

ARTICLES

NEITHER JOINT NOR SEVERAL: ORPHAN SHARES AND PRIVATE CERCLA ACTIONS

BY

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The broad liability scheme of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) often results in multiple “responsible parties” being liable for the costs of cleaning up a contaminated site. Typically, CERCLA cleanup costs are allocated among the various responsible parties pursuant to equitable factors, but frequently some of those responsible parties are now insolvent, dead, or defunct. Who must pay the cleanup costs attributable to the insolvent, dead, or defunct parties—i.e., the “orphan shares”—has long been one of most unsettled and critical issues in private CERCLA litigation.

Via a pair of recent decisions, the Supreme Court ushered in a new era in private CERCLA litigation, expanding the availability of private claims under CERCLA section 107 while limiting them under CERCLA section 113. While this change has raised the specter of jointly and severally liable defendants in private CERCLA actions being forced to bear the entire orphan share burden as a matter of law even where the

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plaintiff is more culpable, this Article posits that this new era affords a fresh opportunity to solve the long-standing orphan share problem. It is time to discard the labels “joint and several” and “several” when describing the scope of liability in private actions under CERCLA sections 107 and 113. Instead, all private CERCLA claims should be governed by a uniform scope of liability in which orphan shares are allocated among all viable responsible parties, both plaintiffs and defendants, pursuant to equitable factors.

I.	INTRODUCTION	1046
II.	BACKGROUND.....	1049
	A. <i>Joint and Several Versus Several Liability</i>	1049
	B. <i>CERCLA</i>	1051
III.	PRIVATE CERCLA CLAIMS AND THE ORPHAN SHARE PROBLEM	1054
	A. <i>Yesteryear</i>	1055
	B. <i>Aviall and Atlantic Watershed</i>	1061
	C. <i>Today</i>	1064
	1. <i>The Muddle of Sections 107 and 113</i>	1064
	2. <i>The Orphan Share Problem</i>	1067
IV.	A SOLUTION: REJECT “JOINT AND SEVERAL” AND “SEVERAL” IN FAVOR OF EQUITABLE ALLOCATION OF ORPHAN SHARES IN ALL PRIVATE CERCLA ACTIONS	1069
	A. <i>Section 113</i>	1070
	B. <i>Section 107</i>	1071
	C. <i>Counterclaims Are Counterproductive</i>	1077
	D. <i>Implementing the Solution: Related Issues</i>	1083
	1. <i>Joinder and Contribution</i>	1083
	2. <i>Contribution Protection and Statutes of Limitations</i>	1088
	E. <i>No Exception for Innocent Private Plaintiff</i>	1090
V.	CONCLUSION	1092

I. INTRODUCTION

The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ imposes a unique, broad, retroactive, strict liability scheme designed to facilitate the cleanup of contaminated sites. Often, multiple “responsible parties” are subject to CERCLA liability for cleanup costs at a site,² and typically the costs are allocated among the various responsible parties pursuant to equitable factors.³ Some of those responsible parties, however, may not be capable of paying (e.g., insolvent). Others, because CERCLA can impose liability today for events that occurred

¹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

² See *id.* § 9607(a)(1)–(4).

³ *Id.* § 9613(f)(1).

decades ago,⁴ may be dead or defunct. The equitable shares of cleanup cost liability attributable to such insolvent, dead, or defunct responsible parties are referred to as “orphan shares.”⁵ Who must pay these orphan shares is, and long has been, among the most controversial and important allocation issues in CERCLA actions brought by private parties.⁶

Responsible parties sued by the government for cost recovery under CERCLA section 107⁷ are usually subject to joint and several liability, meaning each defendant may be liable for all of the cleanup costs at a site.⁸ Consistent with joint and several liability, orphan shares must be paid by the viable defendants alone.⁹ Where the CERCLA claimant is a private party, though, the scope of liability and the treatment of orphan shares are far less clear. Traditionally, the private plaintiff was limited to suing for contribution under CERCLA section 113¹⁰ rather than for cost recovery under CERCLA section 107.¹¹ Defendants’ liability under section 113 was described as several, meaning each defendant was liable only for its share of the site cleanup costs.¹² While true several liability indicates the orphan shares would be paid solely by the plaintiff,¹³ courts nevertheless disagreed over

⁴ See, e.g., *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (holding that CERCLA liability is retroactive).

⁵ See, e.g., *Pinal Creek Grp. v. Newmont Mining Corp. (Pinal Creek)*, 118 F.3d 1298, 1303 (9th Cir. 1997).

⁶ See Kevin A. Gaynor et al., *Unresolved CERCLA Issues After Atlantic Research and Burlington Northern*, 40 ENVTL. L. REP. (Envtl. Law Inst.) 11,198, 11,202–03 (2010); Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 25 (2006); Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 84–85 (1997); Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1096 (1994).

⁷ 42 U.S.C. § 9607 (2006).

⁸ See *O’Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir. 1989) (mentioning that “responsible parties rarely escape joint and several liability” under CERCLA); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 346 (5th ed. 1984) (indicating that each joint tortfeasor is liable for plaintiff’s entire harm).

⁹ *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984); see RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A18 cmt. a (2000); KEETON ET AL., *supra* note 8, § 52, at 345.

¹⁰ 42 U.S.C. § 9613 (2006).

¹¹ See *Cooper Indus., Inc. v. Aviall Servs., Inc. (Aviall)*, 543 U.S. 157, 169 (2004) (collection of cases).

¹² See *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998) (describing CERCLA section 113 liability as several); *Pinal Creek*, 118 F.3d 1298, 1303 (9th Cir. 1997) (describing CERCLA section 113 liability as several); see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 (2000) (stating that several liability means defendant is liable only for its share of plaintiff’s damages); RICHARD A. EPSTEIN, TORTS § 9.2 (1999) (stating that several liability means defendant is liable only for its share of plaintiff’s damages).

¹³ KEETON ET AL., *supra* note 8, § 52; EPSTEIN, *supra* note 12, § 9.2, at 351; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 11 cmt. a, B18 cmt. a (2000).

how to allocate the orphan shares—to plaintiff alone, or shared among the plaintiff and defendants.¹⁴

A series of recent United States Supreme Court cases, however, has changed the landscape of CERCLA litigation, limiting the availability of section 113 claims and broadening the availability of section 107 claims by private claimants.¹⁵ The changes have raised the specter of widespread application of joint and several liability in private CERCLA actions and, in turn, of the orphan share burden falling exclusively upon defendants.¹⁶ This could mean, for example, that a CERCLA section 107 plaintiff, despite being the largest contributor to contamination at a site, could force one small jointly and severally liable defendant, as a matter of law, to pay all of the sizable orphan shares attributable to other responsible parties who are now insolvent or no longer in existence. On the other hand, a CERCLA section 113 plaintiff, which cooperated with the government to get a site cleaned up, could be stuck automatically with the orphan shares while severally liable recalcitrant defendants bear none. At this juncture, however, the law regarding treatment of orphan shares remains far from settled, posing problems both of practice and policy.¹⁷

This Article explores the impact of the changed landscape in private CERCLA litigation and proposes a fresh approach to the problem of orphan share allocation. Part II sets the stage with discussions of joint and several liability, several liability, and liability under CERCLA. Part III analyzes how private CERCLA actions under sections 107 and 113 have evolved, including the dramatic changes wrought by recent Supreme Court cases, with an emphasis on the orphan share problem. Part IV proposes a solution to the orphan share problem. In short, neither joint and several nor several liability should be the rule in private CERCLA litigation. CERCLA section 107 defendants should not be saddled with all of the orphan shares as a matter of law, nor should CERCLA section 113 defendants automatically be free from any orphan share obligation. Rather, this Article proposes that private claims under sections 107 and 113 should be governed by a uniform scope of liability, drawn from evolving principles of common law and tailored to advance the goals of CERCLA, with orphan shares being equitably allocated among all responsible party plaintiffs and defendants. Attempting to achieve such equitable allocation in private section 107 cases via a contribution counterclaim, as suggested by the Supreme Court, is a flawed approach.

