what CERCLA means," to be applied in future cases regardless of their factual contexts.

Thus, the use of statutory purpose promoted by this Article boils down to nothing more than a suggestion that courts distinguish interpretive problems based on the facts of the cases before them. But this is no small methodological advance. It is certainly a substantial improvement over the superficial textualism embraced by the courts that based their decisions solely on the "plain meaning" of § 107's "any other person" language. It is, in fact, an improvement over any textualist approach, to the extent that

188 *See, e.g.*, Eskridge and Frickey, *supra* note 77, at 702-10 (noting this criticism).

such an approach would ignore the factual context of the litigation in which the interpretive decision was made. This approach is also an improvement over the opinions discussed in the prior section,[189] that based their resolution of the PRP-as-plaintiff issue on CERCLA's "purposes," without explicit consideration of the factual context of the particular case before it. As will be seen later, the factual context of the particular case is an important component of the modified "practical reasoning" approach this Article ultimately proposes.[190] Before discussing practical reasoning, however, the Article discusses one more approach courts have taken to deciding the PRP-as-plaintiff issue, an approach turning on the common law meaning of the term "contribution."

D. The Special Role of Contribution

Some courts have resolved the PRP-as-plaintiff issue not by referring to CERCLA's plain meaning or purpose, but instead by considering the appropriate scope of a contribution suit as understood under general tort law principles. These courts have interpreted § 113's use of the term "contribution" as incorporating tort law's conception of contribution suits, and have thus based their decisions on whether the PRP's suit, however styled, was of the type that would be considered a contribution suit under general principles of tort law.

Resolving the issue by reference to common law concepts could be seen simply as a textualist recourse to the interpretive canon that a statute using a common law term be interpreted as having incorporated the common law meaning of that term.[191] As this section of the Article shows, however, a proper application of the concept of contribution in the CERCLA context requires more than a mechanical transfer of the common law meaning. Instead, it requires an understanding of CERCLA's particular liability scheme, as well as the actual workings of the statute in cleanup situations. This fact suggests that even something as straightforward as an interpretive canon requires consideration of factors beyond those easily accommodated in a purely textualist or purposivist reading.

1. Formal Liablity and CERCLA Contribution

Several courts have either held or suggested in dicta that private parties laboring under no formal legal compulsion may bring suits under § 107.[192] On the other hand, some courts have relegated a PRP third-party

189 *See supra* Part II.B.1.

190 *See infra* Part IV.

191 *See, e.g.*, 2B SINGER, *supra* note 97, § 50.03 (1992).

192 *See, e.g.*, Fisher Dev. Co. v. Boise Cascade Corp., 37 F.3d 104 (3d Cir. 1994) (stating that plaintiff cleaned up site without government compulsion; court apparently not presented with claim that plaintiff's suit, pleaded under § 107, should have instead been brought under § 113); United Techs. v. Browning-Ferris Indus., 33 F.3d 96, 99 n.8 (1st Cir. 1994) (dicta), *cert. denied*, 115 S. Ct. 1176 (1995); Gould Inc. v. A & M Battery and Tire Serv., 901 F. Supp. 906, 911-12 (M.D. Pa. 1995) (dicta); Bethlehem Iron Works, Inc. v. Lewis Indus., 891 F. Supp. 221 (E.D. Pa. 1995) (holding that the plaintiff who cleaned up site without obvious government compulsion allowed to sue under § 107); United States v. SCA Servs., 849 F. Supp. 1264, 1282 (N.D. Ind. 1994) (holding that the PRP that signed consent decree with the EPA is allowed to sue under § 107); *see also*

plaintiff to a contribution claim, on the ground that a PRP third-party plaintiff is a liable party despite the lack of a formal liability determination.[193] These disparate results reflect different approaches to an important legal question, namely, the appropriateness of a contribution cause of action when the liability of the third-party plaintiff is not formally established.[194]

This question is especially pertinent in CERCLA cases, where a party will often clean up a site under the terms of either a consent decree negotiated with the EPA in which the private party agrees to perform cleanup actions but does not concede CERCLA liability,[195] or a unilateral EPA cleanup order, issued pursuant to CERCLA § 106.[196] In neither case does the PRP's commitment to perform cleanup activities necessarily presume its formal CERCLA liability. Indeed, the provision authorizing the EPA to enter into consent decrees limits the use of such decrees as evidence of the signatory's CERCLA liability.[197] CERCLA further provides that such decrees may be structured so that the decree could not be construed as an admission of CERCLA liability for any purpose.[198] At least one court has cited these provisions as support for its decision allowing a signatory to a CERCLA consent decree to bring a § 107 suit.[199] CERCLA's provisions re-

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Saco Steel Co. v. Saco Defense, Inc., 910 F. Supp. 803 (D. Me. 1995) (allowing plaintiff to bring CERCLA suit despite fact that it had signed consent decree with state government relating to non-CERCLA violations); *cf.* United States v. New Castle County, 642 F. Supp. 1258, 1264 (D. Del. 1986) (pre-SARA case implying that incurring costs voluntarily may make third-party plaintiff's claim something other than a contribution claim).

193 *See, e.g.*, Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1140-41 (D.R.I. 1992); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1990); Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086 (D.N.J. 1992).

194 Indeed, courts have reached opposite conclusions in factually analogous situations. *Compare, e.g., SCA Servs.*, 849 F. Supp. at 1282-83 (concluding that PRP's signature on a CERCLA consent decree was not enough to presume it was a CERCLA-liable party) *with* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (holding that signatory to CERCLA consent decree is not allowed to sue under § 107).

195 These types of agreements should be distinguished from settlements between a PRP and the government in which the PRP agrees to pay some or all of the cleanup costs incurred by the government. There are distinct statutory provisions authorizing the government to enter into these two types of settlements. *Compare* 42 U.S.C. § 9622(a) (1994) (granting authority to enter into settlements requiring PRP to perform response actions) *with id.* § 9622(h)(1) (1994) (granting authority to enter into settlements requiring PRP to reimburse government for response costs already incurred); *see also* Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1522-24 (D. Utah 1995) (discussing differences between settlements under § 9622(a) and § 9622(h)).

196 42 U.S.C. § 9606 (1994).

197 *See id.* § 9622(d)(1)(B).

198 *See id.* § 9622(d)(1)(C).

199 *See* United States v. SCA Servs., 849 F. Supp. 1264, 1283 (N.D. Ind. 1994).

> Thus, SCA's [the PRP third-party plaintiff's] liability has never been established nor admitted, and it is clear that SCA is not a 'liable' party as that term is generally used in the legal setting. . . . [Other courts have] reasoned that a settling party's claim is necessarily a contribution claim, defining a contribution claim as a claim in which one *liable* party attempts to recover from another potentially liable party for its share of the cost. However, as this court is precluded by the plain language of CERCLA and the Consent Decree from considering SCA's participation in the Consent Decree as a determination or admission of liability, this court finds it difficult, if not impossible, to view SCA's claim against the third-party defendants as a claim for contribution.

Id. at 1283 (citations omitted); *see also* Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575, 582 (D. Conn. 1994) (finding that PRPs that "voluntarily" entered into consent order with the EPA and state agencies requiring PRPs to perform specified remedial actions are allowed to sue under § 107); *cf.* Barton Solvents, Inc. v. Southwest Petro-Chem, Inc., No. Civ.A.91-2382-

garding unilateral EPA cleanup orders (§ 106 orders) also indicate that receipt of such an order should not be equated with a formal liability determination. Specifically, § 106 provides a mechanism by which parties that receive such orders may petition for federal reimbursement of funds thereby expended,[200] and, if the government fails to do so, allows the recipient to bring suit, in which it must show that it does not meet the requirements for CERCLA liability as set forth in § 107.[201] Further, while noncompliance with a § 106 order exposes the recipient to the possibility of penalties for every day of non-compliance[202] or for treble damages when the government is forced to undertake the work due to the recipient's refusal,[203] § 106 has nevertheless been interpreted to protect the recipient of such an order from these penalties if it had a reasonable belief that the work required was unwarranted or that the recipient of the order was not CERCLA-liable.[204] Thus, the mere issuance of a § 106 order does not itself establish formal CERCLA liability, as indeed it could not in light of the lack of a constitutionally-adequate procedure.[205]

Thus, a party that has never admitted CERCLA liability nor been found CERCLA-liable may incur CERCLA costs as a result of government action—the issuance of a § 106 order or the initiation of an enforcement action leading to the signing of a consent decree. The issue then becomes the proper method by which such a party may seek reimbursement of such costs from other parties. If a contribution suit could not be brought, or a judgment on such a suit could not be had, until the third-party plaintiff was

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GTV, 1993 WL 382047 (D. Kan. Sept. 14, 1993) (holding that signatory to consent decree with state agency is allowed to sue under § 107). The court in *Companies for Fair Allocation* described the plaintiffs in *SCA Servs.* and *Barton Solvents* as having not admitted liability in their respective consent decrees. *See Companies for Fair Allocation*, 853 F. Supp. at 579.

