

JOINT AND SEVERAL LIABILITY AND
CONTRIBUTION UNDER CERCLA
SECTIONS 107(a)(4)(B) AND 113(f)(1)

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I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")¹ in 1980 to deal with the growing number of toxic and hazardous waste sites which threatened public health and the nation's environment.² Enacted in the twilight of the Carter administration, CERCLA is often seen as a confused compromise measure which may impose harsh or even draconian penalties to further its two espoused goals—(1) making the polluter pay for the costs of cleanup and (2) cleaning up hazardous waste sites quickly.³ CERCLA authorizes the Environmental Protection Agency ("EPA") to take several different approaches to enforcement. EPA may sponsor cleanups of hazardous waste sites ("sites") and later seek reimbursement for its cleanup costs from polluters. EPA may also choose to impose an administrative order pursuant to CERCLA section 106(a)⁴ requiring one or several potentially responsible parties ("PRPs") to cleanup a site. The PRPs may seek thereafter to recover their costs from other PRPs who did not participate in the cleanup effort.⁵ Finally, under CERCLA section 113(f),⁶ EPA may choose to settle its claims for cleanup costs with one, some, or all of the PRPs at a site, offering those PRPs nearly complete protection from subsequent suits by non-settling parties in return for a quick settlement.⁷

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1. 42 U.S.C. §§ 9601-75 (1988) (hereinafter CERCLA).

2. *See* Legislative History, Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") Pub. L. 96-510, 1980 U.S.C.C.A.N. (94 Stat.) 6119, 6120.

3. *See* *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1082 (D. N.J. 1992); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (noting "[CERCLA] itself is vague and its legislative history indefinite [CERCLA] is a severely diminished piece of compromise legislation from which a number of significant features were deleted.").

4. 42 U.S.C. § 9606(a) (1988).

5. *See id.* §§ 9607(a)(4)(B), 9613(f)(1).

6. *Id.* § 9613(f).

7. *See id.* § 9613(f)(2).

While the original version of CERCLA contained no provision that specifically created a private cause of action by which PRPs might recover their response costs from other PRPs, many courts read section 107(a) to imply such a private right of action.⁸ In 1986, Congress amended the original enactment with the Superfund Amendments and Reauthorization Act of 1986⁹ ("SARA") which specifically allowed private parties to bring suits for contribution to recover response costs incurred as a result of their cleanup of a hazardous waste site under section 113(f)(1).¹⁰

II. DUAL ACTION AND SINGLE ACTION SCENARIOS

EPA will sometimes determine that a site has released or threatens to release toxic or hazardous materials into the environment. EPA may then issue an administrative order under CERCLA section 106,¹¹ requiring a PRP to initiate cleanup at the site.¹²

After incurring response costs at the site, the PRP affected by the EPA order ("responding PRP") may seek to recover some part of its response costs from other PRPs. This recovery action may be initiated under CERCLA section 107(a)(4)(B)¹³ or under CERCLA

8. *See, e.g.*, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

9. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

10. 42 U.S.C. § 9613(f)(1) (1988).

11. *Id.* § 9606.

12. *See, e.g.*, *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1086-87 (D.N.J. 1992) (noting that failure to comply with a § 106(a) Administrative Order carries a fine of up to \$25,000 per day of noncompliance). *See also* 42 U.S.C. § 9606(b)(1) (1988) (listing the several enforcement actions available to the government in securing site cleanup).

13. CERCLA § 107(a)(4)(B) provides, in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to defenses set forth in subsection (b) of this section— . . .

(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 or response costs, of a hazardous substance, 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)(B) (1988).

section 113(f)(1),¹⁴ although the case law gives little or no guidance as to which is the proper legal avenue.

