Trinity and its Shortcomings: Problems with Disallowing PRPs that Enter into State Consent Decrees from Bringing to Cost-Recover Actions Under Cercla

Michael Trentin
TRINITY AND ITS SHORTCOMINGS: PROBLEMS WITH DISALLOWING PRPs
THAT ENTER INTO STATE CONSENT DECREES FROM BRINGING COST-RECOVER ACTIONS UNDER CERCLA

Michael Trentin

I. INTRODUCTION

In Trinity, a case of first impression, the Third Circuit went against its sister Second Circuit, creating a split on yet another issue concerning the somewhat infamous Comprehensive Environmental Reponse, Compensation, and Liability Act (CERCLA). ¹ Since the Supreme Court’s holdings in Cooper Industries and Atlantic Research there has been uncertainty in the CERCLA community about whether a PRP that enters into a consent decree with a state’s administrative agency has settled its CERCLA liability, thereby qualifying the PRP to bring a cause of action under § 113(f)(3)(B) for contribution.

On August 20’th 2013, the Trinity Court considered the extent to which a settlement of state liability for environmental contamination affects the contribution scheme provided by CERCLA, and whether injunctive relief under RCRA is available when a remediation plan is underway. The court held that § 113(f)(3)(B) does not require that a party have settled its liability under CERCLA to be eligible for contribution.

Therefore, Trinity expands the situations in which a potentially responsible party (“PRP”) may bring a contribution claim under § 113(f)(b)(3). However, by so doing, it effectively bars a PRP from bringing a claim under § 107(a). This is because Courts have held that a PRP may not

¹ 423 F.3d 90 (2d Cir. 2005); 42 U.S.C. §§ 9601 – 9675.
bring both a claim under § 113(f) and § 107(a). Any expansion of the scope of one of the provisions effectively eliminates the party’s ability to bring a claim under the other. Therefore, by expanding the scope of § 113(f), Trinity limits a PRP’s claim for contribution and effectively eliminates an otherwise viable (and often preferred) § 107(a) claim.

Such a result is inequitable and runs counter to one of the main goals of CERLCA, to “assign the cost of such cleanups to those responsible for creating or maintaining the hazardous conditions presented.” A cooperating party should not lose its ability to bring a § 107(a) claim merely because it has “settled” its State liability. The Second Circuit got it right by recognizing that allowing a § 107(a) claim despite the party entering into a consent order with a state, creates a stronger incentive for PRPs to cooperate with state agencies and discourages expensive and prolonged litigation. In Trinity, the Court avoided these practical issues. Instead, it based its holding on the theory that a settlement of a state law claim precludes a PRP from being vulnerable under CERCLA. While this holding may seem PRP friendly, it is in fact only friendly to those PRP’s who would otherwise and rightfully have greater liability under § 107(a) but are able to avoid such a claim merely because another PRP had “settled” with the state. Of course, the word “settlement” is misleading in the CERCLA context. In the real word, the EPA or state environmental agency only goes after those PRPs whom they know can front the costs for the initial cleanup. Afterward, those companies are left to chase smaller PRPs who may be 99% responsible for the contamination. It comes as no surprise that first PRPs rarely are able to extract contribution from these illusive PRPs. By further denying the first PRP the right to seek contribution under § 107(a), Trinity effectively cuts another leg out from under these parties, thus forcing them to bear the costs without being allowed a § 107(a) contribution claim.

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This comment discusses CERCLA from a historical perspective paying special attention to the evolution of the private causes of action available under CERCLA and the Supreme Courts’ impact on these provisions. First, it gives a brief background of the Statute and its general function. Second, it discusses the historical development of §§ 107(a) and 113(f) and the Supreme Court’s decisions in Cooper and Atlantic Research. Third, it highlights the advantages of § 107(a) to § 113(f). Fourth, it discusses the split between the Second and Third Circuits. Finally, it argues in favor of the Second Circuit’s approach.

II. CERCLA OVERVIEW AND BACKGROUND

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), codified at 42 U.S.C.A. Article 613 was designed to encourage prompt and effective cleanup of hazardous waste sites.\(^3\) CERCLA empowers the federal government and the states to seek recovery and expenses associated with those cleanups.\(^4\) CERCLA is not well known for its clarity. The Supreme Court noted that “[c]learly, neither a logician nor a grammarian will find comfort in the world of CERCLA.”\(^5\) Despite the statute’s shortcomings, however, Congress has attributed two primary goals to CERCLA: to (1) to encourage timely cleanup of hazardous waste sites, and (2) assign the cost of such cleanups to those responsible for creating or maintaining the hazardous conditions presented.\(^6\)

The most difficult problems with the Statute arise out of its framework for allowing private parties to bring contribution or cost-recovery actions against other private parties. These

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\(^3\) B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 – 1198 (2d Cir. 1992)


\(^5\) See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 363 (US 1986) (noting CERCLA provisions are “not...model[s] of legislative draftsmenship,” and its statutory languages is “at best inartful and at worst redundant”); Artesian Water Co. v. New Castle County, 851 F.2d 643 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to is precipitous passage.”)