¹⁴ *Compare* Gould Inc. v. A & M Battery and Tire Serv., 901 F. Supp. 906, 908 (M.D. Pa. 1995) (allocating to plaintiff alone), *with* Sun Co. v. Browning Ferris, Inc., 124 F.3d 1187, 1193 (10th Cir. 1997) (allocating to both plaintiffs and defendants).

¹⁵ *See Aviall*, 543 U.S. at 166; *United States v. Atl. Research Corp. (Atlantic)*, 551 U.S. 128, 135 (2007); *see also* *Burlington N. & Santa Fe Ry. Co. v. United States (Burlington Northern)*, 129 A. S. Ct. 1870, 1881 (2009) (affirming joint and several liability as the general rule under CERCLA section 107, at least for claims by federal or state government plaintiffs).

¹⁶ *See* Gaynor et al., *supra* note 6, at 11,202; Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225, 255 (2008); Aaron Gershonowitz, *United States v. Atlantic Research Corp.: Who Should Pay to Clean up Inactive Hazardous Waste Sites?*, 19 DUKE ENVTL. L. & POL'Y F. 119, 148–49 (2008).

¹⁷ *See infra* Part III.C.

II. BACKGROUND

A. Joint and Several Versus Several Liability

The essence of joint and several liability is that the plaintiff may sue and recover the full amount of relief from any one of the jointly and severally liable defendants.¹⁸ The plaintiff may sue just one of the jointly and severally liable persons, and that defendant can be held responsible for the entire harm. Similarly, where the plaintiff sues and obtains a judgment against multiple jointly and severally liable defendants, the plaintiff may choose to execute and obtain full satisfaction of the judgment from any one of the defendants.¹⁹ It is the defendant's responsibility to seek contribution from other liable persons. Failure to seek contribution will leave the defendant responsible for the entire harm.²⁰

Joint and several liability can result in one defendant being responsible for plaintiff's entire harm, even though that one defendant may have been relatively less culpable than the other tortfeasors. The harsh consequences of joint and several liability can be ameliorated to some extent by allowing a defendant to bring a claim for contribution against other liable persons. Although early American law generally prohibited contribution among tortfeasors,²¹ during the twentieth century the vast majority of states authorized a right of contribution among tortfeasors, either judicially or by statute.²² The modern view recognizes a right of contribution when two or more persons become liable in tort to the same person for the same harm.²³ The right of contribution is an equitable remedy that exists in favor of a tortfeasor who has discharged a plaintiff's claim by paying more than its equitable share of the common liability, and the right is limited to the amount paid by it in excess of its share.²⁴ As a result of the contribution claim, that tortfeasor and the other tortfeasors it sues can end up sharing plaintiffs' damages.²⁵

But what happens where one or more of the other tortfeasors is insolvent, dead, or defunct? Under joint and several liability, the risk of

¹⁸ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (2000); RESTATEMENT (SECOND) OF TORTS § 875 (1979).

¹⁹ DAN B. DOBBS, THE LAW OF TORTS § 385, at 1078 (2000).

²⁰ *Cf.* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. b (2000) (burden of joining additional defendants is on original defendant).

²¹ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50 (4th ed. 1971). The common law rule against contribution among tortfeasors had its origin in *Merryweather v. Nixan*, (1799) 101 Eng. Rep. 1337 (K.B.), a 1799 English case in which contribution was denied to an intentional wrongdoer. For many decades in the United States, however, courts widely prohibited contribution among all tortfeasors, even in cases of mere negligence. PROSSER, *supra*, at § 50.

²² KEETON ET AL., *supra* note 8, § 50, at 338; RESTATEMENT (SECOND) OF TORTS § 886A cmt. a (1979).

²³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23 (2000).

²⁴ *Id.*; RESTATEMENT (SECOND) OF TORTS § 886A & cmt. c (1979).

²⁵ Today, a contribution claim can be asserted against other tortfeasors in the original action or via a separate action. *See* FED. R. CIV. P. 13(g) (crossclaim); *id.* at 14(a)(1) (third-party complaint); RESTATEMENT (SECOND) OF TORTS § 886A cmt. i (1979).

orphan shares is on the defendant.²⁶ In other words, contribution is worthless to a defendant when the other tortfeasors are insolvent or no longer in existence. The rationale is that it is better to have the culpable defendant bear the risk than the innocent plaintiff.²⁷

By contrast, if the defendant's liability is merely several, the plaintiff may recover from that defendant only its share of the plaintiff's damages.²⁸ There is no need for, or right to, contribution because the defendant has not paid more than its share.²⁹ Where there are multiple severally liable persons, the plaintiff has the burden of joining them and proving each defendant's share of liability.³⁰ The plaintiff cannot be made whole without suing all of the tortfeasors. The risk of insolvency or unavailability of other tortfeasors—the orphan share risk—is on the plaintiff.³¹

Joint and several liability originally was limited to tortfeasors who acted in concert to harm the plaintiff; such concerted action rendered each tortfeasor liable for the plaintiff's entire harm.³² The common law evolved, however, and the applicability of joint and several liability broadened. By the twentieth century, as reflected by the Restatement (Second) of Torts, common law generally imposed joint and several liability upon tortfeasors whose conduct caused an indivisible harm.³³ For example, where D1 negligently shoots P in the leg and D2 negligently shoots P in the arm, and P bleeds to death from the wounds, the harm is indivisible and D1 and D2 are jointly and severally liable for P's entire damages. Where the harm is divisible or there is a reasonable basis for apportioning cause of the single harm, however, each defendant is severally liable only for the harm individually caused.³⁴ So if in our prior example P did not die but was left with an injured leg and arm, D1 would be severally liable for the leg injury and D2 would be severally liable for the arm injury.³⁵

²⁶ RESTATEMENT (THIRD) OF TORTS § 10 cmt. a (2000); KEETON ET AL., *supra* note 8, §52, at 345.

²⁷ RESTATEMENT (THIRD) OF TORTS § 10 cmt. a (2000); *see also* DOBBS, *supra* note 19, §387, at 1082.

²⁸ RESTATEMENT (THIRD) OF TORTS § 11 (2000); KEETON ET AL., *supra* note 8, § 47, at 327.

²⁹ RESTATEMENT (THIRD) OF TORTS § 11 cmt. c (2000).

³⁰ *Id.* § B18 cmt. a.

³¹ *Id.* § 11 cmt. a (2000); KEETON ET AL., *supra* note 8, § 52, at 351.

³² KEETON ET AL., *supra* note 8, § 46, at 322–23; DOBBS, *supra* note 19, § 386, at 1078. Absent such concerted action, the plaintiff could not even join multiple defendants in the same suit. KEETON ET AL., *supra* note 8, § 47, at 325.

³³ RESTATEMENT (SECOND) OF TORTS § 875 (1979); *see* KEETON ET AL., *supra* note 8, § 52, at 345, 347.