Theoretically, a successful action under section 107(a) (“response-recovery action”) should result in a recovery of all response costs from non-responding PRPs (who will be held jointly and severally liable for 100% of the response costs).¹⁵ The responding PRP may obtain a full judgment against the non-responding PRPs who may in turn respond with counter- or cross-claims under section 113(f)(1) for contribution (“contribution action”).¹⁶ A case involving both successive response-recovery actions and contribution actions will be termed a “dual action scenario.” In a dual action scenario, burdens of proof may be shifted onto non-responding PRPs. Defendants in a response-recovery action under CERCLA section 107(a)—i.e., non-responding PRPs—are limited to the three defenses listed in CERCLA section 107(b):¹⁷ (1) an act of God; (2) an act of war; or (3) a complete absence of causation.¹⁸ Non-responding PRPs are strictly, jointly and severally liable for all response costs.¹⁹

In a contribution action, however, the burden of proof is not shifted so dramatically. The defendant in a contribution action, possibly the responding PRP, may assert equitable defenses against those seeking contribution.²⁰ Thus, in a dual action scenario, a

14. CERCLA § 113(f)(1) provides:

Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or under section [107(a)] of this title 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] of this title.

42 U.S.C. § 9613(f) (1988).

15. *See, e.g.*, *United States v. Kramer*, 757 F. Supp. 397, 416 (D. N.J. 1991).

16. *See, e.g., id.* at 412–13.

17. 42 U.S.C. § 9607(a)–(b) (1988).

18. *See Kramer*, 757 F. Supp. at 411, (citing *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989)).

19. *See id.* at 413.

20. *See, e.g., id.* at 412–13 (holding that courts, in contribution actions, may consider the equities of the case, in “sharp contrast” to response-recovery actions, against which the only defense is a complete lack of causation); *see also* *Envtl. Transp. Sys. v. ENSCO*, 969 F.2d 503, 509–11 (7th Cir. 1992) (holding that courts, in contribution actions, must consider each case under a case-by-case analysis and may consider one, several, or many factors as dispositive); *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420,

responding PRP may obtain a judgment against the non-responding PRPs for all of the response costs. The responding PRP may then assert equitable defenses to limit or defeat any contribution action initiated by the non-responding PRPs to recover some part of the cleanup costs from the responding PRP.

Other jurisdictions have treated all suits between PRPs for the recovery of response costs as suits for contribution, whether the claim is brought under section 107(a)(4) or under section 113(f)(1). These jurisdictions have thus cut the two step process down to one.²¹ This streamlined process will be termed a "single action scenario." At present, jurisdictions considering this issue appear evenly split as to which scenario the statute requires.

III. ANALYZING THE DUAL ACTION SCENARIO

Courts have noted several different factors militating in favor of the dual action scenario, most of which suggest that this scenario may be characterized as a "carrot and stick" approach.²² PRPs who settle or otherwise quickly discharge their CERCLA liability are given a "carrot" in the form of protection from suits for contribution from other PRPs, and can recover response costs for which they are not directly liable. PRPs who refuse to settle are given the "stick" in the form of joint and several liability.

Several courts have found a distinction between a response-recovery action by a responding PRP under CERCLA section 107 and a contribution action under section 113, holding that each provision creates a distinct cause of action, the first imposing joint

1426-27 (D. Md. 1991) (noting action for contribution allows court to consider equitable factors in apportioning liability between the parties).

21. See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (noting "When one liable party sues another to recover its equitable share of the response costs, the action is one for contribution . . ."); *Weyerhaeuser*, 771 F. Supp. at 1426; *In re Dant & Russel*, 951 F.2d 246, 249 (9th Cir. 1991) (implying that a suit between PRPs is a suit for contribution, even if it is brought as a response-recovery action under CERCLA section 107(a)(4)(B)). In a single action scenario, all apportionment is performed equitably during a single phase of litigation. See, e.g., *Amoco*, 889 F.2d 672-73 (5th Cir. 1989) (holding suits between PRPs are in the nature of contribution and the court must equitably apportion each party's share of the response costs).