\(^6\) Id. (citing, inter alia, Consol. Edison v. UGI Util., Inc., 423 F.3d 90, 94(2d Cir.2005)).
private parties are known as “potentially responsible parties” (“PRPs”). A PRP is a party that has been identified as being responsible for any portion of the contamination. A PRP can fall into any of the broad categories under the statute: (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for. In addition, any identified PRP may be held fully liable for the contamination of an entire site. Further, courts have expanded the list of PRPs to include: successor corporations to generators, transporters or former owners or operators; lessees of current and former landowners; corporate officers who were active in site operations; active shareholders; parent corporations; lenders; and trustees.

Typically, PRPs are identified by the EPA or other state agencies that investigate contaminated sites. One of the key aspects of CERCLA is that it allows the EPA to bring enforcement actions against these PRPs in order to induce clean-up. Even though the EPA has the ability to respond to releases and spills, it generally looks to PRPs to implement removal and long-term remedial actions. The EPA reserves several remedial options. Generally, upon

7 § 104(a)(1)
8 57 A. Jur. Trials 1.
9 57 Am. Jur. Trials 1
10 Id.
discovery and investigation of a site, it will send a “PRP letter,” announcing that the recipient has been designated a PRP. The EPA then undertakes settlement negotiations with the PRP, usually to induce the PRP to commence voluntary cleanup of the sites. It comes as no surprise that the EPA is going to target PRPs who can afford the high cleanup costs, with little regard for that party’s actual responsibility or contribution to the contamination. This is in fact exactly how the statute was meant to function so as to further CERCLA’s goals, i.e., to (1) encourage timely cleanup of hazardous waste sites, and (2) assign the cost of such cleanups to those responsible for creating or maintaining the hazardous conditions presented. However, in order to meet both goals, and not just the former, responding PRPs must be given a fair chance to alleviate their burdens through response actions.

II. AVAILABLE PRIVATE ACTIONS AGAINST FELLOW PRPs

A. History

Ever since CERCLA was first enacted, the federal and state governments were permitted to bring § 107(a) cost recovery actions against PRPs. Cost-recovery actions generally provided for joint and several liability. However, CERCLA does not expressly provide for joint and several liability. In fact, references to joint and several liability in the Bill were deleted before the CERCLA was enacted. However, the legislative history indicates that the deletion was not a repudiation of joint and several liability; rather it was because Congress did not want to mandate joint and several liability in every instance. In Chem-Dyne Corp., the court ruled that defendants are subject to joint and several liability under 107(a) unless they can show that the

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11 See 40 C.F.R. 300.68(j)
12 57 Am. Jur. Trials 1
13 Id.
17 Kenneth K. Kilbert, Neither Joint Nor Several: Orphan Shares and Private CERCLA Actions, 41 Envtl. L. 1045, 1052 (2011)
harm is divisible. Accordingly, Courts imposed joint and several liability unless the defendant satisfied the heavy burden showing that the harm is divisible or that there was a reasonable basis for determining the contribution of its cause to the entire harm. 

On the other hand, the rights of private parties were unclear. In the early 1980s, Most Courts allowed for a PRP to bring an implied cause of action for contribution against other PRPs. Other courts disallowed such claims in light of the Supreme Court’s refusal to allow implied rights of action in other Statutes. In response, Congress stepped in, and as part of Superfund Amendments and Reauthorization Act of 1986, Congress added an express contribution provision to confirm the right of PRPs to bring a contribution action against other PRPs.

§ 113(f)(1) expressly creates a contribution right for parties liable or potentially liable under CERCLA. § 113(f)(1) permits private parties to seek contribution during or following a civil action under § 106 or § 107(a). § 113(f)(3)(B) permits private parties to seek contribution after they have settled their liability with the Government. The Statute provides that “in resolving contribution claims, the court may allocate response costs among liable parties using

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20 Id.
23 § 9613(f)(1)
24 § 9613(f)(3)(B)
such equitable factors as the court determines are appropriate. 25 § 113(f)(1), unlike § 107(a), confers upon a court broad discretion in allocating response costs among various PRPs, permitting consideration of as many or as few factors as deemed appropriate based upon the totality of the circumstances and the equitable considerations presented. 26 Unfortunately, the Statute itself does not provide a list of factors to be used by the Court in determining the question of allocation for contribution costs, authorizing the use of “such equitable factors as the court determines are appropriate” to reach a just result. 27 To inform the allocation determination courts generally find it appropriate to examine certain factors, which under other circumstances might be deemed more relevant to a liability determination, that are not otherwise considered in light of CERCLA’s creation as a strict liability statute. 28

For example, The Second circuit “has declined to compile a mandatory list of factors for consideration. 29 The lack of uniformity concerning the equitable factors is problematic to say the least. Some relief may be found in the legislative history surrounding the enactment of CERCLA, which references six often cited examples of factors that can inform a proper allocation calculus; those elements, often referred to as the “Gore factors”, including: (1) whether a party’s contribution to release is distinguishable; 2) the amount of hazardous substance involved; (3) the degree of toxicity of the hazardous substance involved; (4) the degree of involvement of the person in the manufacture, treatment, transport or disposal of the hazardous substance; (5) the degree of care taken by the parties with respect to the hazardous waste