³⁴ RESTATEMENT (SECOND) OF TORTS § 433A (1965).

³⁵ KEETON ET AL., *supra* note 8, § 52, at 345; *see* RESTATEMENT (SECOND) OF TORTS § 433A cmts. b & i (1965).

B. CERCLA

CERCLA was enacted in 1980 primarily to fund the investigation and cleanup of hazardous substance disposal sites.³⁶ The statute often is referred to as “Superfund” because, as originally enacted, it established a billion-dollar fund for the federal government to investigate and remediate abandoned contaminated sites.³⁷ More importantly for our purposes, CERCLA’s unique and expansive liability scheme created a powerful tool to force liable persons to pay for the costs of investigating and cleaning up contaminated sites. CERCLA section 107 authorizes the federal and state governments, and private plaintiffs, to sue persons liable under the statute to recover past and future costs incurred in response to releases of hazardous substances at or from a site.³⁸ CERCLA makes four categories of “responsible parties” expressly liable for such response costs: 1) current owners or operators of the site; 2) owners or operators of the site at the time hazardous substances were disposed; 3) generators or others who arranged for the disposal of hazardous substances at the site; and 4) transporters of hazardous substances to the site.³⁹ Liability for these responsible parties is strict,⁴⁰ and statutory defenses are few and narrow.⁴¹ Further, one of the statute’s prime principles is “polluter pays”—that is, responsible parties rather than the taxpaying public should pay for the cleanup costs⁴²—so by

³⁶ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, pmbll., 94 Stat. 2767, 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)). Incidents such as Love Canal, where chemicals from an old waste dump began oozing through a residential community constructed atop the former dumpsite near Niagara Falls, New York, exposed a gap in existing law and prompted enactment of CERCLA. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, & POLICY 393 (6th ed. 2009).

³⁷ See 42 U.S.C. § 9611 (2006). Sales taxes on oil and chemical companies originally provided funding for the Superfund, but the taxes expired in 1995. Today, the money for governmental cleanups comes from federal appropriations and amounts recovered from liable parties. Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 633, 644 (2009). The government typically spends \$15 million to \$30 million to clean up a CERCLA site, but it is not unusual for costs to exceed \$100 million. PERCIVAL ET AL., *supra* note 36, at 438.

³⁸ 42 U.S.C. § 9607(a) (2006). CERCLA section 106 also authorizes the federal government to force a liable person to clean up a contaminated site, either via suit in court or via an administrative order. *Id.* § 9606(a).

³⁹ *Id.* § 9607(a)(1)–(4) (2006). Courts and commentators often use the term “potentially responsible parties” or “PRPs” when discussing persons who might be liable under CERCLA section 107(a). See, e.g., *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 342 (D.N.J. 1999). In this Article, “responsible parties” refers to persons who would be subject to liability under CERCLA section 107(a), irrespective of whether they have been sued or found liable yet. See 42 U.S.C. § 9607(a) (2006).

⁴⁰ The statute adopts the strict liability standard of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (2006). 42 U.S.C. § 9601(32) (2006); see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

⁴¹ 42 U.S.C. § 9607(b) (2006) (listing acts of God, acts of war, or acts or omissions of a third party as defenses).

⁴² See *Burlington Northern*, 129A S. Ct. 1870, 1874 (2009); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805–06 (S.D. Ohio 1983).

and large courts have not been reluctant to impose liability. Thus, it is quite common for there to be multiple responsible parties at one site.⁴³

CERCLA liability also is retroactive,⁴⁴ and its statutes of limitations generally do not begin to run until response actions are underway,⁴⁵ thus rendering persons potentially liable for events that occurred many decades ago.⁴⁶ Combined with the wide net cast by the four categories of responsible parties, at many CERCLA sites some of the persons or corporations who would be liable are now dead, defunct, or insolvent.⁴⁷

CERCLA does not expressly provide for joint and several liability. Indeed, references to joint and several liability in the bill that became CERCLA were deleted prior to its passage.⁴⁸ But 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. Instead, Congress intended that the scope of liability under CERCLA, including the application of joint and several liability, should be determined from “traditional and evolving principles of common law.”⁴⁹

In an early influential CERCLA case, *United States v. Chem-Dyne Corp.*, the district court reviewed the legislative history and then invoked the Restatement (Second) of Torts to determine whether defendants in a governmental section 107 action were subject to joint and several liability.⁵⁰ Specifically, the *Chem-Dyne* court ruled that defendants are subject to joint and several liability unless they satisfy the burden of showing that the harm at the site is divisible or there is a reasonable basis for apportionment of the harm.⁵¹ Congress subsequently endorsed the *Chem-Dyne* / Restatement (Second) approach,⁵² and courts widely adopted it for determining whether

⁴³ See, e.g., *United States v. Davis*, 261 F.3d 1, 14 (1st Cir. 2001); *Compaction Sys.*, 88 F. Supp. 2d at 342–43.

⁴⁴ See *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732–733 (8th Cir. 1986).

⁴⁵ 42 U.S.C. § 9613(g) (2006).

⁴⁶ See, e.g., *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 546–47 (6th Cir. 2001) (finding defendant liable for contamination caused by its predecessor during nineteenth century).

⁴⁷ See, e.g., *Burlington Northern*, 129A S. Ct. at 1876 & n.4 (stating that insolvent former owner-operator was predominantly responsible for contaminating the site).

⁴⁸ See *Chem-Dyne*, 572 F. Supp. 802, 806 (S.D. Ohio 1983) (discussing legislative history of CERCLA).

⁴⁹ See *Burlington Northern*, 129A S. Ct. at 1881 (“[CERCLA does] not mandate ‘joint and several’ liability in every case. Rather, Congress intended the scope of liability to ‘be determined from traditional and evolving principles of common law.’”) (quoting *Chem-Dyne*, 572 F. Supp. at 808); *Chem-Dyne*, 572 F. Supp. at 806–08 (discussing CERCLA legislative history pertaining to joint and several liability); 126 CONG. REC. 30,932 (1980) (statement of Sen. Jennings Randolph (D-W. Va.)); *id.* at 31,965 (statement of Rep. James Florio (D-N.J.)).

⁵⁰ *Chem-Dyne*, 572 F. Supp. at 805–08, 810. The Supreme Court recently called *Chem-Dyne* the “seminal opinion on the subject of apportionment in CERCLA actions.” *Burlington Northern*, 129A S. Ct. at 1880.

⁵¹ *Chem-Dyne*, 572 F. Supp. at 810.

⁵² Congress in 1986 amended CERCLA to add an express provision authorizing contribution, 42 U.S.C. § 9613(f), thus allowing defendants subject to joint and several liability to obtain contribution from other responsible parties. The legislative history quoted liberally from Chief

defendants in a governmental CERCLA section 107 action are subject to joint and several liability. In doing so, courts routinely found that site contamination, often a toxic soup of chemicals from various parties, constituted an indivisible harm.⁵³ Accordingly, courts routinely imposed joint and several liability in section 107 actions by the government, allowing a defendant to escape joint and several liability only in the rare case where the defendant satisfies the heavy burden of showing that the harm it caused is divisible from the entire harm or there is a reasonable basis for determining the contribution of its cause to the entire harm.⁵⁴

In 2009, the Supreme Court in *Burlington Northern and Santa Fe Railway Company v. United States (Burlington Northern)*⁵⁵ endorsed the *Chem-Dyne* / Restatement (Second) approach for determining whether a responsible party is jointly and severally liable to the government in a CERCLA section 107 action.⁵⁶ The *Burlington Northern* Court actually found a reasonable basis for apportionment such that the defendant railroads were not jointly and severally liable for all response costs in that case,⁵⁷ and the opinion arguably has given defendants new hope for more frequent success in establishing divisibility or a reasonable basis of apportionment.⁵⁸ But the Court left no doubt that joint and several liability is the rule in governmental

Judge Rubin's opinion in *Chem-Dyne* and approved its approach to joint and several liability. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1647; H.R. REP. NO. 99-253(I), at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856.