200 *See* 42 U.S.C. § 9606 (b)(2)(A) (1994). For an example of a § 106 order recipient seeking a refund for its cleanup costs, see *California Mining Company Tells EPA Board Agency Abuses Section 106 Coercive Powers*, Toxics Law Reporter (BNA) 174 (July 19, 1995).

201 *See* 42 U.S.C. § 9606(b)(2)(B)-(C) (1994).

202 *See id.* § 9606(b)(1); *see also supra* note 48.

203 *See id.* § 9607(c)(3); *see also supra* note 48.

204 *See* Solid State Circuits, Inc. v. United States EPA, 812 F.2d 383, 385, 391 (8th Cir. 1987) (holding that treble damages may not be assessed against a party that refused to comply with § 106 order on grounds that it was not CERCLA-liable if recipient of order had a reasonable basis for refusing); Aminoil, Inc. v. United States EPA, 599 F. Supp. 69, 76 (C.D. Cal. 1984) (enjoining EPA assessment of daily penalties against a recipient of § 106 order on grounds that the recipient was likely to prevail on a claim that assessment of penalties without a chance to contest order deprived the recipient of due process); 1 TOPOL, *supra* note 5, § 6.2(B) (equating analysis for punitive damages and daily penalties); *see also* J. Wylie Donald, *Defending Against Daily Fines and Punitive Damages Under CERCLA: The Meaning of Without Sufficient Cause*, 19 COLUM. J. ENVTL. L. 185 (1994); Patricia Lindauer, *The CERCLA's Daily Penalty and Treble Damages Provisions: Is Any Cause "Sufficient Cause" to Disobey an EPA Order*, 11 PACE ENVTL. L. REV. 657 (1994). The relevant language of § 106(b)(1) is identical to that of § 107(c)(3): both require the recipient of the order to have "sufficient cause" for disobeying the order before the recipient may escape, respectively, the daily penalties or the treble damages. *Compare* 42 U.S.C. § 9606(b)(1) (1994) *with id.* § 9607(c)(3). The "sufficient cause" provision of § 107(c)(3) was enacted in CERCLA; the analogous provision in § 106(b)(1) was enacted in SARA, apparently with the intention that pre-SARA constructions of that phrase in § 107(c)(3) be applied to § 106(b)(1) as well. *See* H.R. REP. No. 99-253, pt. 1, at 82 (1985).

205 *See, e.g.*, United States v. SCA Servs., 865 F. Supp. 533, 543 (N.D. Ind. 1994) ("Even though liability is strict under CERCLA, it is obvious that legal liability cannot attach until a party has either admitted liability or has been adjudicated as liable.").

actually found liable, such a plaintiff might have a stronger argument that it should be able to recover its costs via a § 107 cost recovery suit.

Unfortunately, courts considering this issue have not provided a great deal of analysis regarding the appropriate timing for a CERCLA contribution suit. Some that have rejected the cost recovery argument have embraced what they apparently consider to be a "practical" take on the issue, concluding that even if the PRP third-party plaintiff was not formally CERCLA-liable, a consent decree or § 106 order imposes sufficient compulsion to justify rejecting a PRP's claim that it acted voluntarily in cleaning up the site.[206] On the other hand, the statutory scheme clearly envisions a party signing a consent decree or being served with a § 106 order without it admitting or being adjudged CERCLA-liable, and at least one court has held that the lack of such formal liability leaves that party free to sue under § 107.[207]

Thus, the issue has been framed: to what extent is formal CERCLA liability a prerequisite for the maintenance of a § 113 contribution suit? This issue implicates both the timeliness of a contribution claim and the timeliness of a judgment on such a claim, questions to which this Article now turns.

2. May a Contribution Claim Be Brought Before the Third-Party Plaintiff Becomes Legally Liable?

The question of a CERCLA contribution suit's timeliness is answered relatively easily. While CERCLA's limitation of actions provision provides no guidance on this question,[208] § 113 provides that contribution actions "shall be brought in accordance with [the other provisions of § 113] and

206 *See, e.g.*, Avnet v. Allied Signal, Inc., 825 F. Supp. 1132, 1140-41 (D.R.I. 1992) (§ 106 order); Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086-87 (D.N.J. 1992) (same); *see also* United Techs. Corp. v. Browning-Ferris Indus., No. 92-0206-B, 1993 WL 660007, (D. Me. May 27, 1993) (consent decree), *aff'd*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995); Ciba-Geigy Corp. v. Sandoz, Ltd., No. Civ. A.92-4491(MLP), 1993 WL 668325, at *6-7 (D.N.J. 1993).

207 *See supra* note 199.

208 Section 113(g)(3) provides a three year limitations period for such actions, commencing on "the date of judgment in any action . . . for recovery of costs or damages," or "the date of an administrative order [under section 122(g) or (h)] or entry of a judicially approved settlement" relating to recovery of costs or damages. 42 U.S.C. § 9613(g)(3) (1994). The fact that the limitations period commences with one of these events suggests that any of them provides the third-party plaintiff with an accrued cause of action. However, courts have generally held that neither a § 106 cleanup order nor a consent decree to perform cleanup activities falls within any of these classes of triggering events. *See, e.g.*, Gould, Inc. v. A&M Battery and Tire Serv., 901 F. Supp. 906, 913-15 (M.D. Pa. 1995) (holding that PRP's acceptance of § 106 consent agreement did not commence limitations period for its contribution action); Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1521-24 (D. Utah 1995) (same). Clearly, there is no judgment in an action to recover response costs or damages. Nor is there an administrative order under § 122(g) or (h); both of these sections deal only with settlements for recovery of costs or damages, and not settlements for prospective performance of cleanup activities. *See, e.g., Ekotek*, 881 F. Supp. at 1522-24 (discussing differences between consent decrees requiring a PRP to take remedial action and consent decrees requiring a PRP to reimburse government for costs incurred by government). *But see* Sun Co. v. Browning-Ferris, Inc., 919 F. Supp. 1523, 1531 (N.D. Okla. 1996) (holding that, in absence of a triggering event mentioned in the statute, the limitations period for CERCLA contribution action begins when contribution plaintiff "has paid more than her fair share of a common liability").

the Federal Rules of Civil Procedure."[209] The Federal Rules of Civil Procedure, in turn, provide that "[a]t any time after commencement of the [primary] action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."[210] An authoritative analysis of the Federal Rules states that "[t]he words 'may be liable' mean that defendant is permitted to join someone against whom a cause of action has not yet accrued, provided that the claim is contingent upon the success of plaintiff's action and will accrue when defendant's liability is determined in the main action or plaintiff's claim is satisfied."[211] Thus, the fact that a PRP third-party plaintiff has not been formally determined to be CERCLA-liable (because, for example, it incurred its expenses due to a consent decree in which it disclaimed liability) does not disqualify it from initiating a contribution suit.[212]

3. Does the Third-Party Plaintiff's Lack of Formal Liability Make Contribution Inappropriate?

A separate and potentially more significant problem with a recipient of a § 106 order or the signatory to a consent decree bringing a contribution suit is whether a judgment in such a contribution suit could be

209 42 U.S.C. § 9613(f)(1) (1994).

210 Fed. R. Civ. P. 14(a); *see* Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1488 n.3 (D. Colo. 1985) (noting correct procedure for stating CERCLA contribution claim is impleader action pursuant to Fed. R. Civ. P. 14); *see also* Fidelity & Deposit Co. of Md. v. C & A Currency Exch., Inc., 738 F. Supp. 302, 305 (N.D. Ill. 1990) (construing Rule 14(a) to allow assertion of contingent claim); Niece v. Sears, Roebuck & Co., 293 F. Supp. 792, 794 (N.D. Okla. 1968) (same).

211 6 CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1451 (1990).

212 This interpretation of § 113(f)(1) is called slightly into question by § 113(f)(3)(B), which provides that:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement [that provides contribution protection under § 113(f)(2)].

42 U.S.C. § 9613(f)(3)(B) (1994). The limitation of contribution rights to settling parties "who [have] resolved [their] liability to the United States or a State" could be read as limiting those rights to settling parties who admit liability in their settlement agreements. This phraseology was seen as significant by the court in *United States v. SCA Servs.*, 849 F. Supp. 1264, 1282-83 (N.D. Ind. 1994), which contrasted it with the wording of § 122(d)(1), 42 U.S.C. § 9622(d)(1); dealing with the entry of CERCLA consent decrees. This latter provision provides for settlements with *potentially* responsible parties and, more importantly, limits the use of such decrees as evidence of the signatory's CERCLA liability. This contrast could be taken to mean that § 113(f)(3)(B)'s provision that "[a] person who has resolved its liability to the United States . . . may seek contribution" makes contribution suits available to settlors only if their settlement agreements include an admission of CERCLA liability.