26 Solvent Chem. Co., 685 F.Supp.2d at 442 (citing, inter alia, Bedford Affiliates, 156 F.3d at 429))
27 42 U.S.C. § 9613(f)(1); Niagara Mohawk Power Corp., 596 F.3d at 130.
28 Id.
29 Nashua Corp. v. Norton Co., 116 F.Supp.2d 330, 352 (N.D.N.Y.2000); see also Goodrich Corp., 311 F.3d at 170 (noting that allocation is an “equitable determination based on the district court’s discretionary selection of the appropriate equitable factors in a given case”); Bedford Affiliates, 156 F.3d at 429 (“While § 113(f)(1) directs courts to allocate cleanup costs between responsible parties ‘using such equitable factors as the court determines are appropriate, it does not limit courts to any particular list of factors. The statute’s expansive language instead affords a district court broad discretion to balance the equities in the interests of justice.”)
involved; and (6) the degree of cooperation between the party and state, federal, or local authorities preventing harm to the public health or the environment, including efforts to mitigate damage after a release occurs.\textsuperscript{30} The court is not required to consider all or even most of these Gore factors, however, when making an equitable allocation under § 113(f): “[t]he court may consider ‘several factors or a few, depending on the totality of the circumstances and equitable considerations.”\textsuperscript{31}

While some courts have considered the Gore factors identified in the legislative history underpinning CERCLA when allocating response costs, others have found the analysis of Judge Ernest C. Torres in the \textit{United States v. Davis},\textsuperscript{32} to provide a more “real world” construct for allocating those expenses, taking into account 1) the extent to which cleanup costs are attributable to the waste for which the particular parties responsible; 2) the parties' degree of culpability; 3) the benefit realized by the party from disposal of the waste; and 4) the party's ability to pay.\textsuperscript{33}

Despite the problems with equitable distribution described above, § 113(f) was successful in confirming Congress’s desire to allow for contributions actions. Also, it was clear that contribution actions provided only for several rather than § 107(a) joint and several liability. However, there was still a problem. Following the addition of § 113(f), there was considerable disagreement over when a private CERCLA plaintiff could bring an action under § 107 rather than § 113(f).\textsuperscript{34} Where the federal government sued a PRP under § 107(a) or settled with a PRP

\begin{thebibliography}{9}
\bibitem{30} Niagra Mohawk Power Corp., 596 F.3d at 130 (citing S.Rep. No. 96–848, at 345–46) (1980)).
\bibitem{31} Solvent Chem. Co., 685 F.Supp.2d at 442 (citing and quoting \textit{N.J. Turnpike Auth. v. P.P.G. Indus., Inc.}, 197 F.3d 96, 104 (3d Cir.1999)).
\bibitem{32} Kran, 31 F.Supp.2d 45, 63 (D.R.I.1998), \textit{aff'd}, 261 F.3d 1 (1d Cir. 2001)
\bibitem{33} See Solvent Chem. Co., 685 F.Supp.2d at 442.
\bibitem{34} E.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 348 (6th Cir. 1998); see also Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187, 1192-94 (10th Cir. 1997) (noting section 107 imposes joint and several liability while section 113 imposes several liability); Kramer, 757 F. Supp. at 414-15 (contrasting section 107 and section 113 claims).
\end{thebibliography}
under § 113(f)(3)(B), it was clear that the PRPs only cause of action was for contribution under § 113(f).\(^{35}\) As one commenter noted, however, some savvy responsible parties, rather than waiting for the government to perform clean-up and then be sued, had begun voluntarily cleaning up contaminated sites for which they were subject to liability.\(^{36}\)

The question then became whether these pre-PRPs could bring suit for cost recovery under § 107(a), and thus attain the joint and several benefits of § 107(a), or were these parties still confined to recovery under § 113(f). Defendants argued that private parties should be limited to claims under § 113(f), for which defendants would only be severally liable.\(^{37}\) Plaintiffs, on the other hand, argued that their costs were incurred “voluntarily” and therefore, they should be allowed the benefits under § 107(a).\(^{38}\)

By the late 1990s, however, virtually all of the circuits had addressed the issue and unanimously had held that a PRP plaintiff was limited to suing under § 113 and cannot maintain an action under section 107(a).\(^{39}\) The primary reasoning behind these holdings was that a PRP should not be entitled to the advantage under 107(a), merely because they anticipated suit and acted early in order to preserve a 107(a) claim.\(^{40}\) Other reasons were that allowing responsible party plaintiffs to sue under section 107 would circumvent the contribution protection afforded by § 113(f)(2) to parties who settle with the government and would provide them with more favorable statutes of limitations under 42 U.S.C. §9613(g).\(^{41}\)

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\(^{38}\) See, e.g., Centerior Serv. Co., 153 F.3d at 349-350.


\(^{40}\) See Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1134-35 (10th Cir. 2002); Bedford Affiliates, 156 F.3d at 424; Centerior Serv., 153 F.3d at 349-50; New Castle Cnty., 111 F.3d at 1121-22.