22. See *Kramer*, 757 F. Supp. at 415-17 (collapsing the distinction between CERCLA § 107(a)(4)(B) and § 113(f)(1) ignores the incentive which joint and several liability creates to settle and/or cleanup quickly); *Allied Corp. v. Acme Solvents Reclaiming*, 691 F. Supp. 1100, 1117-19 (N.D. Ill. 1988) (noting that joint and several liability provides all PRPs with an incentive to cleanup sites quickly).

and several liability on the non-responding PRPs, and the second allowing the non-responding PRPs to bring an action for contribution.²³ While some courts have neglected to analyze the issue,²⁴ others have noted several reasons to think that CERCLA requires a dual action scenario: the structure of the statute, CERCLA's policy goals of expeditious cleanup and making polluters pay, and incentive structures all weigh in favor of the dual action approach.

A. Statutory Analysis

Several courts have found that the principles underlying the structure of CERCLA favor making a distinction between response-recovery actions under section 107 and contribution actions under section 113. *Burlington Northern Railroad Co. v. Time Oil Co.*²⁵ is one of the most analytically sound of the dual action cases.

The *Burlington* court found that CERCLA created a structure which required interpretation of section 107(a)(b)(B) as distinct and separate from section 113(f)(2).²⁶ *Burlington* noted three separate provisions in CERCLA which make a distinction between actions under the two sections.²⁷ For example, section 113(g)(2),²⁸ dealing with the statutes of limitations for response-recovery and contribution actions, provides for a three year limitation for con-

23. See, e.g., *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. 471 (E.D. Pa. 1992); *Kramer*, 757 F. Supp. at 413-15; *Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992); *Burlington N. R.R. Co. v. Time Oil Co.*, 738 F. Supp. 1339, 1342-43 (W.D. Wash. 1990), *overruled by implication* in *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991); *AT&T Technologies, Inc. v. Heleva*, 1990 U.S. Dist. LEXIS 6898 (E.D. Pa. 1990); *Allied Corp. v. ACME Solvents Reclaiming*, 691 F. Supp. 1100, 116-19 (N.D. Ill. 1988).

24. See, e.g., *FMC*, 786 F. Supp. 471 (E.D. Pa. 1992). Other cases, such as *Smith Land & Imp. Corp. v. Celotex Corp.*, 851 F.2d 86 (3rd Cir. 1988), incorrectly analyzed the legal question. The *Smith Land* court clearly stated that equitable defenses are unavailable to a defendant in an action to determine initial liability under CERCLA § 107(a). *Id.* at 89. The *Smith Land* court went on, however, to accept the equitable doctrine of caveat emptor as an appropriate defense to the response-recovery action and held that the responding PRP/plaintiff, if successful, could "recover an amount deemed equitable for [response costs expended]," as if the action were one for contribution. *Id.* (emphasis added). See also *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1087 (D. N.J. 1992) (seizing on the *Smith Land* holding to collapse the distinction between § 107(a)(4)(B) and § 113(f)(1) actions).

25. 738 F. Supp. 1339 (W.D. Wash. 1990).

26. *Id.* at 1342-43.

27. *Id.*

28. 42 U.S.C. § 9613(g)(2) (1988).

tribution actions and a six year limitation for cost recovery after construction of on-site remedial measures.²⁹

Burlington also found the legislative distinction drawn in section 113(h)(1) significant.³⁰ Section 113(h)(1) provides that a court may review an action “to recover response costs *or* damages *or* for contribution”.³¹ The *Burlington* court found it significant that Congress had chosen in this provision to list the separate actions eligible for judicial review, even though the section does not provide for different standards of treatment for response-recovery actions and contribution actions.³²

Finally, the *Burlington* court examined the different defenses available against response-recovery actions and contribution actions and found that those differences suggested a congressional intent to maintain separate causes of action.³³ Section 107(a) imposes strict, joint and several liability for all of a responding PRP’s response costs “subject only to the defenses set out in [section 107(b)].”³⁴ The defenses available to a defendant in a response-recovery action—i.e., to a non-responding PRP—therefore do not include settlement with the government, the responding PRP’s liability under section 113, or any other equitable defenses.³⁵

Under CERCLA section 113(f)(1), however, defendants may raise equitable defenses against claims for contribution.³⁶ The availability of equitable defenses in CERCLA section 113(f)(1) contribution actions, and the relative lack of any available defenses under CERCLA section 107(a) response-recovery actions, have driven much of the litigation in this area, with the various litigants attempting to characterize a PRP’s liability under one or the other sections.