⁵³ *United States v. Monsanto Co.*, 858 F.2d 160, 171–72 (4th Cir. 1988); *United States v. Western Processing Co.*, 734 F. Supp. 930, 942 (W.D. Wash. 1990); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1552–53 (W.D. Mich. 1989).

⁵⁴ *See* *O'Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir. 1989); CRAIG N. JOHNSTON, WILLIAM F. FUNK & VICTOR B. FLATT, *LEGAL PROTECTION OF THE ENVIRONMENT* 593 (3d ed. 2010); *RESTATEMENT (SECOND) OF TORTS* § 433A (1965).

⁵⁵ 129A S. Ct. 1870 (2009).

⁵⁶ *Id.* at 1880 (referring to *Chem-Dyne* as the “seminal opinion on the subject of apportionment in CERCLA actions”).

⁵⁷ *Id.* at 1882–84. The Court upheld as reasonable the apportionment of the district court, which held that the railroads were liable for nine percent of the site response costs. The trial court relied on the facts that the railroads owned only a portion of the site for only a portion of the time it was in operation and that only two of the three chemicals driving the remediation were spilled on the railroad's parcel. *Id.*

⁵⁸ Some commentators contend that *Burlington Northern* has made it easier for defendants to establish a reasonable basis of apportionment and thus avoid joint and several liability in governmental section 107 cases. *See* Gaynor et al., *supra* note 6, at 11,205–06; Rachel K. Evans, Case Comment, *Burlington Northern & Santa Fe Railway Co. v. United States*, 34 HARV. ENVTL. L. REV. 311, 319 (2010); Robert M. Guo, Note, *Reasonable Bases for Apportioning Harm Under CERCLA*, 37 *ECOLOGICAL L.Q.* 317, 319 (2010). Others, including the United States Department of Justice, contend that *Burlington Northern* has not changed the fundamental approach to determining divisibility or reasonable basis for apportionment. *See* *United States v. Iron Mountain Mines, Inc.*, No. 91-0768-JAM-JFM, 2010 WL 1854118, at *3 (E.D. Cal. May 6, 2010); Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 VT. J. ENVTL. L. 307, 310 (2009); Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern Is Not the Sword of Damocles for Joint and Several Liability*, 44 *NEW ENG. L. REV.* 249, 287 (2010).

CERCLA section 107 actions, absent proof of divisibility or a reasonable basis of apportionment by the defense.⁵⁹

Courts have repeatedly rejected defense arguments that the government in a CERCLA section 107 case must join other identified responsible parties as defendants, as necessary or indispensable parties.⁶⁰ Consistent with joint and several liability, the government may sue just one responsible party and recover all response costs at the site from that one defendant, irrespective of whether other responsible parties contributed to the contamination and would be liable if sued. It is the original defendant's burden, say the courts, to join or sue additional responsible parties and seek contribution from them.⁶¹

What happens, though, when the other responsible parties are insolvent or no longer in existence and cannot be sued for contribution under CERCLA? Because the contamination at Superfund sites often occurred decades prior to suit, orphan shares are common and can be sizable in CERCLA cases.⁶² Where the government plaintiff brings a section 107 action, consistent with joint and several liability, the defendant bears the entire orphan share and the plaintiff government bears none.⁶³

III. PRIVATE CERCLA CLAIMS AND THE ORPHAN SHARE PROBLEM

While joint and several liability is clearly the general rule in governmental CERCLA section 107 actions, the picture is far more hazy for private CERCLA claims. Two CERCLA sections authorize private claims for response costs. As mentioned above, section 107(a) contemplates actions by private parties, as well as by the federal and state governments, to recover past and future costs incurred in response to releases of hazardous substances.⁶⁴ Additionally, section 113(f) allows a responsible party to seek

⁵⁹ The Court articulated the same standard articulated in *Chem-Dyne* and the Restatement (Second) of Torts § 433A to uphold the district court's basis for apportionment. *Burlington Northern*, 129A S. Ct. at 1881.

⁶⁰ See, e.g., *United States v. Marisol, Inc.*, 725 F. Supp. 833, 843 (M.D. Pa. 1989).

⁶¹ See, e.g., *id.*; *Cal. Dept. of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1043 (C.D. Cal. 2002).

⁶² See Gershonowitz, *supra* note 16, at 148–49.

⁶³ See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989) (“While a right of contribution undoubtedly softens the blow where parties cannot prove that the harm is divisible, it is not a complete panacea since it frequently will be difficult for defendants to locate a sufficient number of additional, solvent parties.”). See also *PERCIVAL ET AL.*, *supra* note 36, at 430 (fear of being saddled with orphan shares spurs responsible parties to argue divisibility or reasonable basis of apportionment). Responding to cries of unfairness by viable responsible parties at sites where much of the contamination was attributable to insolvent responsible parties, the federal government developed an “orphan share policy.” See U.S. ENVTL. PROT. AGENCY, INTERIM GUIDANCE ON ORPHAN SHARE COMPENSATION FOR SETTLORS OF REMEDIAL DESIGN/REMEDIAL ACTION AND NON-TIME-CRITICAL REMOVALS 1, 4 (1996), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/orphan-share-rpt.pdf>. At its discretion and as part of a settlement, the government may pay up to 25% of the site response costs in recognition of a substantial orphan share. *Id.* at 4.

⁶⁴ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a) (2006).

contribution from other responsible parties under certain circumstances.⁶⁵ Which section applies when, and what effect that has on scope of liability and orphan shares, are questions that have bedeviled courts and commentators.

A. Yesteryear

As originally enacted, CERCLA contained no express provision authorizing contribution.⁶⁶ In the early 1980s, the question repeatedly arose whether a defendant sued under CERCLA had a right of contribution against other responsible parties. Most courts held that, despite the absence of an express contribution provision in CERCLA, a defendant had a right of contribution against another responsible party, either impliedly or as a matter of federal common law.⁶⁷ However, the availability of contribution under CERCLA was not free from doubt at that time, in light of some district court precedent disallowing contribution under CERCLA⁶⁸ and some Supreme Court precedent refusing to imply contribution under other statutes.⁶⁹ In 1986, as part of the Superfund Amendments and Reauthorization Act, Congress added an express contribution provision—section 113(f), specifically labeled “Contribution”—to clarify and confirm the right of a jointly and severally liable responsible party to seek contribution from other responsible parties.⁷⁰ In resolving contribution claims, section 113(f)(1) instructs courts to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”⁷¹

⁶⁵ *Id.* § 9613(f).

⁶⁶ See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767–2811 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)); *Aviall*, 543 U.S. 157, 162 (2004).

⁶⁷ See, e.g., *United States v. New Castle Cnty.*, 642 F. Supp. 1258, 1269 (D. Del. 1986) (finding that the right to contribution under CERCLA exists as a matter of federal common law); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 223–29 (W.D. Mo. 1985) (holding in part that the right of contribution is implied); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (holding in part that the right of contribution is implied); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1488–89 (D. Colo. 1985) (finding that Congress intended issues of contribution to be determined under the federal common law).