B. The Supreme Court Steps In

The Supreme Court upset the unanimity of the Circuits by reversing the Fifth Circuit in *Cooper Industries*. In that case, Cooper owned and operated four contaminated aircraft engine maintenance cites before selling them to Aviall in 1981.\(^{42}\) Some years later, Aviall discovered that both it and Cooper had contaminated the facilities when oil and other hazardous substances leaked into the groundwater.\(^{43}\) Aviall notified the Texas Natural Resource Conservation Commission (the “Commission”) of the contamination.\(^{44}\) The Commission directed Aviall to clean-up the site and threatened to pursue an enforcement action but took no judicial or administrative measures to compel cleanup.\(^{45}\) Aviall cleaned-up the properties under the state’s supervision and incurred approximately $5 million in clean-up costs.\(^{46}\) Aviall then brought suit against Cooper under §§ 113(f)(1), 107(a), and state law.\(^{47}\) Aviall then amended its complaint to combine the §§ 113(f)(1) and 107(a) claims into a single § 113(f) claim.\(^{48}\)

The question on appeal was whether Cooper had standing to bring a § 113(f)(1) claim.\(^{49}\) The Court held that only PRPs that were sued under §§ 106 or 107, or had been party to an administrative or judicial settlement could rightfully bring a cause of action under § 113(f).\(^{50}\) In reaching this holding, the Court relied solely on the plain language of § 113(f)(1).\(^{51}\) The court expressly refused to look at the legislative history or policy implications of its holding.\(^{52}\) Also,


\(^{43}\) Id. at 163 – 64.

\(^{44}\) Id at 164.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Cooper, 543 U.S. at 164.

\(^{48}\) Id.

\(^{49}\) Id. at 164-65

\(^{50}\) Id. at 165.

\(^{51}\) Id at 166 –67.

\(^{52}\) Id. at 167 (“Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purposes of CERCLA at all.”)
despite the Dissent’s advice, the Majority refused to address whether Cooper was entitled to a § 107(a) claim after being denied a claim under § 113(f).53

This holding shocked the CERCLA community and had result of discouraging PRP settlement.54 Not only did the majority refuse to grant Aviall a cost-recovery action, but it also left Aviall with no remedy because it refused to decide the § 107(a) issue. Thus, post-Cooper, “a responsible party who voluntarily cleaned up a site could be left shouldering the entire cleanup cost burden, without a CERCLA remedy against other potentially responsible parties under either section 107 or 113.”55

In 2007, the Supreme Court attempted in to clean-up the Cooper mess with its decision in Atlantic Research. In that case, Atlantic leased a research facility from the United States Department of Defense where Atlantic retrofitted rocket motors for the United States.56 The work resulted in the contamination of soil and ground water at the site.57 Atlantic cleaned the site at its own expense and then sought to recover some of the costs from the United States under §§ 113(f) and 107(a). 58 After Cooper was decided, however, Atlantic was forced to amend its complaint and to seek relief under solely under § 107(a) and the common law.59 The District Court then granted the United State’s motion to dismiss relying upon Cooper.60 The Court of Appeals for the Eight Circuit reversed, recognizing that Cooper undermined the reasoning of the

53 Cooper, 543 U.S. at 168.
56 Atlantic Research, 551 U.S. at 133.
57 Id.
58 Id.
59 Id.
60 Id. at 134.
Circuit’s prior precedent. The court reasoned that § 107(a)(4)(B) authorized suit by any person other than the persons permitted to sue under § 107(a)(4)(A). Accordingly, it held that § 107(a)(4)(B) provides a cause of action to Atlantic Research. It reasoned that PRPs that “have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality.”

The Supreme Court attempted to reconcile the perceived conflict predicted by the Court of Appeals. First, the Court affirmed the Court of Appeals allowing Atlantic to bring a cause of action under 107(a). The Court also reasoned that the reference in section 107(a)(4)(B) to “any other person” included parties like Atlantic, who are responsible for a portion of the liability but who also incurred costs “voluntarily.” In so holding, the Court expressly rejected the Government’s argument that section 107(a)(4)(B) authorizes relief only for “innocent” private parties. Thus, the Court determined that a PRP who may be responsible for part of the contamination may nonetheless incur voluntary cleanup costs.

Second, the Court addressed issues concerning the “friction” between 107(a) and 113(f). Specifically, the Court took notice of the Government’s concerns that (1) “by offering PRPs a choice between §§ 107(a) and 113(f), effectively allows PRPs to circumvent § 113(f)’s shorter statute of limitations;” and (2) “PRPs will eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a).” The Court only partially addressed these concerns. It noted that §§ 107(a) and 113(f) provide “clearly distinct remedies” that complement

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61 Atlantic Research Corp v. U.S., 459 F.3d 827, 830, n. 4. (8th Cir. 2006)
62 Id. at 835.
63 Id.
64 Id., at 836–837
65 Atlantic Research, 551 U.S. at 134.
66 Id. at 135.
67 Id. at 136
68 Id. at 137.
69 Id. at 137 -38.
each other by providing causes of action ‘to persons in different procedural circumstances.’” 70