The court in *United States v. Kramer*³⁷ also applied a similar analysis to find the statute’s language supported a distinction between the two types of actions. The *Kramer* court emphasized the

29. *Burlington*, 738 F. Supp. at 1342–43.

30. *Burlington*, 738 F. Supp. at 1343.

31. 42 U.S.C. § 9613(h)(1)(1988).

32. *See Burlington*, 738 F. Supp. at 1343.

33. *See id.*

34. 42 U.S.C. § 9607(a) (1988).

35. *See id.* § 9607(b); *see also Burlington*, 738 F. Supp. at 1343.

36. 42 U.S.C. § 9613(f)(1) (1988), (noting that “In resolving contribution claims, the court may allocate response costs among liable parties using such *equitable factors* as the court determines are appropriate” (emphasis added)).

37. 757 F. Supp. 397 (D. N.J. 1991).

language of CERCLA section 107(a) imposing liability “[n]otwithstanding any other provision or rule of law and subject only to defenses set forth in [section 107(b)].”³⁸ For the *Kramer* court, “[n]otwithstanding any other provision or rule of law . . . means that Congress clearly intended to maintain CERCLA section 107(a) as a separate and distinct cause of action the force of which should not be diluted by the application of other provisions such as CERCLA section 113(f)(1).³⁹

The court in *Allied Corporation v. ACME Solvents Reclaiming*⁴⁰ also relied on a close examination of a particular aspect of the statute. The court noted that the 1986 SARA amendments explicitly created a permissive right to contribution⁴¹ but did not narrow the rights of the responding PRP by forcing the square peg of a response-recovery action under section 107(a)(4)(B) into the round hole of a contribution action under section 113(f)(1).⁴² In other words, the responding PRP may seek to recover its response costs under either section. The *Allied* court’s analysis appears to rest on its belief that while strict, joint and several liability was already available to responding PRPs under CERCLA section 107, Congress did not remove that option with the 1986 amendments, but rather gave plaintiffs the additional option of bringing a contribution action.⁴³

Finally, the court in *Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co.*⁴⁴ focused on the plain language of section 107(a)(4)(B)⁴⁵ in deciding that a responding PRP was entitled to maintain separate causes of action.⁴⁶ The *Chesapeake* court focused specifically on the absence of any indication that the term “any other person” in section 107(a)(4)(B) did not apply to PRPs.⁴⁷ The court applied the rule that, absent a specific legislative

38. See *Kramer*, 757 F. Supp. at 416 (citing 42 U.S.C. § 9607(a) (1988)).

39. See *id.*

40. 691 F. Supp. 1100 (N.D. Ill. 1988).

41. See 42 U.S.C. § 9613(f)(1) (1988) “[a]ny person may seek contribution from any person who is liable or potentially liable under section 9607(a) . . . during or following any civil action under [sections 9606 or 9607(a)]” (emphasis added).

42. See *Allied*, 691 F. Supp. at 1118.

43. See *id.*

44. 814 F. Supp. 1269 (E.D. Va. 1992).

45. 42 U.S.C. § 9607(a)(4)(B) (1988).