⁶⁸ See *United States v. Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587, at *4 (S.D. Ind. June 29, 1983).

⁶⁹ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639–40 (1981) (Sherman Act and Clayton Act); *Nw. Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 94–95 (1981) (Equal Pay Act and Title VII of the Civil Rights Act); see also *Aviall*, 543 U.S. 157, 161–62 (2004).

⁷⁰ 42 U.S.C. § 9613(f) (2006); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1647 (1986); H.R. REP. NO. 99-253(I), at 79 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

⁷¹ 42 U.S.C. § 9613(f)(1) (2006). Courts in CERCLA section 113(f) cases have employed a plethora of factors to allocate response costs equitably among responsible parties. Frequently invoked are the so-called Gore factors, proposed by then-Representative Al Gore during Congress’s consideration of the bill that would become CERCLA: 1) the ability of the party to demonstrate that its contribution to the contamination can be distinguished; 2) the amount of

A private right of action also is available under CERCLA section 107. Section 107(a) expressly provides that responsible parties “shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State” and “(B) any other necessary costs of response incurred by any other person.”⁷² In the early 1980s, courts wrestled with whether a private party could maintain an action for cost recovery under section 107 when the plaintiff was a responsible party, and most courts found that a responsible party plaintiff could sue under section 107.⁷³ Courts that allowed a responsible party to bring a section 107 action, though, sometimes seemed uncomfortable with allowing the responsible party plaintiff to actually recover costs, denying recovery on equitable grounds such as unclean hands.⁷⁴

Following the addition of section 113(f) in 1986, there was considerable disagreement over when a private CERCLA plaintiff could bring an action under section 107 rather than section 113. Courts during this era consistently stated that defendants in section 107 actions were subject to joint and several liability whereas defendants in section 113 actions were only severally liable.⁷⁵ Where the government sued a defendant for response costs under CERCLA section 107, it was clear that the defendant’s third-party

hazardous substance involved; 3) the degree of toxicity of hazardous substance involved; 4) the degree of involvement by the party in the generation, transportation, treatment, storage, or disposal of hazardous substance; 5) the degree of care exercised by the party; and 6) the degree of cooperation by the party with government officials to prevent harm to public health or the environment. 126 CONG. REC. 26,781 (1980). But virtually any factor a lawyer can think of has been utilized, and no single factor is determinative. *See, e.g.,* Bedford Affiliates v. Sills, 156 F.3d 416, 429–30 (2d Cir. 1998) (allocating 5% share to plaintiff lessor and 95% share to defendant lessee); United States v. R.W. Meyer, Inc., 932 F.2d 568, 571–73 (6th Cir. 1991) (analyzing the trial court’s decision to allocate two thirds share of liability to generators and one third share of liability to owner, and noting that Congress gave the courts broad discretion under section 113(f)(1) to take into account any factor when allocating contribution).

⁷² 42 U.S.C. § 9607(a)(4)(A), (B) (2006). The elements of private and governmental claims for response costs under section 107 are the same, except that a private plaintiff must prove that the costs incurred are “necessary” and “consistent with the national contingency plan,” whereas in government actions the defendant has the burden of showing that the costs incurred are inconsistent with the national contingency plan. *Id.*

⁷³ *See* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (reversing district court); Walls v. Waste Res. Corp., 761 F.2d 311, 317–18 (6th Cir. 1985) (reversing district court); *see generally* Aviall, 543 U.S. 157, 161–62 (2004) (noting various courts allowed responsible parties to bring section 107 cause of action).

⁷⁴ *See* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1057–58 (D. Ariz. 1984), *aff’d*, 804 F.2d 1454 (9th Cir. 1986) (unclean hands); Smith Land & Improvement Corp. v. Rapid-Am. Corp., 26 ERC 2023 (M.D. Pa. 1987), *rev’d sub nom.* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89–90 (3d Cir. 1988) (caveat emptor). The statute expressly sets forth only three defenses to liability in an action under section 107: where the release is caused solely by an act of God, an act of war, or an act or omission of a third party. 42 U.S.C. § 9607(b) (2006). Equitable defenses to liability are not recognized in governmental actions under section 107. *See* United States v. Kramer, 757 F. Supp. 397, 427–28 (D.N.J. 1991).

⁷⁵ *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).

complaint or cross-claim against other responsible parties was for contribution under section 113.⁷⁶ However, some savvy responsible parties, rather than waiting for the government to perform the cleanup and then be sued, had begun “voluntarily” cleaning up contaminated sites for which they were subject to liability.⁷⁷ Could such responsible parties bring a suit for cost recovery under section 107, or must they sue under section 113? In general, private plaintiffs argued in favor of section 107, eager to obtain the benefit of joint and several liability afforded government plaintiffs.⁷⁸ Defendants, by contrast, typically argued that private plaintiffs should be limited to section 113 claims, for which defendants would be only severally liable.⁷⁹ A few district court opinions during this era held that a responsible party plaintiff could maintain an action under section 107 to recover response costs incurred.⁸⁰ Other district courts, though, ruled that only innocent plaintiffs could sue under section 107; responsible party plaintiffs were limited to suing under section 113—irrespective of whether those plaintiffs had undertaken the cleanup “voluntarily.”⁸¹

By the late 1990s, however, virtually all of the circuits had addressed the issue and unanimously had held that a responsible party plaintiff was limited to suing under section 113 and could not maintain an action under section 107.⁸² A prime rationale was that a responsible party plaintiff should

⁷⁶ See, e.g., *United States v. Davis*, 20 F. Supp. 2d 326, 332 (D.R.I. 1998), *aff'd in part*, 261 F.3d 1 (1st Cir. 2001); *United States v. Kramer*, 953 F. Supp. 592, 601 (D.N.J. 1997).

⁷⁷ Private parties may be able to perform a cleanup more cost effectively than the government. See JOHN M. HYSON, *PRIVATE COST RECOVERY ACTIONS UNDER CERCLA*, at xi–xii (2003); Joseph A. Fischer, Comment, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the UCATA*, 30 HOUS. L. REV. 1979, 1991–92 (1994). Also, because the government can recover its litigation costs from responsible parties in a CERCLA action, a voluntary response action saves the private party both the costs of its own and of the government’s attorneys. See *United States v. Serafini*, 795 F. Supp. 723, 727–28 (M.D. Pa. 1992), *vacated for reconsideration*, 898 F. Supp. 287 (M.D. Pa. 1994), *aff’d*, 135 F.3d 767 (3d Cir. 1997).

⁷⁸ See, e.g., *Centerior Serv. Co.*, 153 F.3d at 349–50. Depending on the circumstances, a claim under section 107 might also have advantages for purposes of the applicable CERCLA statute of limitations and in avoiding the contribution protection bar of 42 U.S.C. § 9613(f)(2). See *infra* Part IV.D.2.

⁷⁹ See, e.g., *New Castle Cnty. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997).

⁸⁰ See, e.g., *Charter Twp. of Oshtemo v. Am. Cyanamid Co.*, 910 F. Supp. 332, 337–38 (W.D. Mich. 1995); *Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1293 (E.D. Va. 1992); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118–19 (N.D. Ill. 1988). Some commentators also advocated for allowing a responsible party plaintiff to sue under section 107. Hernandez, *supra* note 6, at 110–13.