“As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a).” 71

Nonetheless, in a footnote, the Court recognized the looming problem that a party that enters into a consent decree with the government following suit under CERCLA and performs cleanup work pursuant to the decree’s terms is neither incurring costs voluntarily nor reimbursing costs of another. 72 The Court declined to “decide whether these compelled costs of response are recoverable under 113(f), 107(a), or both.” 73

By now the reader is probably confused as to the state of the law after Cooper and Atlantic. To summarize, Cooper decided that a PRP who is not subject to a § 106 or § 107 suite may not bring a § 113(f) claim. Three years later, Atlantic held that a PRP who voluntarily cleans up a site may pursue a cost recovery action under § 107(a). After Atlantic, a majority of circuits have not allowed a plaintiff to pursue both a 107(a) cost recovery claim when a § 113(f) contribution claim is available. 74

In Agere, the Third Circuit confronted the issue left open by the Supreme Court in Atlantic Research, “whether, in addition to § 113(f) claims, plaintiff such as these have § 107(a) claims for expenses sustained pursuant to a consent decree following a CERCLA suit.” 75 In that case, the Court was faced with a PRP who neither incurred costs voluntarily, nor were they

70 Id. at 138 – 39 (citing Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., 423 F.3d 90, 99 (2d Cir. 2005)
71 Id.
72 Id. at n. 11.
73 Id.
75 Id. at 228.
reimbursed to another party.\textsuperscript{76} The court recognize a problem with Atlantic Research’s reasoning that “any fear that PRPs will eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a) is mitigated by the fact that a § 113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action.”\textsuperscript{77} The Court pointed out that plaintiffs that have entered into consent decrees “would be able to recover 100 percent of their own costs…, even though themselves are actually responsible for…a significant portion of the contamination.”\textsuperscript{78} Refusing to enforce an inequitable result, the court held that “costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f).”\textsuperscript{79}

\textbf{C. The Advantage of § 107 to § 113}

Since liability is joint and several under § 107(a), the private party may recoup \textit{all recoverable costs} from any responsible party. In contrast, because liability is merely several under § 113(f), a PRP may only recoup an \textit{equitable share} of cleanup and response costs from other PRPs. A contribution action is more limited because in determining relative contribution of the parties in such an action, courts must look to the totality of the circumstances,\textsuperscript{80} and the court will, therefore, have broad discretion in determining how to allocate costs under PRPs. Moreover, a non-settling party who sues for contribution may finds its equitable share of costs reduced because, under § 113(f)(2), other parties that do not settle with the government are given contribution protection from claims by non-settling PRPs.\textsuperscript{81} Another major disadvantage of having to resort to a contribution action instead of a private cost recovery action is that the

\begin{itemize}
\item \textsuperscript{76} Id. at 227.
\item \textsuperscript{77} Id. at 228 (internal quotations omitted)
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F. 3d 204 (3d Cir. 2010)
\item \textsuperscript{80} Environmental Transp. Sys. v. Ensco, Inc., 969 F. 2d. 503 (CA 1992).
\item \textsuperscript{81} Amer. Jur.
\end{itemize}
statute of limitations for contribution claims is only three years as opposed to a six year period form cost recovery claims.  

Kenneth K. Kilbert, a commentator, recognized another drastic advantage afforded § 107(a). Under § 107(a) orphan shares stay orphan, while under § 113(f), the cost of cleaning up “orphan shares” of hazardous waste from unidentifiable sources or insolvent parties could be allocated between the remaining potentially responsible party and settling defendants. The term “orphan share” refers to the common situation where multiple parties are subject to CERCLA liability for clean-up costs at a site. Some of those PRPs however, may not be capable of contributing payment because they are insolvent, dead, or defunct. This is especially common because of the large costs associated with cleanup and because CERLA can impose liability for events that occurred decades ago.

After trudging through the complexities of § 107(a) and § 113(f), we are left with two principals that are important here: (1) § 107(a) and § 113(f) are distinct causes of action that occur procedurally in different places, and § 107(a) allows for joint and several liability while § 113(f) is limited to contribution recovery from a judgment or settlement; (2) it is advantageous that a PRP position itself to bring a claim under § 107(a) as opposed to § 113(f). With these principals in mind, we now turn to the split between the Second and Third Circuits.

III. THE CIRCUIT SPLIT

i. Consolidated Edison

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82 Id.
83 Kenneth K. Kilbert, Neither Joint Nor Several: Orphan Shares and Private CERCLA Actions, 41 Envtl. L. 1045, 1069 (2011)
84 Id.
85 Id.
86 Id.
87 Id. at 1047.
In *Consolidated Edison*, the New York State Department of Conservation (the “Department”) began investigating gas plants in Westchester. In 2002, Con Ed entered into a voluntary Cleanup Agreement with the Department to clean up more than 100 sites at which Con Ed or its predecessors might have formerly owned or operated. Prior to entering the cleanup agreement, Con Ed sued other PRPs to recoup costs that Con Ed had incurred and would incur in cleaning up the sites allegedly contaminated by these other PRPs. Con Ed claimed that it has spent $4 mil and might exceed total spending of over $100 mil. The District Court for the Southern District of New York granted the defendant’s motion for summary judgment rejecting Con Ed’s claims.