46. See *Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1272 (E.D. Va. 1992).

47. *Id.*

intent to the contrary, the text of the statute itself must direct the actions of the court. As the court did not find that the text of CERCLA clearly required a response-recovery action to be treated as an action for contribution, it held that the responding PRP could bring an action under either section.⁴⁸

B. Incentive Structures and Goals of CERCLA

The other major argument in favor of the dual action scenario notes that such a scenario creates incentives among PRPs to further the expressed goals of CERCLA—expediting cleanup while forcing those who caused the harm to fund remedial efforts. The dual action courts view CERCLA section 107(a) actions, properly handled, as providing incentives for private parties to risk the large amounts of capital necessary to fund a CERCLA cleanup.⁴⁹

The *Kramer* court noted that section 107 permits a private party to “go in, clean up the mess, pay the bill, then collect *all* its costs not inconsistent with the NCP from other responsible parties—even if plaintiff was also responsible for the contamination.”⁵⁰ While other non-responding PRPs may later seek contribution from the responding PRP, the net effect is a “temporary windfall” which ensures that the responding PRP will be rewarded for acting quickly to remedy the environmental damage.⁵¹

The flaw in this logic, however, lies in the assumption that the non-responding PRPs, after assuming joint and several liability for 100% of the response costs, will be able to recover any significant amount from the responding PRP. The burden of seeking contribution may be unfair to non-responding PRPs who may, in fact, be only minimally responsible for the pollution.⁵² In a worst case scenario, with a responding PRP responsible for 85% of the harm and the remainder distributed among *de minimis* contributors and bankrupt or otherwise judgment-proof PRPs, the responding PRP

48. *Id.*

49. *See, e.g.,* United States v. Kramer, 757 F. Supp 397, 416 (D. N.J. 1991).

50. *Id.*

51. *Id.* at 417.

52. *Cf. Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992) (noting that plaintiff, “itself liable under CERCLA, 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 that plaintiff should not benefit from its own tortious activity).

could recover 100% of the response costs, imposing joint and several liability on the *de minimis* contributors.⁵³ Without a class action to aggregate their claims and lower the cost of bringing each individual claim, many of the *de minimis* contributors would drop out or seek protection in bankruptcy.⁵⁴ A contribution action also would obtain only 85% of the total cost at most—the responding PRP’s share. A court could foreseeably allocate all remaining “orphan” shares—those parts of the harm for which bankrupt or otherwise judgment proof PRPs are responsible—among the *de minimis* contributors.⁵⁵ Such a situation could imaginably result in a single PRP, contributor of 1% of the total harm, being held liable for 15% (or more) of the response costs.

The *Chesapeake* court strongly disapproved of awarding such a large windfall to a responding PRP. Although it noted the *Kramer* court’s advocacy of the windfall incentive, the district court in *Chesapeake* went on to hold:

While the Court recognizes the potential value of this incentive, it has nonetheless attempted to minimize the windfall by ruling at this time, in advance of the contribution phase of the lawsuit, that the Plaintiff will not be allowed to recover those costs attributable to its own dumping or the orphan shares allocated to it by the Court Thus . . . the Court will streamline this procedure by holding that, at no time, will any defendant have to pay for environmental harm attributable to [the Plaintiff].⁵⁶

The *Chesapeake* court thus minimized the windfall incentive of the *Kramer* decision but retained one important aspect: by imposing joint and several liability for the defendants’ share of the total harm, the court ensured that the responding PRP will receive that portion of cleanup costs not attributable to itself (less the costs

53. *E.g.*, *Kramer*, 757 F. Supp. at 416–17 (allowing responding PRP to recover 100% of response costs against smaller non-responding PRPs).

54. For an example of a debtor seeking protection from environmental claims by entering bankruptcy, see *In re Dant & Russell*, 951 F.2d 246 (9th Cir. 1991).

55. *See Kramer*, 757 F. Supp. at 416–17 (allowing responding PRP to recover all of its response costs and then noting the responding PRP “will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been [its] equitable share.”); *Cf. Chesapeake*, 814 F. Supp. at 1277–78 (avoiding this problem by imposing joint and several liability only to the extent of the non-responding PRPs’ share of the cleanup costs, allocating orphan shares between responding PRPs and non-responding PRPs, and holding the responding PRP responsible for all cost directly attributable to its own actions).