⁸¹ See, e.g., *Reynolds Metals Co. v. Ark. Power & Light Co.*, 920 F. Supp. 991, 995–97 (E.D. Ark. 1996); *Kaufman & Broad-S. Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1216–17 (N.D. Cal. 1994). See also Karl Tilleman & Shane Swindle, *Closing the Book on CERCLA Section 107 “Joint and Several” Claims by Liable Private Parties*, 18 VA. ENVTL. L.J. 159, 171–74 (1999) (advocating that responsible party plaintiffs may sue only under section 113).

⁸² *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530 (8th Cir. 2003); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423–24 (2d Cir. 1998), *overruled by* *W.R. Grace & Co. v. Zotos Int’l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009); *Centerior Serv. Co.*, 153 F.3d at 351; *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek*, 118 F.3d 1298, 1303 (9th Cir. 1997), *overruled by* *Kotrous v. Goss-Jewett Co.*, 523 F.3d 924, 926–27 (9th Cir. 2008); *New Castle Cnty.*, 111 F.3d at 1124; *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489,

not be entitled to the advantage of joint and several liability under section 107, but rather should be limited to several liability under section 113.⁸³ Pointedly, section 107 joint and several liability was viewed as mandating that the entire orphan share be absorbed by defendants, and courts did not want responsible party plaintiffs to be relieved of the orphan share burden as a matter of law.⁸⁴ An example is *Pinal Creek Group v. Newmont Mining Corp.*⁸⁵ The plaintiff, a group of admittedly responsible parties, sued other responsible parties under section 107 to recover the costs the group had voluntarily incurred in cleaning up an Arizona site.⁸⁶ The Ninth Circuit ruled that the responsible party plaintiff must sue under section 113, specifically rejecting the availability of a section 107 claim because of the consequences of joint and several liability.⁸⁷ Key to the Ninth Circuit's rationale was its concern that joint and several liability under section 107 would require the defendants to pay for all of the orphan shares while the responsible party plaintiff would bear none of the orphan shares:

If a group of defendant-PRPs is held jointly and severally liable for the total response costs incurred by a claimant-PRP, reduced by the amount of the claimant-PRP's own share, those defendant-PRPs would end up absorbing all of the costs attributable to "orphan shares"—those shares attributable to PRPs who either are insolvent or cannot be located or identified. There is no statutory support for such a rule, which would immunize the claimant-PRP from the risk of orphan-share liability and would restrict substantially the ability of courts to apportion costs equitably pursuant to § 113(f). Immunizing PRPs who have directly paid for cleanup operations from the risk of sharing the cost associated with orphan shares would undermine the ability of courts to allocate costs between all PRPs "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1).⁸⁸

Such concern was not unfounded. Some of the district courts which had allowed a responsible party plaintiff to sue under section 107 held that, due to joint and several liability, the defendants bore all of the orphan shares

1496 n.7 (11th Cir. 1996); *United States v. Colo. & E.R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *United Techs. Corp. v. Browning-Ferris Indus. Inc.*, 33 F.3d 96, 100 (1st Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (dicta).

⁸³ 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. Other reasons were that allowing responsible party plaintiffs to sue under section 107 would circumvent the contribution protection afforded by 42 U.S.C. § 9613(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). See *Akzo*, 30 F.3d at 766; *United Techs.*, 33 F.3d at 101; see generally *infra* Part IV.D.2.

⁸⁴ *Pinal Creek*, 118 F.3d at 1303; *Centerior Serv.*, 153 F.3d at 354 n.12.

⁸⁵ 118 F.3d 1298 (9th Cir. 1997).

⁸⁶ *Id.* at 1299–1300.

⁸⁷ *Id.* at 1306.

⁸⁸ *Id.* at 1303. Accord *Morrison Enters.*, 302 F.3d at 1135.

while the plaintiff bore none.⁸⁹ Yet not all district courts which had allowed responsible party plaintiffs to sue under section 107 during that era universally followed the defendants-only approach to orphan share allocation. Some courts that authorized section 107 suits by responsible party plaintiffs, despite incantations of joint and several liability, nevertheless made the plaintiffs as well as the defendants absorb portions of the orphan share.⁹⁰

The eventual unanimity among the circuits that responsible party plaintiffs were precluded from suing under section 107 and were limited to section 113 actions, however, did not translate into uniformity in how courts dealt with orphan shares in section 113 actions. As mentioned in Part II.A, the hallmark of several liability is that the defendant only pays for its share of the harm and the plaintiff bears the burdens of joining other liable parties and paying the share of any insolvent, dead, or defunct defendant.⁹¹ Thus true several liability would dictate that defendants in CERCLA section 113 actions not bear any responsibility for orphan shares. Nevertheless, courts addressing responsibility for orphan shares in CERCLA section 113 cases were not consistent during this era. At least one court did hold that a responsible party plaintiff suing under section 113 bears all of the orphan share risk because liability of defendants is several and they can pay no more than their own shares.⁹² By contrast, several courts held that orphan shares did not fall exclusively on the section 113 plaintiff.⁹³ Even though these courts recited that defendants in section 113 actions were subject only to several liability, they held that orphan shares could be allocated among

⁸⁹ For example, in *Pneumo Abex Corp. v. Bessemer & Lake Erie RR.*, 921 F. Supp. 336 (E.D. Va. 1996), *rev'd sub nom.* 142 F.3d 769 (4th Cir. 1998), the responsible party plaintiffs incurred cleanup costs pursuant to a consent decree with the United States and were permitted to sue other responsible parties for cost recovery under section 107. Although the court did not hold defendants liable for plaintiffs' equitable share of the response costs, defendants were held jointly and severally liable for the remaining response costs and, specifically, that "[d]efendants are liable for any orphan shares." 921 F. Supp. at 348; *see also* *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (finding defendants in private CERCLA section 107 action subject to joint and several liability and liable for all orphan shares); *Hernandez*, *supra* note 6, at 110.

⁹⁰ *See* *Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992) (holding defendants jointly and severally liable for their shares of the response costs, but court refused to hold defendants liable for the entire orphan share, ruling that responsible party plaintiff must also absorb a portion of the orphan share); *Charter Twp. of Oshtemo v. Am. Cyanamid Co.*, 898 F. Supp. 506, 509 (W.D. Mich. 1995) (ruling that defendants were jointly and severally liable for their shares of the cleanup costs, but that shares attributable to insolvent parties should be equitably allocated among both plaintiffs and defendants).

⁹¹ KEETON ET AL., *supra* note 8, § 52; EPSTEIN, *supra* note 12, § 9.2; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 cmt. a (2000).

⁹² *Gould Inc. v. A & M Battery & Tire Serv.*, 901 F. Supp. 906, 908, 913 (M.D. Pa. 1995), *vacated on other grounds*, 232 F.3d 162 (3d Cir. 2000); *cf.* *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (reasoning that unless defendants were subject to joint and several liability in private CERCLA section 107 actions, it "would leave the willing PRP holding the bag for the insolvent companies"); *see also* 2 ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE*, § 10.1 (1992).