Ultimately, this seems to be too fine a distinction. Since section 113(f)(1) of CERCLA is universally regarded as the source of the right to contribution, and since section 113(f)(2) immunizes settling parties from such contribution claims, it appears that the only change effected by section 113(f)(3)(B) is to explicitly authorize a settling party to bring a contribution suit. This reading is supported by the legislative history. *See* H.R. REP. No. 99-253, pt. 3, at 20 (1985). An alternative reading of this section that leads to the same conclusion would argue that the heading for subsection (f)(3)—"Persons not party to settlement"—and the other parts of subsection (f)(3) indicate that subparagraph (f)(3)(B) does not intend to deal with the class of persons that can *bring* a contribution suit but instead speaks to the class of persons that can be *made subject* to such a suit.

handed down before the third-party plaintiff's own liability is conclusively determined. Of the courts rejecting the PRP's "voluntariness" claim, most merely point to the practical fact that the lack of formal liability means little in the face of EPA compulsion, either in the form of a § 106 order or a consent decree signed on pain of even more coercive action taken by the agency.[213] However, the court in *Transtech Industries, Inc. v. A & Z Septic Clean*[214] provided reasoning for considering these PRP third-party plaintiffs to be liable parties. It held that "[a]bsent a statutory provision to the contrary, a claim against one liable party by a party who voluntary [sic] agreed to perform certain actions pursuant to a settlement agreement is still a claim for contribution."[215] It based this conclusion on the analysis of a federal appellate opinion applying state law in a non-CERCLA context, which stated that

> the principle of contribution is founded . . . upon the principles of equity and natural justice, which require that those who are under a common obligation or burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his coobligor . . . . [W]hile a judgment is conclusive on [the liability] issue it is not necessary that it be proved in that way. If a judgment has not been rendered, the validity of the claim against both parties can be determined by the Court in the action seeking contribution.[216]

The above rule is apparently not universally acknowledged; in fact, several states have statutes limiting contribution to those against whom judgments have been rendered fixing both liability and amount.[217] This limitation is justified on the grounds that it would be unfair for a third-party defendant to be held liable for a share of a settlement it opposed.[218]

However, CERCLA's particular characteristics limit the applicability of this "unfair settlement" rationale. First, in the traditional case, it is the third-party *defendant* that would claim unfairness in allowing a contribution suit to proceed without the third-party plaintiff having been found liable. By contrast, in the CERCLA context, it is the third-party *plaintiff* that usually attempts to invoke this rule, in order to avoid being relegated to a § 113 contribution suit.[219] Moreover, since both sides in the third party

213 *See, e.g.*, Avnet v. Allied-Signal, Inc., 825 F. Supp. 1132, 1141 (D.R.I. 1992) (noting fines that PRP plaintiff risks if it does not comply with a CERCLA § 106 cleanup order).

214 798 F. Supp. 1079 (D.N.J. 1992).

215 *Id.* at 1086.

216 Huggins v. Graves, 337 F.2d 486, 489 (6th Cir. 1964) (applying Tennessee law), *quoted in Transtech*, 798 F. Supp. at 1085 n.10. The court in *Huggins* indicated that its discussion on this point was based on substantive Tennessee law, although it failed to cite any Tennessee authorities in support of its analysis of contribution law. *Huggins*, 337 F.2d at 489. By contrast, the *Transtech* court was presumably applying a federal common law of CERCLA contribution. *Cf.* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-09 (S.D. Ohio 1983) (holding that CERCLA liability rules should be developed as part of federal common law).

217 *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 339 (5th ed. 1984).

218 *See id.*

219 *See, e.g., Transtech*, 798 F. Supp. at 1086 (noting that third-party plaintiffs argued that their claim could not be for contribution). Still, third-party defendants may make this argument, as part of an attempt to escape all CERCLA liability. *See, e.g.*, Alloy Briquetting Corp. v. Niagara Vest, Inc., 756 F. Supp. 713, 718 (W.D.N.Y. 1991) (noting that in addition to attacking plaintiff's § 107 claim, defendants argued that plaintiff's § 113 claim, concurrently pled with the § 107

suit arguably have an equal interest in minimizing cleanup costs, any unfairness to the third-party defendant from being made to share in the responsibility for a settlement of which it did not approve is substantially reduced.[220] At any rate, all interested parties have the right to comment on a consent decree before it is entered,[221] and some courts have held that nonsettlors have the right to intervene in consent decree proceedings in order to challenge proposed government settlements with other PRPs.[222]

Most importantly, the structure of CERCLA's liability scheme greatly reduces the relevance of the "unfair settlement" concern. In the traditional tort situation, a private party plaintiff's choice might be between a contribution suit and no third-party action at all. In contrast, under CERCLA a private party plaintiff may recover costs from the defendant regardless of whether the former was in fact liable under CERCLA, due to § 107's provision for private cost recovery actions. The important fact here is that § 107 authorizes a CERCLA-innocent party to recover cleanup costs from any CERCLA-liable party. Thus, tort law's concern with a "sweetheart" deal between the original plaintiff and the original-defendant-third-party-plaintiff[223] does not apply to CERCLA private cost recovery actions.[224] Thus, there appears to be no reason to require the third-party plaintiff to show, as a prerequisite to a contribution suit, that it was in fact liable "to the original plaintiff," that is, liable under the statutory scheme.

Indeed, adjudicating a PRP-plaintiff's own CERCLA liability as part of its contribution suit (the solution suggested by the *Transtech* court) might actually damage CERCLA's mechanism. For if a PRP third-party plaintiff brought a § 113 contribution suit, and in the course of that suit the court determined the CERCLA liability of both the third-party plaintiff and the third-party defendant, could the court's determination of the third-party plaintiff's liability then be used as collateral estoppel by the EPA in an attempt to require that individual to be responsible for even more of the

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claim, was not ripe "because plaintiff has not yet been held liable for response costs or entered into a settlement regarding response costs under CERCLA").

220 Depending on the parties' relative positions, however, this might not always be the case. For example, if the recipient of a § 106 order was the current owner of the land, it might be willing to abide by an unnecessarily stringent cleanup order if it could hold other parties at least partially responsible for the cleanup and benefit financially from owning a cleaner parcel.

221 *See* 42 U.S.C. § 9622(i)(2) (1994).

222 *See* United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995) (finding right to intervene); United States v. Acton Corp., 131 F.R.D. 431 (D.N.J. 1990) (same); *see also* United States v. Anderson, Greenwood & Co., No. H-91-3529, 1996 WL 363439 (S.D. Tex. April 10, 1996) (rejecting a proposed consent decree at the urging of the non-settling party). *But see* United States v. Alcan Aluminum, Inc., 25 F.3d 1174 (3d Cir. 1994) (dictum) (finding no right to intervene); United States v. ABC Indus., 153 F.R.D. 603 (W.D. Mich. 1993) (finding no right to intervene); United States v. Mid-State Disposal, Inc., 131 F.R.D. 573 (W.D. Wis. 1990) (same).

223 *Cf.* J. LEE & B. LINDAHL, MODERN TORT LAW § 20.26 (1994) (stating that the purpose of statutes obliging a settling defendant to pay contribution to non-settling co-defendants is the prevention of collusive agreements between the plaintiff and settling defendant).

224 In such a case, the response costs the third-party plaintiff could recover from the defendant would be limited to those costs that were consistent with the NCP. *See* 42 U.S.C. § 9607(a)(4)(B) (1994). Thus, even here there would be a limit on the costs the third-party plaintiff could recover, thereby further mitigating the policy concern reflected in the traditional rule about such "sweetheart" deals. For the role of NCP consistency in private-party CERCLA actions, see James R. Deason, Note, *Clear as Mud: The Function of the National Consistency Plan Consistency Requirement in a CERCLA Private Cost-Recovery Action*, 28 GA. L. REV. 555 (1994).

cleanup costs at the site? Such a result appears possible under federal civil procedure.[225] It could, however, devastate the third-party plaintiff. As a practical matter, the scope of both a § 106 order and a consent decree would be the subject of negotiation between the EPA and the PRP; thus, there is a good likelihood that the PRP would have been able to avoid being saddled with full liability for the site's cleanup costs. Moreover, site cleanups usually proceed in phases, and a particular § 106 order or consent decree usually concerns only one phase of the site's cleanup.[226]

Thus, a court decision to adjudicate the CERCLA-liability of a PRP third-party plaintiff may leave that party worse off than if it had never sued, since if the court found it CERCLA-liable, that finding might have quite undesirable collateral effects. This possibility could reduce the utility of contribution actions, because a would-be third-party plaintiff might well think twice before instituting a suit which could—indeed, probably would—result in a determination of its own liability, with potentially serious consequences flowing from that determination. If contribution suits become less attractive to would-be PRP third-party plaintiffs, they might in turn be less inclined to cooperate with government cleanup efforts.[227]

In sum, then, it appears as though the *Transtech* court may have been right, but for the wrong reason. The fact that the PRP third-party plaintiff has not been formally adjudged CERCLA-liable should not "disqualify"[228] it

225 *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (applying offensive collateral estoppel when the first suit involved the government as plaintiff and established defendant's violation of law, and the second suit involved a private plaintiff alleging the same violation against the same defendant). The scope of the appropriate use of offensive collateral estoppel has been described as "fluid," and as depending "to an important degree on 'sound judicial discretion.'" *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 11.24-.25 (3d ed. 1985). The same source describes a two-step rule which courts use to evaluate such claims. Under this test the court must first determine whether the party against whom the judgment is sought had a full and fair opportunity to litigate the issue in the first action. If the target did have such an opportunity, issue preclusion presumptively applies unless it can show a good reason that it should not. *See id.* at § 11.25. At the very least, then, it is quite possible that the EPA could claim issue preclusion or collateral estoppel in this case.