56. *Chesapeake*, 814 F. Supp. at 1278.

of the orphan shares allocated to the responding PRP). Under a section 113(f)(1) contribution action, the responding PRP could only be sure of obtaining the contribution of the named defendants.⁵⁷ The fate and allocation of any orphan share would be uncertain, possibly forcing the responding PRP to assume an equitable share of the burden for insolvent contributors and removing the incentives to step in quickly and clean-up a hazardous release. As noted in *Allied*:

Policies underlying CERCLA support the notion that claims between PRPs are not always, and should not always be, in the nature of contribution . . . CERCLA seeks the expeditious and safe clean up of hazardous waste sites. A blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing PRP from cleaning up on its own. This is especially true where one or more of the parties are insolvent and, thus, incapable of sharing the costs of cleanup. In this situation, a PRP which is otherwise amenable to cleaning up may be discouraged from doing so if it knows that, where the harm is indivisible, its only recourse for reimbursement is contribution from the solvent PRP's. A prohibition against joint and several liability would leave the willing PRP holding the bag for the insolvent companies.⁵⁸

This incentive, however, may not be as important in cases where EPA has imposed an administrative order under CERCLA section 106(a) on a PRP.⁵⁹ Failure to comply with a section 106 order may result in further injunctions against the PRP and/or a \$25,000 fine for every day the PRP's noncompliance continues.⁶⁰

IV. SINGLE ACTION SCENARIO

Like the courts that find CERCLA provides for dual action scenario, several courts that find the statute provides for a single action scenario simply state with little or no analysis that a suit by a responding PRP against one or more non-responding PRPs for the recovery of response costs incurred at a site is a suit for contribu-

57. See *Allied Corp. v. ACME Solvents Reclaiming*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988).

58. *Id.* at 1118.

59. 42 U.S.C. § 9606(a) (1988).

60. *Id.* § 9606(b).

tion rather than a suit for joint and several liability.⁶¹ Where courts do take a more analytical approach, they base their arguments for the single action scenario on both statutory language and legislative history.

A. Statutory Analysis

Several of these courts closely analyze the statutory structure of CERCLA, finding that the statute requires response-recovery suits between PRPs to be in the nature of contribution. Most of these courts focus on the 1986 passage of SARA, which indicates congressional approval for suits for contribution under section 113(f)(1).⁶²

In *Transtech Industries v. A & Z Septic Clean*,⁶³ the plaintiff argued that CERCLA sections 107(a)(4)(B) and 113(f)(1) created distinct causes of action. Section 107(a), the plaintiff contended, with its limited defenses to joint and several liability, allowed cost recovery for voluntary responses. Section 113(f)(1), by contrast, with its range of equitable defenses to several liability only, was available to parties who responded involuntarily under threat of legal action by EPA.⁶⁴

The *Transtech* court rejected the plaintiff's voluntary cooperation argument. In creating a specific cause of action for contribution among liable parties in SARA,⁶⁵ Congress clarified and defined the responses available to responding PRPs.⁶⁶ As the court states: "[W]hen properly construed, the two sections work together, one

61. See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (citing CERCLA § 113(f) (42 U.S.C. § 9613(f) (1988))); *Ellman v. Woo*, 34 Env't. Rep. Cas. (BNA) 1969, 1971 (E.D. Pa. 1991). It is unclear, however, whether the *Ellman* court described the suit as an action for contribution because only two parties were involved or for some other reason. See also *In re Dant & Russell*, 951 F.2d 246, 249 (9th Cir. 1991) (holding the court may treat a suit brought under CERCLA § 107(a) as a suit brought under CERCLA § 113(f)(1)).

62. 42 U.S.C. § 9613(f)(1) (1988).

63. 798 F. Supp. 1079, 1085 (D.N.J. 1992).

64. *Id.* at 1085; see also *Allied Corp. v. Acme Solvents Reclaiming*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (advocating that decision whether to allow plaintiff PRP to pursue joint and several liability should be based in part on plaintiff's willingness to cooperate with EPA).