⁹³ *See, e.g., Pinal Creek*, 118 F.3d at 1303.

both plaintiff and defendants.⁹⁴ Reasoning that section 113(f)(1) gave them the power to allocate response costs equitably, the courts ruled that they could allocate orphan shares to achieve equitable results as well.⁹⁵

So as the new millennium was dawning, the law could be summarized as follows: It was clear that the federal or state government could maintain an action under CERCLA section 107, and defendants in such government cases were subject to joint and several liability, absent the rare instance of a defendant establishing divisibility or a reasonable basis of apportionment. The government need not join all responsible parties as defendants; the government could sue and recover all of its response costs at a site from just one responsible party, if it chose. It was up to the defendants to pursue other responsible parties for contribution, and the government bore no orphan share risk.⁹⁶

The courts of appeals had also made clear that a private responsible party could only maintain an action under section 113, not section 107, even if the plaintiff had never been sued by the government and was seeking recovery of its own cleanup costs. Liability of defendants in such section 113 actions was described as several.⁹⁷

But it was far less than clear what such several liability meant with respect to orphan shares. Response costs were allocated among the responsible parties, both plaintiffs and defendants, pursuant to equitable factors, as section 113(f)(1) directs. However, where one or more of the responsible parties were insolvent, dead, or defunct, courts were mixed on how such orphan shares should be handled. A minority of courts found that the section 113 plaintiff bore all of the orphan shares, while the majority ruled that the orphan shares could be allocated among all solvent existing parties, whether plaintiffs or defendants.⁹⁸ Commentators during this era

⁹⁴ *Id.*

⁹⁵ *See, e.g., id.*; *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 & n.12 (6th Cir. 1998); *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 13 F. Supp. 2d 756, 773 (N.D. Ill. 1998), *aff'd in part, rev'd in part*, 195 F.3d 953 (7th Cir. 1999); *see also* *United States v. Kramer*, 953 F. Supp. 592, 601 (D.N.J. 1997) (stating orphan shares can be allocated among original defendants in governmental section 107 action and third-party defendants in section 113 contribution action, despite third-party defendants' liability only being several). Typically, orphan shares were allocated among the responsible parties in the same pro rata percentages as their response costs were allocated. *See Ekotek Site PRP Comm. v. Self*, 1 F. Supp. 2d 1282, 1293–94 (D. Utah 1998); *United States v. Vertac Chem. Corp.*, 79 F. Supp. 2d 1034, 1040 (E.D. Ark. 1999), *vacated on other grounds*, 247 F.3d 706 (8th Cir. 2001). But equitable considerations led some courts to allocate the orphan shares differently. *See City of Wichita v. Trustees of the Apco Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1118–19 (D. Kan. 2003). Plaintiffs in section 113 cases had the burden of proving that a responsible party was insolvent, dead, or defunct. Failure to satisfy this burden resulted in the plaintiffs being liable for the shares of such nonparties. *Boeing Co. v. Nw. Steel Rolling Mills, Inc.*, No. 97-35973, 2004 WL 540706, at *3 (9th Cir. Mar. 17, 2004); *United States v. Davis*, 31 F. Supp. 2d 45, 68 (D.R.I. 1998), *aff'd in part*, 261 F.3d 1 (1st Cir. 2001).

⁹⁶ *See supra* Part II.B.

⁹⁷ *See supra* text accompanying notes 83–84.

⁹⁸ *See supra* text accompanying notes 92–95.

noted both the uncertainty in the law regarding the treatment of orphan shares in private CERCLA litigation and the critical importance of the issue.⁹⁹

B. Aviall and Atlantic Watershed

During the past several years, however, the United States Supreme Court in a pair of watershed decisions upset what was well-settled law regarding private rights of action under sections 107 and 113. Whereas previously a private responsible party was limited to suing under section 113 and could not maintain an action under section 107, these two decisions overturned unanimous circuit authority to sharply restrict a private party's ability to bring a section 113 contribution claim but greatly expand the ability to sue under section 107. As yet unanswered is whether this wholesale change to private CERCLA claims will alter or clarify the law applicable to orphan shares. The remainder of this Part III discusses the two Supreme Court decisions and their impact on the ability of private parties to maintain claims under sections 107 and 113. It then explores the impacts of this changed landscape of private CERCLA actions upon orphan shares.

The first shoe to drop came in 2004 in *Cooper Industries, Inc. v. Aviall Services, Inc. (Aviall)*.¹⁰⁰ Cooper sold to Aviall four sites in Texas, which Aviall subsequently discovered were contaminated. Faced with a threatened suit by a state agency, Aviall "voluntarily" remediated the sites and then sued Cooper under section 113 to recover a portion of its \$5 million response costs.¹⁰¹ The federal district court, giving a literal reading to the terms of section 113(f)(1) providing that a person may seek contribution "during or following" civil actions under CERCLA section 106 or section 107, dismissed plaintiff's section 113 claim on the basis that Aviall had not been sued under CERCLA section 106 or section 107.¹⁰² The Fifth Circuit en banc reversed, following the unanimous decisions of other circuits and holding that a responsible party plaintiff, although barred from maintaining an action for cost recovery under CERCLA section 107, could sue under section 113 for response costs incurred "voluntarily" irrespective of any prior CERCLA suit or settlement.¹⁰³

⁹⁹ See Hernandez, *supra* note 6, at 84–85; Organ, *supra* note 6, at 1096–97 (suggesting amendment of section 113 to authorize allocation of orphan shares); William D. Auxer, Comment, *Orphan Shares: Should They Be Borne Solely by Settling PRP Conducting the Remedial Cleanup or Should They Be Allocated Among All Viable PRPs Relative to Their Equitable Share of CERCLA Liability*, 16 TEMP. ENVTL. L. & TECH. J., 1997–1998, at 267, 269–70.

¹⁰⁰ 543 U.S. 157 (2004).

¹⁰¹ *Id.* at 164.

¹⁰² *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. Civ.A.397CV1926D, 2000 WL 31730, at *4 (N.D. Tex. Jan. 13, 2000). Aviall also had not resolved its CERCLA liability to the government in an administrative or judicially approved settlement, as described in 42 U.S.C. § 9613(f)(3)(B). See *Aviall*, 543 U.S. at 167–68.

¹⁰³ See *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004). The Fifth Circuit's original panel decision had affirmed the district court, two to one. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 135, 145 (5th Cir. 2001), *rev'd en banc*, 312 F.3d 677 (5th Cir. 2002), *rev'd*, 543 U.S. 157 (2004).

The Supreme Court, though, stunned the CERCLA community by reversing the Fifth Circuit.¹⁰⁴ The Court held that a private responsible party could seek contribution under section 113 only after being sued under sections 106 or 107 or after resolving its CERCLA liability in an administrative or judicially approved settlement.¹⁰⁵ In so doing, the Court overruled unanimous circuit precedent that all claims by a responsible party plaintiff to recover CERCLA response costs were in the nature of contribution and were governed by section 113. Instead, the Court relied on the “clear meaning of the text”¹⁰⁶ to interpret section 113(f): Aviall had not been sued before it brought its CERCLA claim against Cooper, so its claim was not “during or following any civil action under section 9606 . . . or under section 9607(a)” as contemplated by section 113(f)(1).¹⁰⁷ Nor had Aviall “resolved its liability to the United States or a State . . . in an administrative or judicially approved settlement” as contemplated by section 113(f)(3)(B).¹⁰⁸ Thus Aviall, a responsible party plaintiff who “voluntarily” incurred response costs, was precluded from maintaining a CERCLA section 113(f) claim.¹⁰⁹ The majority refused to decide Aviall’s alternative contention, that it had a claim under section 107, because the issue had neither been decided nor briefed below.¹¹⁰

The *Aviall* decision left the CERCLA community in a state of anxiety and uncertainty.¹¹¹ “Voluntary” cleanups—that is, cleanups by responsible parties undertaken without first having settled or been sued under CERCLA—had become commonplace.¹¹² Yet *Aviall* cut off the ability of such responsible parties to recover their costs under section 113, while failing to address the unanimous circuit precedents that barred a responsible party from suing under section 107. Thus, post-*Aviall* a responsible party who voluntarily cleaned up a site could be left shouldering the entire cleanup cost burden, without a CERCLA remedy against other responsible parties under either section 107 or 113. Not surprisingly, responsible parties became less inclined to voluntarily undertake CERCLA cleanups, which forced the government to sue responsible parties or conduct the cleanup itself,

¹⁰⁴ See *Aviall*, 543 U.S. at 167–68; Aronovsky, *supra* note 16, at 245 (“*Aviall* stunned the regulated community, causing widespread uncertainty about whether PRPs could recover voluntarily incurred cleanup costs from other PRPs.”); Jeffrey M. Gaba, *United States v. Atlantic Research: The Supreme Court Almost Gets It Right*, 37 ENVTL. L. REP. (Envtl. Law Inst.) 10,810, 10,812 (2007) (“[*Aviall*] rocked the established view of CERCLA.”).