It should be noted that the collateral estoppel issue discussed here is not the same as the question of the collateral estoppel effect created by an initial agency adjudication of a particular issue. *See generally* Eric N. Macey, Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65 (1977). Nor is this a situation in which a private party would seek to assert collateral estoppel *against* the federal government, either because the matter had been adjudicated in an earlier proceeding involving the government, *see* William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199, 266-68 (1988), or because a private party, for example, one acting under a citizen suit provision, brought suit against the same defendant on the same issue and lost, *see* Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Law, Part II*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10063, 10081-82 (Feb. 1984).

226 Indeed, the issue of the scope of CERCLA consent decrees is much litigated, since the protection such settlements provide from other PRPs' contribution suits extends only to the "matters addressed in the settlement." 42 U.S.C. § 113(f)(2) (1994). The debate over the meaning of this term is recounted in Sucaet, *supra* note 69.

227 *See* H.R. REP. No. 99-253, pt. 1 (1985); S. REP. No. 99-11 (1985). These two reports represent legislative history expressing hope that the contribution provision would facilitate cleanups and encourage PRPs to settle with the government; *cf.* Key Tronic Corp. v. United States, No. C-89-694-JLQ (E.D. Wash. Aug. 9, 1990) (expressing concern that misanalysis of PRPs' access to cost recovery and contribution suits would discourage PRPs from settling with the government).

228 This term is in quotation marks because, as noted above, it would normally be the third-party plaintiff itself that argued that it was "disqualified" from suing under § 113. *See supra* text accompanying note 219.

from bringing a contribution suit. Rather than adjudicating the third-party plaintiff's liability as part of its own contribution action, however, as suggested by *Transtech*, it may make more sense simply to allow the contribution suit to go forward without a determination of the third-party plaintiff's own CERCLA liability.

For our methodological inquiry into the appropriate approach for resolving the PRP-as-plaintiff issue, the lesson here is that the above conclusion does not flow from a mechanical transfer of common law contribution principles into CERCLA cases. Instead, those principles must be applied in the context of CERCLA's unique liability scheme, with an eye to the practical implications which a particular application would have on parties' incentives to act in furtherance of CERCLA's goals. Thus, even an approach such as this, grounded in a fundamental interpretive canon and referring to a well-established body of tort contribution law, requires an inquiry into CERCLA's particular structure and real-life application.

III. Toward a Practical Reasoning Interpretation of CERCLA

As reflected in the judicial opinions discussed in Part II, courts have employed a variety of methodologies in their attempts to resolve the PRP-as-plaintiff issue. The results have not been promising. Appeal to the statutory text, specifically § 107's "any other person" language, appears justified by the relative clarity of that provision, yet essentially ignores Congress's addition of § 113 in SARA, a troubling result. A more sophisticated textualist reading goes beyond § 107's "any other person" language, but ultimately fails to reflect the dynamic nature of the process that resulted in the statute as it currently exists. SARA's legislative history provides some insight into the SARA Congress's position on the relationship between § 107 and § 113, but fails to resolve underlying ambiguities about the PRP's position in CERCLA's scheme. Reliance on CERCLA's underlying policies—at least without consideration of the facts of the particular case—leads to an outcome which is no more satisfactory because those policies often point in different directions, as in fact they do with the PRP-as-plaintiff issue. Finally, recourse to the common law meaning of contribution, while perhaps sensible, requires consideration of a whole variety of factors unique to CERCLA and even to the particular case before the court. Some interpretive theory is needed that can accommodate the insights provided by these approaches while mitigating the problems these approaches raise.

These difficulties suggest recourse to the interpretive approach known as "practical reasoning" as a possible means of combining, into a coherent and satisfactory whole, the insights of the methodologies already discussed. Practical reasoning has been the subject of much recent academic discussion,[229] and, if its proponents are correct, courts have utilized this method

229 As with its discussion of textualism, this Article does not purport to offer a comprehensive exposition of practical reasoning. Such expositions can be found in any of the following articles: Eskridge & Frickey, *supra* note 77; Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. Rev. 1615 (1987); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137 (1990); Eileen A.

in deciding statutory interpretation cases.[230] Practical reasoning is less a theory of statutory interpretation than an approach to it. It seeks not to uncover fundamental first principles from which outcomes in particular cases logically and ineluctably flow, but rather offers a method of approaching the interpretive task.[231] That method prominently features an explicit acceptance of the fact that different pieces of interpretive evidence point in different directions; a willingness to consider all interpretive evidence (including that which militates against the interpreter's tentative view); and sensitivity both to the factual context of an interpretive problem and the larger societal significance of those facts. Most fundamentally, practical reasoning accepts that with many statutes no interpretation is always and unambiguously correct. In such cases, practical reasoning suggests that the court should consider all the conflicting evidence of the statute's meaning and the factual context in which the issue arises, filtering them through various criteria such as the text itself, the legislature's intent, the purpose of the statute, and the evolution of the political, legal, and social context in which the statute acts.[232]

The attractiveness of practical reasoning as a method of resolving the PRP-as-plaintiff problem lies in the fact that it allows for consideration of all the "complex and cross-cutting"[233] values informing a particular interpretive problem. This feature is particularly important in our situation, where courts have based their interpretations of § 107 and § 113 on a variety of grounds, each of which is useful but in itself incomplete, and where § 113 seems to have been the product of a dialogue between Congress and the courts that interpreted the original version of CERCLA. By providing a framework within which all of these factors could be considered, practical reasoning seems to be a promising approach to the PRP-as-plaintiff issue.

Application of practical reasoning to the PRP-as-plaintiff problem should take account of the three bases courts have used to decide this issue—the statutory text, the policies underlying CERCLA, and the common law meaning of contribution—in addition to the legislature's intent regarding the relationship of § 107 and § 113.[234] All four of these criteria are reasonable bases for courts to decide this issue. First, the importance of the statutory text is self-evident; any statutory interpretation must at least consider the actual text as enacted by Congress, both as the only statement

Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

230 *See, e.g.*, Eskridge & Frickey, *supra* note 77, at 345-62 (presenting the practical reasoning model as a synthesis of actual Supreme Court statutory interpretation analysis). *But cf.* Scallen, *supra* note 229, at 1759-814 (analyzing five recent Supreme Court opinions construing the Federal Rules of Evidence and concluding that the Court only rarely applied the practical reasoning approach).

231 Two commentators have analogized this method to the method by which scientists go about their work. *See* Farber & Frickey, *supra* note 229, at 1629-30.

232 *See, e.g.*, Taslitz, *supra* note 80, at 394-95. Commentators have even gone so far as either to find or suggest a hierarchy among these sources, with statutory text counted as most important, followed by historical or intentionalist considerations and then examination of changes in the social or legal context. *See, e.g.*, Eskridge & Frickey, *supra* note 82, at 354-62 (describing this hierarchy of sources as the one used by Supreme Court in statutory interpretation cases); Taslitz, *supra* note 80, at 394-95 (approving of this hierarchy).

233 Frickey, *supra* note 229, at 1206.

234 *See supra* Part II.

formally enacted into law and as the most reliable indicator of Congress's actual intent. Second, the dialogic nature of CERCLA's evolution suggests review of the legislature's intent in enacting § 113. Third, the policies underlying CERCLA should also be considered, in order to ensure that a proposed interpretation of § 107 and § 113 promotes, or at least does not impede, the underlying statutory goals. Finally, any interpretation of § 113 should be tested for consistency with the common law meaning of contribution, not only because of the general presumption that Congress intends to incorporate the common law meaning of a term it uses in a statute,[235] but especially here, where Congress clearly envisioned that the federal courts would develop a federal common law of CERCLA liability.[236] Practical reasoning would require a flexible application of these sources of meaning, being mindful of the factual context of the case, and able to move between these criteria depending on their usefulness in the particular case.