The Court interpreted the Supreme Court’s holding in *Cooper*, as limiting a party’s contribution claims under § 113(f). Specifically, the Court relied on *Cooper’s* language that stated “contribution may only be sought subject to the specified conditions, namely ‘during or following’ a specified civil action.” The Court read the Legislative History of the Superfund Amendments and Reauthorization Act 1986 (“SARA”) to support its’ reading of the statute, arguing that “the House Committee Report on Energy and Commerce Accompanying SARA states that section 113 ‘clarifies and confirms the right of a person held joint and severally liable under CERCLA to seek contribution from other potentially liable parties.’” (“Because the H. Report makes “no mention of any intent to meddle with the contribution rules governing settlement of non-CERCLA claims...we believe section 113(f)(3)(B) does not permit

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88 Con Ed, 423 F.3d at 92 – 93.
89 Id. at 93.
90 Id.
91 Id.
92 Con Ed., 423 F.3d at (Case Synopsis).
93 Id. at 93 – 94 (citing *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. at 157 (2004)).
94 Id. at 95 (quoting *Cooper*, 543 U.S. at 583) (internal citations omitted).
95 Id. at 96.
96 Id. (quoting H.R. Rep. No. 99 – 253(I) at 79 (1985)).
contribution actions based on the resolution of liability for state law – but not CERCLA – claims.”)\textsuperscript{97}

ii. \textit{W.R. Grace}

\textit{W.R. Grace} can be read in conjunction with the \textit{Con Ed’s} opinion. In addition, it was one of the first court opinions to address the issue of consent decrees post-\textit{Atlantic Research}. It also goes into a more detailed analysis of the purpose of CERCLA and the practical implications of the Court’s holding. In \textit{W.R. Grace}, a landfill owner sought to recover response costs it incurred cleaning up a contaminated site in New York.\textsuperscript{98} In 1983, the site came under investigation by the New York State of Environmental Conservation ("DEC").\textsuperscript{99} Thereafter, the DEC entered into a series of two administrative orders with the owner of the site in which the owner agreed to perform certain remedial work and to reimburse the DEC for costs of investigation.\textsuperscript{100} In consideration, the DEC promised a release of liability under New York Law for claims related to the site.\textsuperscript{101} After spending approximately $1.7 million on remedial activities, the owner sued Zotos, a fellow PRP, for contribution and cost recovery.\textsuperscript{102}

The issue addressed on appeal was “whether a potentially responsible party who has remediated a contaminated site pursuant to an administrative consent order has a cause of action to pursue necessary associated costs.”\textsuperscript{103} The Court first held that Grace did not settle its CERCLA liability by way of its consent order with the State of New York.\textsuperscript{104} The Court reasoned that “the fact that a party enters into a consent order before beginning remediation is of

\begin{itemize}
\item \textsuperscript{97} Id.
\item \textsuperscript{98} \textit{W.R. Grace & Co.-Conn. v. Zotos Intern., Inc.}, 559 F.3d 85, 90 (2d Cir. 2009).
\item \textsuperscript{99} Id. at 87.
\item \textsuperscript{100} Id. at 88 – 87.
\item \textsuperscript{101} Id. at 88.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} \textit{W.R. Grace}, 559 F.3d at 90.
\item \textsuperscript{104} Id. at 91 – 92.
\end{itemize}
no legal significance with respect to whether or not the party has incurred response costs.\textsuperscript{105} The Court recognizes that Grace sought to “recover costs for remediation \textit{it performed itself}; it does not seek to recoup expenses incurred in satisfying a settlement agreement or court judgment.” \textsuperscript{106} Instead of focusing on the tedious and ambiguous differences between § 107(a) and § 113(f), the Court instead focused on the facts surrounding the specific actions taken by Grace, which the Court determined were remedial in nature despite the State Order.\textsuperscript{107} The fact is that by entering into an agreement with the State to investigate and remediate a contaminated site, Grace “saved the parties and the government litigation costs, and presumably also limited ongoing contamination by promptly remediating the site.”\textsuperscript{108} Further, the Court recognizes that to deny Grace to a § 107(a) claim would be to “discourage parties from entering agreements with the states to ensure proper cleanup.”\textsuperscript{109} If Grace had not acted responsibly by entering into the consent order with the DEC, and instead waited for suit, it would have a cause of action under § 113(f)(1), but that course of action would have occasioned both further contamination and greater expenses associated with the delay in instituting litigation.\textsuperscript{110}

iii. \textit{Trinity}

In \textit{Trinity}, the owner of industrial site brought action against former owner, seeking injunctive and monetary relief from former owner, for remediation of site it was undertaking pursuant to court order, and asserting claims under CERCLA.\textsuperscript{111} The former owner filed a counter claim for contribution. The environmental site at issue is located at an industrial facility

\textsuperscript{105} Id.

\textsuperscript{106} Id. at 93.