65. See 42 U.S.C. § 9613(f)(1) (1988).

66. See *Transtech*, 798 F. Supp. at 1087.

governing liability and the other governing contribution from those found liable.”⁶⁷

Other courts have followed *Transtech*'s reasoning, holding that CERCLA sections 107(a)(4)(B) and 113(f)(1) should be interpreted as a unit when deciding liability issues between a responding PRP and liable non-responding PRPs. The court in *Weyerhaeuser Co. v. Koppers Co.*,⁶⁸ for example, held that the proper procedure in a response-recovery action under CERCLA section 107(a)(4)(B) is first to determine whether liability should be imposed and then to apportion that liability among all parties, including the responding PRP, in a contribution action under CERCLA section 113.⁶⁹

The court in *PVO International v. Drew Chemical Corporation*,⁷⁰ also interpreted the statute as requiring sections 107(a)(4)(B) and 113(f)(1) to be read in conjunction with one another.⁷¹ The question in *PVO* was whether the court should allow equitable factors to enter into its consideration of a response-recovery action.⁷² The court concluded that, because section 107(a)(4)(B) “does not explicitly provide for apportionment of costs between liable parties[,]” section 107(a)(4)(B) should be read in conjunction with section 113(f)(1), which does explicitly provide for such apportionment.⁷³ In apportioning liability in this manner, it is clear that the *PVO* court ignored a non-responding PRP's ability to seek contribution from the responding PRP who prevailed in a section 107(a)(4)(B) action.⁷⁴

The court in *AVNET v. Allied-Signal*⁷⁵ went even further than most other courts, building on the language of the *Transtech* court. The court held that Congress enacted section 113(f)(1) only to clarify and affirm an existing cause of action under section 107(a)(4)(B) already available to PRPs seeking to apportion response costs:

67. *Id.* at 1086.

68. 771 F. Supp. 1420 (D. Md. 1991).

69. *Id.* at 1425-27.

70. 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20077 (D. N.J. 1988).

71. *Id.* at 20080.

72. *See id.*

73. *Id.* *See also* *Southland Corp. v. Ashland Oil*, 696 F. Supp. 994, 1002-03 (D. N.J. 1988) (noting § 107(a)(4)(B) establishes liability and § 113(f)(1) allocates the contribution of each party).

74. *See* *United States v. Kramer*, 757 F. Supp. 397, 416 (overruling by implication the *PVO* court's analysis).

75. 825 F. Supp. 1132 (D.R.I. 1992).

[W]ith Section 113, Congress did not add a new cause of action, but showed that it was only affirming and making clear an existing cause of action for contribution under Section 107. Congress did not demonstrate in any way in the statute or in the legislative history that Section 113(f) was intended to be an independent, alternative cause of action distinct from the Section 107 cost recovery action. Accordingly, there is no basis for the plaintiffs' attempt to distinguish between a cause of action under Section 107 and one under Section 113.⁷⁶

By collapsing the two provisions, the *AVNET* court stands in clear opposition to cases such as *Allied* and *Burlington*, both of which found that Congress intended separate causes of action under sections 107 and 113.⁷⁷

B. Legislative History

Among the courts that collapsed distinctions between a response-recovery action under CERCLA section 107 and a contribution action under CERCLA section 113, only the *AVNET* court makes any examination of the legislative history of section 113.⁷⁸ The court found persuasive the comments made by various legislators during the passage of SARA who stated that the addition of section 113(f)(1) clarified the already existing right of contribution under CERCLA.⁷⁹

The *AVNET* court makes a slight logical jump in its analysis of this language by interpreting Congress' confirmation of a pre-existing right of contribution as exclusive of any other cause of action available to responding PRPs.⁸⁰ This analysis, however, ignores the many statements in the legislative history which could be read to support an opposite holding, i.e., that Congress intended to maintain separate causes of action under sections 107(a)(4)(B) and 113(f)(1).⁸¹ For example, the legislative history notes that "as

76. *Id.* at 1137 (footnotes omitted).

77. *See Allied*, 691 F. Supp. at 1118-19; *see also Burlington*, 738 F. Supp. at 1342-43.