A. United States v. SCA Services: *A First Cut at Practical Reasoning*

One court which considered the PRP-as-plaintiff problem appears to have applied at least some of the principles of practical reasoning. In *United States v. SCA Services, Inc.*,[237] the court consciously attempted to balance several of the factors noted above, and decided the issue with a careful regard for the facts of the particular case and the actual workings of the statute. *SCA Services* involved an attempt by SCA Services of Indiana (SCA) to recover costs it had incurred and expected to incur in cleaning up a Superfund site. SCA's expenses flowed from its acceptance of a consent decree with the EPA. SCA sought to recoup these expenses by bringing a § 107 cost recovery suit against a number of parties which SCA alleged to be CERCLA-liable. Those third-party defendants responded by claiming that SCA, because of its settlement with the EPA, could not sue under § 107 but instead could sue only for contribution under § 113.[238] They also argued that such a contribution suit would be barred by the three year limitations period, with the result that SCA could sue the third-party defendants for neither contribution nor cost recovery.[239]

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235 *See* 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 50.03 (5th ed. 1992). In *Morissette v. United States*, 342 U.S. 246, 263 (1952), the court noted that when the legislature

> borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette, 342 U.S. at 263.

236 *See, e.g.*, H.R. REP. No. 99-253, pt. 1, at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (noting intention of Congress enacting CERCLA that courts "establish the scope of [CERCLA] liability through a case-by-case application of traditional and evolving principles of common law and pre-existing statutory law" and stating that "[t]he courts have made substantial progress in doing so") (internal quotation omitted from first quotation); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (noting that CERCLA envisioned courts developing liability rules based on common law principles).

237 849 F. Supp. 1264 (N.D. Ind. 1994).

238 *Id.* at 1269-70.

239 *Id.*

In examining whether SCA could bring a § 107 suit, the court in *SCA Services* began with the statutory text, specifically, § 107's "any other person" language. It stated that by:

> [e]mploying a straight-forward reading of § 107(a)(4)(B), it is clear that SCA is 'any other person' who has 'incurred' response costs. Thus, absent some clear indication to the contrary, SCA has a strong argument that it should be able to bring an action under § 107(a)(4)(B) to attempt to recover its response costs from potentially liable third parties.[240]

But the court did not stop there. Instead, it continued by noting the sharp split among courts considering this issue.[241] It concluded that, of all the cases that had faced this issue, only one, *United Technologies Corp. v. Browning-Ferris Industries*,[242] was directly on point.[243] In support of that conclusion, the *SCA Services* court then embarked on a detailed discussion of the cases on both sides of the PRP-as-plaintiff issue.[244] The court distinguished the cases, not on the basis of whether their legal reasoning was correct, but on their factual context. Specifically, the court concluded that, for the most part, the judicial split on this issue tracked the question whether the third-party defendants had settled their liability with the government before being sued by the PRP third-party plaintiff.[245]

Since the defendants in *SCA Services* had not settled their liability to the government, the court focused on the cases where the third-party defendants also had not done so. The court found that, with the exception of *United Technologies*, all of these cases allowed the third-party plaintiff to sue under § 107.[246] The *SCA Services* court then considered the analysis in *United Technologies*, and rejected it for two reasons. First, the court disagreed with the *United Technologies* court's view that the language of § 113 clearly indicated a legislative intent to limit parties such as SCA to § 113 actions. The *SCA Services* court reasoned, "[i]f the language of § 113 clearly resolved this issue, there would not be such a profusion of diverse and conflicting opinions discussing the issue."[247] It then rejected a distinction the *United Technologies* court had drawn in the language of the statute, between plaintiffs who incurred costs on their own initiative (who would be allowed to bring a § 107 action) and plaintiffs who were subject to a suit by a governmental body (who would be relegated to a § 113 suit).[248]

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240 *Id.* at 1270.

241 *Id.*

242 Civ. No. 92-0206-B, 1993 U.S. Dist. LEXIS 19162 (D. Me. 1993), *aff'd on other grounds*, 33 F.3d 96 (1st Cir. 1994).

243 *See SCA Servs.*, 849 F. Supp. at 1270-71.

244 *Id.* at 1271-81.

245 *See id.* at 1281. This distinction was significant because CERCLA entitled settling parties to protection from contribution suits. *See* 42 U.S.C. § 9613(f)(2) (1994). Thus, the rationale behind courts' rejection of PRP attempts to sue settling PRPs under § 107 was that allowing such a suit would amount to a circumvention of the settling parties' contribution protection. *SCA Servs.*, 849 F. Supp. at 1271-78 (discussing cases in which third-party defendants had settled their CERCLA liability); *see also supra* Part II.B (discussing policies behind CERCLA).

246 *See SCA Servs.*, 849 F. Supp. at 1281.

247 *Id.* at 1271, 1281.

248 *Id.* at 1281-82.

Before continuing, it is worth pointing out the ways in which the court's analysis already reflects a practical reasoning approach. The court started with a basic interpretive tool—the statutory text—noting that a "straight-forward" reading of § 107 strongly favored SCA's position. However, it recognized that courts had split on the issue, and thus did not stop its analysis with the statute's plain meaning.[249] Thus, already the court was testing a preliminary interpretation of the statute against other interpretive criteria—here, the decisions of other courts which had considered the issue.[250] This principle is also reflected in the court's rejection, based again on the very fact of a judicial split on the issue, of the *United Technologies* court's claim that § 113's language reflects a clear congressional intent.[251] In addition, the court's analysis of precedent indicates a sensitivity to each case's factual context. This is significant since the issue is one of statutory interpretation; theoretically, a court would be justified in ignoring the facts of the other cases which have considered the issue, on the grounds that statutory interpretation is a "pure question of law" that will not vary based on the litigation facts.

Having canvassed the case law, distinguishing many of the cases on their facts and rejecting the rationale in *United Technologies*, the *SCA Services* court then proceeded to offer its own analysis of § 107 and § 113. It began by stating:

> This court has carefully studied the record of the present case, the pertinent portions of the CERCLA statute (including the SARA amendments), and a whole plethora of cases from all across the country. As a result of this study, the court has concluded that the correct result in this case is best achieved by permitting SCA to pursue its § 107 cost recovery claim. In reaching this decision, this court gave due consideration to the particular facts of this case which are discussed more fully below.[252]

This paragraph is significant because it reflects, again, the court's recognition that the proper outcome should depend heavily on the particular facts of this case.[253] Thus, the court stated that, in preparation for its ruling, it had studied the record, in addition to the statute and the relevant cases.[254] It also stated that "[i]n reaching [its] decision, this court gave due consideration to the particular facts of this case."[255] Finally, and most importantly, the court phrased its conclusion not as the proper reading of the statute, but as "the correct result in this case."[256] Given that its examination of precedent focused not only on the relevant cases' legal reasoning, but also on their factual backgrounds, the court's phraseology cannot be

249 *Id.* at 1270.
250 *Cf.* Eskridge & Frickey, *supra* note 77, at 348-54, 360-62.
251 *SCA Servs.*, 849 F. Supp. at 1281.
252 *Id.* at 1282.
253 As will be discussed in the next section, this fact-intensiveness also has the undesirable effect of causing unpredictable results. *See infra* Part III.C.2. This Article will propose a solution that attempts to mitigate this unpredictability while retaining the benefits of a careful inquiry into the facts of the particular case before the court. *See infra* Part IV.
254 *SCA Servs.*, 849 F. Supp. at 1282.
255 *Id.*
256 *Id.*

dismissed as accidental or boilerplate. Instead, the court was embracing a reading of the statute which it thought most appropriate in light of the factual context.[257] Heavy reliance on the facts of the case before it was the next logical step in the court's analysis, after rejecting categorical interpretations based either on the text[258] or the legislative intent[259] and after interpreting the other opinions on the issue—legal texts themselves—against the backgrounds of their own particular facts.[260]

According to the *SCA Services* court, the case's factual context had several relevant components. First, the court clearly thought that SCA had acted responsibly. It found that SCA was the only party to respond to the EPA's letters notifying various parties that they were suspected of being liable for cleanup costs at the site.[261] It also noted that SCA signed its consent decree with the EPA only six weeks after the EPA had determined the appropriate remedial action.[262] Based on these findings, the court concluded that "SCA has demonstrated its willingness to take appropriate action with respect to the site,"[263] and rejected what it characterized as the third-party defendants' attempts to portray SCA as only a grudging participant in the cleanup process.[264]

Second, the court found it important that SCA never admitted CERCLA liability.[265] It quoted the part of the consent decree in which SCA denied liability and which provided that the decree would not constitute evidence of SCA's liability.[266] The court then cited the CERCLA provision governing consent decrees, noting that that provision both allowed a signatory to deny liability and in fact limited the use of a decree as evidence of liability.[267]

Based on the particular facts of SCA's conduct, its formal denial of liability in the consent decree, and the CERCLA provision limiting use of consent decrees as evidence of liability, the court concluded that "SCA's liability has never been established nor admitted, and it is clear that SCA is not a 'liable' party as that term is generally used in the legal setting."[268]

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257 This discussion finds echoes in the line of Supreme Court cases declining to hear cases on grounds, for example, of ripeness, based on the Court's disinclination to decide legal issues outside of a live dispute providing a factual context. *See, e.g.*, United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89-90 (1947) (determining that Civil Service employees challenging Hatch Act prohibition on political activities do not present a ripe case or controversy, in part because of the hypothetical nature of the activity in which they wish to engage).

258 *See SCA Servs.*, 849 F. Supp. at 1270-81.