\textsuperscript{107} Id. at 91(“The Consent Order at issue here does not resolve CERCLA claims that could be brought by the federal government”)

\textsuperscript{108} Id. at 94.

\textsuperscript{109} W.R. Grace, 559 F.3d at 95.

\textsuperscript{110} Id.

\textsuperscript{111} Trinity Industries, 735 F.3d at 132.
called the South Plant, located in Pennsylvania. Trinity acquired the property in 1988 and manufactured cars there until 2000. The Pennsylvania Department of Environmental Protection ("DEP") started investigating the site in 2004. In 2006, the DEP initiated enforcement proceedings against Trinity, which resulted in Trinity entering into an agreement, in which it pled nolo contendere to five counts of unlawful conduct. On December 21, 2006 Trinity and the DEP entered into a consent order pursuant to the Pennsylvania’s Hazardous Sites Cleanup Act ("HSCA") and Land Recycling and Environmental Remediation Standards Act ("LRA"). The Consent order names Trinity as a “responsible person” for the release of hazardous substances at the site, but also “expressly reserves Trinity’s right to pursue its cost recovery, contribution, and other claims against CB & I.”

Trinity’s claims are based on CB & I’s role in causing contamination now under remediation at the site. Trinity had purchased the plant from MBM, a third party, in 1988, which had purchased it from CB & I in 1985. Trinity alleges that CB & I contaminated several sections of the site through abrasive blasting and painting, pointing to Deposition of former CB & I employee. Immediately after signing the Consent Order, Trinity filed claims against CB & I under § 113(f)(3)(B), RCA, and state law, seeking contribution from CB & I for its share of remediation costs and injunctive relief. The District Court granted summary

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112 Id. at 132.
113 Id.
114 Id. at 133
115 Id.
116 Id.
117 Trinity, 735 F.3d at 134.
118 Id.
119 Id.
120 Id. at 134, n.1.
121 Id. at 134.
judgment to CB & I and Trinity appealed.\textsuperscript{122} The United States filed an amicus brief in support of Trinity.\textsuperscript{123}

The issue that the Court faced was “whether CERCLA § 113(f)(3)(B) provides a contribution claim where a party seeking contribution has settled its state – law liability as opposed to its liability under CERLCA, and whether injunctive relief pursuant to RCRA Article 107(a)(1)(B) is available where a remediation plan has already been instituted and begun.”\textsuperscript{124} The District Court relied on the Second Circuit’s opinion in \textit{Con Ed}, holding that § 113(f)(3)(B) allows for contribution only for claims brought under CERLCA itself.\textsuperscript{125}

However, on appeal, the Court of Appeals chose to go against the Second Circuits’ holdings for the following reasons: (1) the Statutory Language of § 113(f)(3)(B) “requires only the existence of a settlement resolving liability to the US or a state ‘for some or all of a response action’,”\textsuperscript{126} (2) the Legislative History relied upon by the Second Circuit referred only to § 113(f)(1),\textsuperscript{127} (3) the “cost recovery and contribution provisions in HSCA are virtually identical to those in CERLCA.\textsuperscript{128}” and (4) Pennsylvania law is constructed to comply with CERLCA.\textsuperscript{129} Therefore, a resolution of PA Law is a \textit{de facto} resolution of CERLCA.

Because Trinity sought a contribution claim under § 113(f)(3)(B), and only argued for a § 107(a) claim in the alternative the court, in a footnote, declined to address whether Trinity had a claim under § 107(a).\textsuperscript{130} Thus, the court refused to address the problems with granting a § 113(f) claim but not a 107(a) claim.

\textsuperscript{122} Trinity, 735 F.3d at 134.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 135.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 136.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 137.
\textsuperscript{129} Id. at 5 (“accordingly, under PA law, remediation pursuant to the LRA \textit{is} remediation under CERLCA.”).
\textsuperscript{130} Trinity, 735 F.3d at 138, n. 5
IV. ARGUMENT

A. The Definition of “resolved his liability” Under the Statute

In *Trinity* the Courts pay little attention to the actual language in the agreement and instead focus on the fact that a State has the power to settle Trinity’s CERCLA liability. Assuming that conclusion is true, that should not be the first inquiry of the problem. First, it is important to ask whether the Consent Order actually “resolves” the PRP’s CERCLA liability. A settlement in which a PRP promises to undertake certain remedial measures – that once finished, are subject to the State’s approval- in exchange for a release of claims is itself not a resolution of the PRP’s liability. It is only after the completion of the remediation work that the claims are actually discharged. Thus, any actions brought in the interim are not contribution actions within the meaning of § 113(f). This subtle, but important distinction is articulated in a well thought out opinion in the Seventh Circuit.131

In *Bernstein*, the EPA discovered groundwater pollution at a site that posed a contamination risk to the town’s drinking water.132 The EPA responded with a series of Consent Orders with identical contractual terms – the 1999 AOC and the 2002 AOC - in which the respondents promised to undertake substantial remedial action and to reimburse the EPA cleanup costs.133 In return, the EPA agreed to release their liability but not until such conditions were met.134 The Court held that only the Consent Orders that were completed and approved by the