78. *See AVNET*, 825 F. Supp. at 1136-38.

79. *See id.* at 1137 n.32 (citing legislative history).

80. *See id.* at 1137.

81. *See H. Rep. No. 99-253(I)*, 2d Sess. (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861-63 (drawing distinctions between joint and several liability issues and contribution issues).

with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law," possibly drawing a distinction between the two types of actions.⁸² The legislative history also clarifies the differing period of limitation on the two causes of action: an action for contribution must be filed within three years after a date of judgment or entry of settlement while a response-recovery action must be filed within six years of the expenditure of response costs.⁸³ These distinctions suggest a congressional intent to keep separate the two causes of action.

V. CONCLUSION

The federal courts are split on the issue of whether a response-recovery action brought by one PRP against one or more others is, in fact, an action for contribution, or whether they are separate and distinct causes of action. While a technical reading of CERCLA sections 107(a)(4)(B) and 113(f)(1) supports maintaining a distinction between the two causes of action, many courts appear willing to overlook that distinction. Both the Fifth and Ninth Circuits have asserted that any action to recover response costs between two liable parties is an action for contribution.⁸⁴ Neither of these courts, however, appears to have closely examined the issue. Instead, the courts simply stated a cursory conclusion.⁸⁵ Courts that have maintained a distinction between the causes of action, in contrast, appear to have examined the issue in more detail than their counterparts who have not.⁸⁶

Both sides of the dispute have examined the issue of fairness. Courts focusing on the burden borne by the responding PRP will tend to reward a cooperative responding PRP by allowing the PRP to seek joint and several liability of non-responding PRPs.⁸⁷ These

82. *Id.* at 2862.

83. *See id.* at 2861.

84. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *see also In re Dant & Russell*, 951 F.2d 246, 249 (9th Cir. 1991) (implied conclusion).

85. *See Amoco*, 889 F.2d at 672; *see also In re Dant & Russell*, 951 F.2d at 249.

86. *See, e.g., Burlington N. R.R. Co. v. Time Oil Co.*, 738 F. Supp. 1339, 1342-43 (W.D. Wash. 1990); *Allied Corp. v. Acme Solvents Reclaiming*, 691 F. Supp. 1100, 1117-18 (N.D. Ill. 1988). *But see Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1085-87 (D. N.J. 1992) (adopting single action scenario after detailed examination of history and meaning of right of contribution).

87. *See, e.g., United States v. Kramer*, 757 F. Supp. 397, 416-17 (D. N.J. 1991);

courts have often noted that PRPs found jointly and severally liable for all response costs may recover a share of the costs from the responding PRP through a contribution action.⁸⁸ Other courts have focused on the burden joint and several liability places on non-responding PRPs and have declined to impose it.⁸⁹ Courts declining to impose joint and several liability in section 107(a)(4)(B) actions rarely mention the availability of a CERCLA section 113(f)(1) contribution action to non-prevailing defendants.⁹⁰

The courts have split on this matter, not only between, but also within jurisdictions. It is unclear how any given court will decide (except in the Fifth and Ninth Circuits),⁹¹ and no court has laid down any distinguishing criteria. While there may be good arguments for finding that the statute requires either a dual action or single action scenario, it is important that both the courts and Congress, in contemplating CERCLA's future, consider the need to state clearly and unambiguously which scenario is the correct one.

Allied, 691 F.Supp. at 1118 (noting that inability to obtain fair reimbursement through joint and several liability would discourage willing PRP from effecting its own response).

88. See *Kramer*, 757 F. Supp. at 416-17; see also *Allied*, 691 F. Supp. at 1118.

89. See, e.g., *PVO Int'l v. Drew Chemical Corp.*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20077, 20080 (D. N.J.) (holding that it is unfair to allocate entire burden of cleanup to defendants in a response recovery action); but see *Kramer*, 757 F. Supp. at 416 (evinced disdain for this aspect of the *PVO* holding).

90. Cf. *PVO*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20080.

91. See *supra* note 86 and accompanying text.