259 *Id.* at 1281.

260 *Id.* at 1270-81.

261 *Id.* at 1282.

262 *Id.*

263 *Id.*

264 *Id.*

> The third-party defendants portray SCA as an unwilling participant who had been threatened with a lawsuit by the federal government and then, admitting liability in the face of certain defeat, agreed at the last minute to enter into a consent decree. However, it is clear that the record simply does not support the third-party defendants' portrayal of SCA.

Id.

265 *Id.*

266 *Id.*

267 *Id.* at 1282-83 (quoting 42 U.S.C. § 9622(d)(1) (1994)).

268 *Id.*, 849 F. Supp. at 1283.

From this, the court concluded that it could not view SCA's claim as one for contribution, despite reasoning in other opinions indicating that contribution was always the appropriate cause of action when the third-party plaintiff was itself a PRP.[269] The court then concluded its analysis by noting with approval SCA's argument explaining the rationale for differing limitations periods for contribution and cost recovery actions, as illustrated by SCA's own experience in performing cleanup at the site.[270]

Thus, the *SCA Services* opinion reflects several strands of a practical reasoning approach. First, the court considered a variety of interpretive sources, without depending solely on any one. For example, the court began with, and assigned great weight to, the statutory text, but was not willing to accept an interpretation based solely on a plain meaning or a legislative intent rationale if other courts had not been able to agree on a particular interpretation. This attitude reflects the practical reasoning approach of employing a variety of interpretive methods and testing the results of one against those of another.[271]

Second, the court's opinion is infused throughout with an understanding that the statute can be properly interpreted only in the context of the facts of the case. The court's analysis reflects the insight that a statute as complicated as CERCLA cannot be understood or interpreted separately from the facts of a particular case. The *SCA Services* court applied this principle in three ways: first, when it distinguished a class of cases on their facts (i.e., the fact that the third-party defendants had settled their liability to the government) even though those cases considered the same statutory interpretation question at issue in *SCA Services*; second, when it evaluated SCA's conduct in the course of determining whether it was a liable party as understood under traditional contribution law; and finally, when it confirmed its interpretation by examining how the statutory scheme would operate with SCA being allowed to sue under § 107.

B. The Problems With SCA Services

Nevertheless, while *SCA Services* suggests the benefits of a practical reasoning approach, it remains an incomplete answer to the PRP-as-plaintiff problem. The court's analysis raises two main issues. The first is a straightforward issue of statutory interpretation. The second is a more subtle problem dealing with the court's methodology.

1. Statutory Coherence

The statutory interpretation problem raised by the *SCA Services* analysis concerns whether that analysis leaves any effect to Congress's provision of a contribution cause of action in § 113. This issue is reflected in the opinion of the court of appeals in *United Technologies*.[272] While not commenting

269 *Id.*
270 *Id.* at 1283-84.
271 *See, e.g.*, Scallen, *supra* note 229, at 1762-63 (noting the practical reasoning methodology of weighing the value of interpretive sources which suggest conflicting results).
272 United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96 (1st Cir. 1994).

directly on *SCA Services*, the appellate court in *United Technologies* considered, and rejected, a reading of § 107 allowing PRPs to bring suit. It rejected that reading on the grounds that it would essentially read § 113's contribution cause of action out of the statute by making a § 107 action available to a larger class of third-party plaintiffs.[273] As explained above,[274] a § 113 contribution action is less desirable, from a plaintiff's point of view, than a § 107 cost recovery action. The insight of the *United Technologies* court, then, is that any fair reading of CERCLA would have to preserve some situations for which § 113 would provide the only available cause of action; otherwise, § 113 would become a dead letter. This is a powerful argument reflecting a fundamental canon of statutory interpretation.[275]

At least on one level, the analysis offered by *SCA Services* fails this test. Read as a pure statutory analysis, *SCA Services* offers the third-party plaintiff a feast or a famine: if the third-party defendant it sues has not settled its liability with the government, then the plaintiff may sue under § 107; but if the third-party defendant has settled, the third-party plaintiff may then sue under neither § 107 (by the terms of the rule) nor § 113 (since the statutory bar on contribution suits would come into play).

However, the *SCA Services* opinion, by relying so heavily on the facts of the particular case before it, did not set forth a hard and fast rule of the sort implied above, but merely held that "the correct result in [that] case [was] best achieved by permitting SCA to pursue its § 107 cost recovery claim."[276] Thus, in some factual situations a court adopting the *SCA Services* analysis might still relegate a PRP to a § 113 action. For example, if the facts showed that a third-party plaintiff was not as cooperative as the *SCA Services* court believed SCA to be, or if a consent decree it signed did not include an express denial of liability, then perhaps a court would accept a characterization of that party as essentially one liable party among several, and require it to sue its fellow PRPs only for contribution. Thus, the fact-specific approach employed by *SCA Services* appears to avoid the problem identified by the appellate court in *United Technologies*.

2. The Methodological Problem in *SCA Services*

As suggested by the discussion so far, the analysis in *SCA Services* has much to recommend it. It allows the court the room to balance consciously CERCLA's two underlying goals. It also looks to the common law concept of contribution as informing the meaning of that same term when it appears in § 113. Finally, through this fact-sensitive approach, it prevents § 113 from being reduced to surplusage, which would occur if PRPs were always able to sue under § 107.

Nevertheless, the court's approach is not ideal. The court's approach fails to balance fact-sensitivity with the predictability and legitimacy of a more definite rule. Recall that, after examining the statutory text and the

273 *See supra* text accompanying notes 94-100.
274 *See supra* Part I.C.
275 *See* 2A SINGER, *supra* note 235, § 46.05 (stating the rule that a statute should not be interpreted so as to leave one of its components without meaning).
276 United States v. SCA Servs., 849 F. Supp. 1264, 1282 (N.D. Ind. 1994).

relevant case law the *SCA Services* court ultimately allowed SCA to sue for cost recovery based on the particular facts of the case, specifically, SCA's apparently voluntary cooperation in the cleanup effort and the court's determination that SCA could not reasonably be said to have been a liable party.[277] This analysis arguably relies too much on the particular facts of the case, without explicitly adopting a clear interpretation of the scope of § 107 and § 113. Such a clear interpretation would minimize the legitimacy problem courts might face if they were perceived as applying CERCLA's liability rules purely on the basis of the equities of the case before it.[278]

Moreover, predictability and certainty values suggest that a court's interpretation of a statute, while it should be informed by the facts of the particular case before it, should ultimately announce some general rules guiding individuals who may be affected by these provisions in the future. The predictability of clear rules is especially important in a context such as CERCLA, where important litigation and negotiation decisions turn on an estimation of their liability consequences.

The challenge, then, is to interpret the liability scheme reflected in § 107 and § 113 so as to optimize the balance between, on the one hand, judicial sensitivity to the facts before it—as reflected in *SCA Services*—and, on the other, certainty and predictability. This requires a middle course between the ad hoc nature of decisionmaking that is sometimes associated with practical reasoning and the view that interpretive rules applied to a statute should dictate outcomes without the leavening influence of facts. The next Part of this Article proposes a rule that embodies such a middle course.[279]

IV. A Modified Practical Reasoning Approach

This Article proposes a two-part interpretation of § 107 and § 113. The first part concerns a PRP's ability to bring a § 107 cost recovery suit. Under this part of the rule, a PRP that has neither admitted nor been formally adjudged CERCLA-liable could make the initial choice between suing under § 107 or § 113. If it chose to sue under § 107, however, the PRP would have to establish its CERCLA innocence before its § 107 suit could proceed. If the PRP third-party plaintiff in such an action established its CERCLA innocence, it could then press its cost recovery suit, even against parties that have settled with the government. If it failed to establish its CERCLA innocence, however, the PRP third-party plaintiff would be relegated to a § 113 contribution suit, with the attendant limitations on that suit, including the immunity from contribution enjoyed by parties that

277 *Id.* at 1283.

278 *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 Vand. L. Rev. 533, 542-43 (1992) (noting legitimacy problem); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 Geo. L.J. 353, 402-03 (1989).

279 *Cf.* Farber, *supra* note 278, at 538-39 ("[P]ractical reason does not mean—as it is sometimes mistakenly thought—an embrace of *ad hoc* decisionmaking. Rather, it means a rejection of the view that rules and precedents in and of themselves dictate outcomes.").

have settled their CERCLA liability.[280] In addition, such a plaintiff would have to face any collateral consequences of the determination that it was CERCLA-liable.[281] However, under this proposed rule the PRP third-party plaintiff would have the option of immediately suing for contribution under § 113, without having to establish its own CERCLA innocence.