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131 See *Bernstein v. Bankert*, 733 F.3d 190 (7d Cir. 2012); see also *ITT Industries Inc. v. Borgwarner Inc.*, 506 F.3d 452 (2007).
132 *Bernstein*, 733 F.3d at 196 – 197.
133 Id. at 197-198
134 Id. at 203 – 204
EPA constituted a resolution of liability within the meaning of § 113(f)(3)(B).\(^{135}\) However, any Consent Order issued for work that was “ongoing” and without a notice of EPA approval was not considered a resolution of liability. Thus, no § 113(f)(3)(B) claim was available.\(^{136}\) What was available was a § 107(a) claim for response costs incurred according to the national contingency plan.\(^{137}\) Thus, the Court rejected the argument that the mere signing of a settlement agreement amounted to a resolution of liability for purposes of the statute.\(^{138}\) The Court also noted that recovery under § 107(a) was appropriate even though the parties were “compelled” to incur the costs because of the government’s actions.\(^{139}\) The Court based its findings on its interpretation of § 113(f)(B)(3)’s plain language.\(^{140}\) It reasoned that a conditional promise is not a resolution of liability. The Court called for a “look at the terms of the settlement on a case-by-case basis.”\(^{141}\)

Further, the Court discussed policy concerns. Specifically, the Court addressed the EPA’s concern that its decision would discourage PRPs incentive to settle with the State because they will lose the “possibility of obtaining contribution from non-settling parties as soon as a settlement is executed which incentivizes PRPs to settle in the first place.”\(^{142}\) The Court points out a fundamental flaw in this argument – even though a PRP is not entitled to sue a non-settling PRP under § 113(f)(3)(B), it is entitled to sue under § 107(a) cost recovery action – noting that “the cost recovery action is subject to a longer statute of limitations, making it arguably the preferable recovery vehicle for a PRP embarking on what might well be a decade-long cleanup effort, and thus actually creating a further positive incentive to settle.”\(^{143}\)

\(^{135}\) Id. at 204 – 207
\(^{136}\) Id. at 207
\(^{137}\) Id.
\(^{138}\) Id. at 208.
\(^{139}\) Id. at 209.
\(^{140}\) Id. at 212-213.
\(^{141}\) Id. at 213
\(^{142}\) Id. at 214
\(^{143}\) Id.
The same reasoning applied by Bernstein concerning EPA settlements should also apply to state settlements in Con Ed and Trinity. The Court in Bernstein recognizes two important facts: (1) clean ups can be very expensive and be drawn out for long periods of time; and (2) §§ 107(a) claims are preferred to 113(f) claims. Trinity completely ignores these practical concerns in favor of a bright line rule – that any agreement with a state constitutes a settlement under § 113(f) – without acknowledging that such a rule would actually discourage settlement.

B. Encouraging Settlement

The Statutory Language is ambiguous with regard to state settlements. As such, it must be read in a manner that “supports the principal congressional concerns of ensuring that those responsible promptly clean up and pay for the removal of hazardous waste.”

Trinity’s reading of the statute would work against the legislative intent of CERCLA by discouraging responsible PRP’s for taking immediate remedial action in conjunction with State Agencies.

Actions under §§ 107(a) and 113(f) are substantially unequal. And until the Supreme Court or Congress steps in, they will remain unequal. Under Trinity, the problem of inequality makes it disadvantageous for a PRP to cooperate with State agencies by entering into consent decrees. Barring a responsible PRP from being allowed a cause of action under § 107(a) will discourage willing and capable parties from taking efficient cleanup measures because they will be effectively admitting liability and will lose their opportunity to prove their lesser degree of responsibility under the strict and several liability standard set forth under § 107(a). It serves no purpose for a CERCLA § 113 plaintiff, who stepped forward to cooperate with the statement government to pay for the cleanup of the site and to shoulder the orphan shares as a matter of law while recalcitrant defendants are immune from the orphan share burden.

C. Avoiding Uncertainty

144 W.R. Grace, 559 F.3d at 94.
Finally, *Trinity’s* argument that its holding avoids the uncertainty that a PRP faces settling with a State Government – which the Court correctly asserts will leave the PRP open to further liability- will actually create more uncertainty with regard to State settlement orders. A PRP that chooses to enter into an order with the State knows that it is simply resolving its liability with the State (who may otherwise have asserted a cause of action under CERCLA). The settlement is not entered into with the intent to relinquish its total liability for the said contaminated cite. Under the Second Circuits framework, the PRP knows this and still chooses to enter into the agreement in a good faith attempt to remediate cleanup costs. *Trinity’s* holding would place special emphasis on the actual language in the Order, which will “turn on the semantics of the state program’s title, which will undoubtedly vary from state to state and be subject to internal state modifications.”¹⁴⁵

V. CONCLUSION

The *Trinity* Court failed to address some of the practical implications of barring PRPs from bringing cost recovery actions merely because they have entered into a consent order with state agencies. Thus, its holding takes away an important remedy from responsible PRPs. As a result, it works to discourage cooperation between PRPs and state agency in an effort to pursue effective remediation.

¹⁴⁵ Id.