The second part of the rule governs liability and cost-apportionment when the PRP third-party plaintiff sues under § 113, either by choice or because it failed to establish its CERCLA innocence. This part of the rule proposes that courts employ their equitable apportionment powers under § 113 to impose a modified joint and several liability regime, under which the liability of third-party defendants could be joint and several as between the defendants, rather than merely several. Under such a regime, a court would apportion the cleanup costs for which each party (both the third-party plaintiff and each of the third-party defendants) would be responsible, but could hold each third-party defendant liable for the aggregate amount of costs apportioned to all the third-party defendants. Further, this Article proposes that courts should consider as an equitable factor any actual cleanup action taken by the third-party plaintiff, and the degree to which the court considers that action to be voluntary. Thus, the second part of the proposed rule speaks to both the allocation of costs among the contribution defendants as well as between the contribution defendants and plaintiff.

CERCLA provides clear authority for courts to adopt this proposed rule. First, the legislative history of CERCLA indicates that Congress intended that courts shape CERCLA's liability rules in conformance with evolving common law principles.[282] Indeed, in the course of enacting SARA's contribution provision, Congress indicated its approval of pre-SARA case law employing common law principles in exactly that way.[283] For courts not keen on legislative history, judicial authority to create a com-

280 42 U.S.C. § 9613(f)(2) (1994). Another of those limitations would be the limitations period for contribution actions, which is shorter than that for some cost recovery actions. *Compare id.* § 9613(g)(2) (limitations periods for cost recovery actions) *with id.* § 9613(g)(3) (limitations period for contribution actions). The implication of this analysis is that any PRP § 107 plaintiff would probably feel significant pressure to bring its suit so that it would be timely even if it was converted into a § 113 suit after an unfavorable finding on the plaintiff's own CERCLA liability. *Cf.* United Techs. Corp. v. Browning-Ferris Indus., 33 F. 3d 96 (1st Cir. 1994) (holding PRP third-party plaintiff's suit time-barred because suit was not for cost recovery but rather for contribution, and thus subject to shorter limitations period).

281 Such consequences might include a much-weakened bargaining posture with governmental authorities negotiating with the PRP over financing of later phases of the site cleanup, and even a weakened position with regard to other PRPs that might seek to shift some of their own liability onto the unsuccessful § 107 plaintiff. *See supra* text accompanying notes 225-27 (discussing adverse collateral consequences of judicial determination of third-party plaintiff's CERCLA liability).

282 *See, e.g.*, 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio); 126 CONG. REC. 30,984 (1980) (statement of Sen. Stafford); *see also* United States v. USX Corp., 68 F.3d 811, 824 (3d Cir. 1995); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (CERCLA envisioned courts developing liability rules based on common law principles); H.R. REP. No. 99-253, pt. 1, at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (House Energy Committee Report) (noting intention of Congress enacting CERCLA that courts "establish the scope of [CERCLA] liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law" and stating that "[t]he courts have made substantial progress in doing so") (quoting 126 CONG. REC. 31,965 (1980)).

283 *See, e.g.*, H.R. REP. No. 99-253, pt. 1, at 74 (1985) (House Energy Committee Report).

mon law of CERCLA contribution liability could also be based on § 113's use of the term "contribution," with all its common law implications.[284] Thus, the courts clearly have the authority to shape the scope of the liability that may be imposed on third-party defendants in contribution actions. Second, CERCLA explicitly grants the courts the authority to consider appropriate equitable factors when allocating costs in a contribution action.[285] The Article proposes merely that "credit for cleanup" become a standard component of courts' equitable allocation calculus.

A. The Proposed Rule and the Existing Cases

This proposed rule incorporates the insights provided by the three interpretive methods courts have used to resolve the PRP-as-plaintiff issue. Specifically, this rule is faithful to the text, promotes CERCLA's underlying policies, and reads § 113 consistently with the common law understanding of contribution.

First, this proposal gives meaning to each relevant provision in the statute. Specifically, the proposed rule leaves an important core of meaning for § 107's provision that "any other person" may bring a cost recovery suit, while also ensuring that § 113's provision for contribution actions is not rendered superfluous by the availability to plaintiffs of the more plaintiff-favorable cause of action under § 107. Under the proposed rule, private party cost recovery suits may be brought both by non-PRPs (e.g., neighbors of a CERCLA site that incurred expenses to fence off the contaminated property or clean up groundwater)[286] and by PRPs that are able to establish their CERCLA non-liability, for example, by establishing one of the defenses set forth in § 107(b).[287] Conversely, by relegating CERCLA-liable parties to contribution actions under § 113, this rule ensures that Congress's provision of a right of contribution would not become superfluous, as it would if CERCLA-liable parties were able to sue for cost recovery under § 107, since those parties would surely sue under § 107 if they had the choice.[288]

Second, the Article's proposed rule balances CERCLA's goals of promoting both settlements and speedy and voluntary private-party cleanups. Essentially, the rule attempts to balance a CERCLA-liable third-party plaintiff's disappointment at not being able to sue for cost recovery under § 107 with the promise, through its modified joint and several liability provision, of a more secure funding source for the part of the cleanup costs allocable to the contribution defendants. The rule also attempts to encourage PRPs

284 *See supra* note 235.

285 *See* 42 U.S.C. § 9613(f)(1) (1994) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

286 *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985) (homeowners living adjacent to Superfund site incurred response costs arising out of contamination from site); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 770 F. Supp. 41 (D. Mass. 1991) (landowner adjacent to contaminated site incurred costs to remediate contaminated groundwater migrating from site).

287 42 U.S.C. § 9607(b) (1994); *see also supra* notes 53-55.

288 *See supra* Part I.C (noting benefits to plaintiffs of cost recovery cause of action as compared with contribution cause of action).

to perform cleanups by means of the provision that courts take such actions into account when allocating costs between the third-party plaintiff and defendants. At the same time, the proposed rule attempts to promote settlement in CERCLA cases, by limiting the extent to which a third-party plaintiff could circumvent a settlor's contribution protection by suing for cost recovery under § 107 as opposed to contribution under § 113.[289]

Third, the proposed rule is consonant with general principles of contribution law, as applicable in the CERCLA context. The key fact here is that CERCLA § 107 allows non-liable parties to recover costs they incur while cleaning up a site.[290] As noted above,[291] this fact removes much of the force from the argument that allowing a PRP to sue for contribution is unfair to the contribution defendant if the plaintiff has not yet been adjudged CERCLA-liable. Moreover, the proposed rule has the further advantage of clarifying the situation facing courts. If the PRP third-party plaintiff succeeds in establishing its CERCLA innocence, the court need not concern itself with contribution principles, and the case becomes one based purely on the cause of action provided by § 107's "any other person" language. On the other hand, if the PRP-plaintiff tries but fails to establish its CERCLA innocence, the court will be left with a situation with which traditional contribution law is quite comfortable: a plaintiff, adjudged liable for a violation of a quasi-tort statutory scheme, suing another party it alleges is a joint tortfeasor.

These effects are illustrated by the opening hypothetical[292] which assumed a hazardous waste site at which three PRPs—GM, Ford, and Chrysler—are identified, but at which it is clear that other unknown or insolvent parties, or both, conducted a significant amount of the activity causing the contamination. Under the proposed rule, GM could attempt to recover its cleanup costs by suing Ford and Chrysler under § 107. Bringing a § 107 suit would require GM, as a preliminary matter, to prove its CERCLA innocence. Should it prevail on that issue, GM would be able to recover all of the costs it incurred in remediating the site. Ford and

289 42 U.S.C. § 9613(f)(2) (1994). It has been suggested that the availability of contribution protection should not turn on whether the third-party plaintiff is suing for cost recovery under § 107 or contribution under § 113. *See* Ann Alexander, *Toward a Comprehensive Understanding of the Relationship Between CERCLA §§ 107 and 113: Part II*, Toxics Law Rep. (BNA) 184, 186-87 (July 19, 1995). That conclusion is open to debate. First, CERCLA's contribution protection provision specifically speaks to "contribution claims." 42 U.S.C. § 9613(f)(1) (1994). Since the statute repeatedly refers to both "cost recovery" and "contribution" actions, it seems clear that had Congress intended to protect settlors from cost recovery claims it would have said so. *Compare, e.g., id.* § 9613(g)(2) (limitations period for cost recovery actions) *with id.* § 9613(g)(3) (limitations period for contribution actions). Second, it is quite plausible to conclude that Congress intended to protect settlors from contribution actions from liable PRPs but not from cost recovery actions. Since cost recovery plaintiffs would often be CERCLA-innocent parties, Congress may well have been concerned about allowing such parties a full opportunity to recover the cleanup costs they expended, if necessary by suing settlors.

290 42 U.S.C. § 9607(a) (1994), *see, e.g.*, Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (rejecting PRP's attempt to sue for cost recovery under § 107, stating that plaintiff "has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands"); *see also* cases cited *supra* note 286.

291 *See supra* Part II.D.3.

292 This example was first set forth in the Introduction to this Article.

Chrysler would bear joint and several liability for those costs, including the costs attributable to the conduct of unknown or insolvent parties. Moreover, they would bear such liability regardless of whether either or both of them had settled with the government.

Alternatively, GM could sue Ford and Chrysler for contribution under § 113, unless Ford or Chrysler, or both, had settled with the government and gained protection from contribution liability. In this contribution suit, GM could seek to impose on Ford and Chrysler joint and several liability for all of the costs equitably allocable to either of them. That equitable allocation would include a share of the costs caused by the conduct of the unknown or insolvent parties. The court, however, would ultimately have the discretion to decide whether to do so, based on its evaluation of the facts of the case considered in light of CERCLA's underlying policies. This modified joint and several liability and equitable allocation would also be the result if GM had sued under § 107 but failed to establish its CERCLA innocence. In that latter case, however, GM would also face any collateral consequences flowing from the determination of its own liability.

This division of liability makes sense in light of CERCLA's objectives. First, the requirement that GM prove its CERCLA innocence before being allowed to sue for cost recovery requires it to determine whether it has an acceptable chance of proving its CERCLA innocence before being able to sue under a provision allowing it to recover 100% of its costs. In light of the fact that GM is a PRP by virtue of a governmental determination that there is at least some evidence indicating its liability, that is a reasonable burden to place on GM, and helps ensure that a liable party does not completely escape liability by cleaning up a site "and being the first to the courthouse door to sue its confederates in environmental misbehavior."[293]

At the same time, this example illustrates the incentives the proposed rule offers for parties to clean up a site. The modified joint and several nature of the rule's contribution liability provides an incentive to clean up a site, by ensuring a secure funding source for all costs not attributable to the party doing the cleanup work. In this example, modified joint and several liability would enable GM to recover from either Ford or Chrysler the full amount of the costs which the court determined were not equitably allocable to GM, should the court decide that GM's conduct merited such favorable treatment. The effect, then, would be to continue to hold GM responsible for costs attributable to it, but to make it as easy as possible for it to recover all other costs, in recognition of GM's conduct in helping clean up the site.

The final component to this example is the actual equitable allocation. Under the proposed rule, the court, in performing this allocation, could credit GM with having actually performed cleanup work, recognizing that its actions helped mitigate harm to the environment and public health while reducing the strain on the public fisc. The advantages to this provision are clear.

293 Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal, 814 F. Supp. 1269, 1277 (E.D. Va. 1992).

B. The Proposed Rule as an Exercise in Practical Reason

This proposed rule seeks to combine the fact sensitivity displayed by the *SCA Services* court with the predictability and certainty of a clear determination of PRPs' rights to sue for cost recovery under § 107. It clearly communicates the litigation options open to a prospective third-party plaintiff, by explicitly setting forth the conditions under which it could sue under § 107. At the same time, it allows judges to use the facts of the particular case to shape the ultimate relief granted, within the context of the type of suit the rule would allow that particular plaintiff to bring. Thus, the rule essentially pushes *SCA Services*' fact specific inquiry one step further out in the litigation process: while *SCA Services* considered the facts at the stage of determining whether a PRP could sue under § 107, a court applying the proposed rule would consider the particular facts of the case once it was decided whether the PRP was suing under § 107 or § 113. So understood, this proposal reflects the mixture of fact-based particularity and law-based classification associated with Karl Llewellyn's approach to statutory interpretation, as expressed in his advice to judges faced with interpretive issues:

> As you size up the facts, try to look first for a significant life-problem-situation into which they comfortably fit, and only then let the particular equities begin to register; so that when the particular equities do begin to bite, their bite is already tempered by the quest for and feel for an appropriate rule that flows from and fits into the significant situation-type.[294]

This description of the proposal is borne out by returning, for the last time, to the opening hypothetical. Under the proposed rule, should GM sue Ford and Chrysler for contribution, the court could impose on Ford and Chrysler joint and several liability for all of the costs equitably allocable to either of them. The costs allocable to Ford or Chrysler could include a share of the costs caused by the conduct of the unknown or insolvent parties. The court, however, would ultimately have the discretion to decide whether to take either of those steps, based on its evaluation of the facts of the case considered in light of CERCLA's underlying policies. Thus, the court would have the freedom to consider matters such as the character of GM's conduct at the site (did it help clean up, and did it do so voluntarily), its cooperation with the government (did it promptly sign a consent decree or engage in lengthy litigation), and the nature of Ford's and Chrysler's conduct. The court would have the discretion to consider these facts in light of CERCLA's policies, again viewed through the prism of the particular case. For example, if the site was near a sensitive area such as a residential development or major drinking water source the court might weigh more heavily CERCLA's goal of ensuring prompt cleanups and might place special importance on the fact that GM performed the cleanup, especially if GM did so promptly. On the other hand, if exigent circumstances did not make an immediate cleanup as important, but if the cleanup was quite

294 KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 222 (1962), *quoted in* Farber, *supra* note 278, at 536.

expensive, the court might weigh more heavily CERCLA's goal of ensuring that liable parties, including GM, paid their fair shares.

Ultimately, this suggested approach is not particularly novel. Indeed, several courts to consider this issue have adopted portions of it.[295] However, none of these courts has integrated the various components of the proposed rule into a single rule governing PRPs' ability to sue other PRPs. Moreover, courts have by no means reached a consensus on the proposed rule's components, including the nature of contribution liability,[296] whether a PRP should receive favorable consideration for cleaning up a site,[297] and, of course, whether a PRP can ever sue for cost recovery under § 107.[298] Finally, courts have not reached a consensus on whether the solution to the PRP-as-plaintiff problem should take the form of an absolute rule or, like this proposal, an approach giving more discretion to judges.

V. CONCLUSION

It has become common to lament the lack of clarity and precision with which Congress drafted CERCLA.[299] However, CERCLA's lack of clarity can be attributed in part to Congress's wish that courts apply evolving common law principles to the statute's liability scheme.[300] This Article submits that the issue of PRPs' ability to sue for cost recovery under § 107 is the sort of issue that a court can best decide, based on general interpretive principles as applied, through a modified practical reasoning approach, to the text of the statute and the policies underlying it and as filtered through the prism of the particular facts of the case before it. The fact that courts should take a lead in developing a common law of CERCLA liability further

295 *See, e.g.*, City of Fresno v. NL Indus., No. CV-F 93-5091, 1995 WL 641983, at *12-13 (E.D. Cal. July 19, 1995) (relegating PRP third-party plaintiff to contribution action but indicating that court will consider plaintiff's performance of remediation activities as factor in allocating costs); Kaufman & Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1216 (N.D. Cal. 1994) (The court relegated the PRP third-party plaintiff to a § 113 contribution suit, but stated that "[i]f [the plaintiff] succeeds in establishing its innocence within the meaning of [CERCLA], then it will be entitled to seek full recovery of its costs under § 9607(a). Otherwise it is limited to bringing a contribution action under § 9613(f)."); *Chesapeake and Potomac Tel. Co.*, 814 F. Supp. 1269 (allocating costs between plaintiff and defendants but making defendants jointly and severally liable for amount not allocated to plaintiff).

296 *See* 1 TOPOL, *supra* note 5, § 4.4(F) (noting split in authority on whether contribution liability should be joint and several or merely several).

297 *Compare, e.g., Chesapeake and Potomac Tel. Co.*, 814 F. Supp. at 1277 (PRP plaintiff "should not benefit from starting the cleanup operation unilaterally and being the first to the courthouse door to sue its confederates in environmental misbehavior."), *and* City of Fresno v. NL Indus., No. CV-F 93-5091, 1995 WL 641983, at *12 (E.D. Cal. July 9, 1995) (same), *and* T H Agric. & Nutrition Co. v. Aceto Chem. Co., 884 F. Supp. 357, 361-62 (E.D. Cal. 1995) (same), *with* United States v. Taylor, 909 F. Supp. 355, 364 (M.D.N.C. 1995) ("Some courts have also expressed fear that PRP's who unilaterally initiate cleanups will run to the courthouse to sue their confederates. The short answer to that concern is that cleanups should be encouraged.") (citing *T H Agric. and Nutrition Co.*, 884 F. Supp. at 357).

298 *See, e.g.*, United States v. SCA Servs., 849 F. Supp. 1264, 1270-81 (N.D. Ind. 1994) (comparing cases rejecting and accepting PRPs' attempts to sue under § 107).

299 *See, e.g.*, United States v. USX Corp. 68 F.3d 811, 824 n.26 (3d Cir. 1995) ("CERCLA is 'notorious for its lack of clarity and poor draftsmanship.'") (quoting Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993)).

300 *See, e.g., USX Corp.*, 68 F.3d at 824 (explaining that CERCLA's legislative history indicates legislative intent to have liability issues not addressed in statute determined based on evolving common law principles).

suggests the appropriateness of an approach that elevates factual context and sound judicial discretion over absolute or unqualified rules purportedly based on the statutory text or the statute's overarching goal. The common law, after all, grew in response to cases featuring particular facts that required a change in the existing law. The proposed rule recognizes the congressional mandate to develop a common law of CERCLA by harmonizing general tort principles with CERCLA's text and underlying policies. It thus best reflects Congress's intent not only with regard to the substance of CERCLA liability, but also with regard to the methodology by which those liability rules should be developed.