¹⁰⁵ See *Aviall*, 543 U.S. at 167–68.

¹⁰⁶ *Id.* at 167.

¹⁰⁷ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(f)(1) (2006); see *Aviall*, 543 U.S. at 167–68.

¹⁰⁸ 42 U.S.C. § 9613(f)(3)(B) (2006); see *Aviall*, 543 U.S. at 167–68.

¹⁰⁹ See *Aviall*, 543 U.S. at 165–68.

¹¹⁰ See *id.* at 170. In her dissent in which Justice Stevens joined, Justice Ginsburg did not disagree with the majority’s analysis of section 113, but she would have ruled that Aviall had a claim for cost recovery under section 107. *Id.* at 171–74 (Ginsburg, J., dissenting).

¹¹¹ See Ferrey, *supra* note 37, at 688 (“*Aviall* created uncertainty and chaos.”).

¹¹² *Id.* at 687.

resulting in delays in site remediation and increased government litigation and cleanup costs.¹¹³

Many district courts continued to follow pre-*Aviall* circuit precedents and held that responsible parties could not sue under section 107, even where they no longer had any remedy under section 113.¹¹⁴ At the appellate level, a few circuits were willing to revisit their prior precedents in light of the changed post-*Aviall* landscape and allow responsible parties to maintain a section 107 action.¹¹⁵ Others, however, continued to rule that responsible parties could not maintain a section 107 claim, even where that would leave the plaintiff without a CERCLA remedy.¹¹⁶

The other shoe dropped in 2007 when the Court decided *United States v. Atlantic Research Corp. (Atlantic)*.¹¹⁷ Atlantic “voluntarily” cleaned up a contaminated site in Nevada it had leased from the United States Department of Defense, then sued the United States under CERCLA section 107 in an effort to recover a portion of its response costs.¹¹⁸ The district court dismissed plaintiff’s section 107 claim, in reliance on pre-*Aviall* circuit precedent precluding a responsible party from suing under section 107.¹¹⁹ But the Eighth Circuit reversed, overruling its prior precedent and holding that a responsible party can maintain a section 107 action.¹²⁰ The Supreme Court unanimously affirmed, holding that a responsible party who voluntarily incurs response costs can sue under CERCLA section 107. Focusing on the “plain language” of CERCLA section 107(a)(4)(B)¹²¹ and

¹¹³ See Brief for Amici Curiae Natural Resources Defense Council in Support of Respondent at 28–30, *Atlantic*, 551 U.S. 128 (2007) (No. 06-562); Jason Nichols, *Resolving the Federal Court Conflict over CERCLA Cost Recovery for Potentially Liable Parties—Some Suggestions for Giving Order to Post-Aviall Section 107 Jurisprudence and for Encouraging Voluntary Cleanup of Environmental Site Contamination*, 74 TENN. L. REV. 275, 281 (2007).

¹¹⁴ See, e.g., *Differential Dev.–1994, Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 753 (S.D. Tex. 2007); *AMCAL Multi-Housing, Inc. v. Pac. Clay Prods.*, 457 F. Supp. 2d 1016, 1026 (C.D. Cal. 2006); *Mercury Mall Assoc. v. Nick’s Mkt., Inc.*, 368 F. Supp. 2d 513, 520 (E.D. Va. 2005). However, a few district courts allowed a responsible party plaintiff to sue under section 107 post-*Aviall*. See, e.g., *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3, 7–8 (D.D.C. 2005).

¹¹⁵ *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 92, 95 (2d Cir. 2005); *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 836 (7th Cir. 2007).

¹¹⁶ *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 532 (3d Cir. 2006).

¹¹⁷ 551 U.S. 128 (2007).

¹¹⁸ *Id.* at 133.

¹¹⁹ Atlantic originally sued under section 113 as well, but the Court’s subsequent decision in *Aviall* clearly foreclosed relief under section 113 for Atlantic because it neither had been sued under CERCLA nor had settled with the government. *Id.* at 133–34.

¹²⁰ *Id.* at 134; *Atl. Research Corp. v. United States*, 459 F.3d 827, 837 (8th Cir. 2006), *aff’d*, 551 U.S. 128 (2007).

¹²¹ 551 U.S. at 136. Section 107(a)(4) provides that a responsible party 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; [and] (B) any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.” Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(4) (2006) (emphasis added). The defendant, United States, had argued that the phrase “any other person” meant persons other than the four categories of

rejecting arguments by the defendant United States, the Court ruled that *any person* may maintain an action for cost recovery under section 107, irrespective of whether that person is a responsible party.¹²² Thus, *Atlantic* overruled the many lower court decisions that had foreclosed section 107 actions by responsible parties and opened a new avenue for responsible parties to recover a portion of their response costs, notwithstanding their inability, post-*Aviall*, to maintain a section 113 claim for contribution.

C. Today

1. The Muddle of Sections 107 and 113

Today, in the aftermath of *Aviall* and *Atlantic*, the old CERCLA paradigm governing private section 107 and section 113 claims has been turned largely on its head. No longer is every CERCLA claim by a responsible party considered an action for contribution under section 113. Rather, a contribution claim under section 113 is limited to persons who have been sued in a civil action under sections 106 or 107 or have resolved their CERCLA liability to the government via an administrative or judicially approved settlement.¹²³ No longer is a section 107 claim limited to government and innocent plaintiffs. Any person who voluntarily incurs its own response costs, even a responsible party, can maintain a section 107 action.¹²⁴

Atlantic cleared up a major question left unanswered by *Aviall*—now we know that a responsible party that has voluntarily cleaned up a site is not left without a CERCLA remedy even though it has no section 113 contribution claim. Yet the Court in *Atlantic* left plenty to be decided regarding the circumstances under which a responsible party may maintain a section 107 claim, a section 113 claim, neither or both.¹²⁵

The government in *Atlantic* had argued that allowing responsible parties to sue under section 107 would create friction between sections 107 and 113.¹²⁶ The *Atlantic* Court, though, stated that the two sections “complement each other by providing causes of action ‘to persons in

responsible parties identified in section 107(a)(1)–(4), but the Court agreed with *Atlantic* and the Eighth Circuit that the phrase meant persons other than the federal or state government or Indian tribe referenced in section 107(a)(4)(A). 551 U.S. at 134–35.

¹²² 551 U.S. at 134–41.

¹²³ *Aviall*, 543 U.S. 157, 167–68 (2004); 42 U.S.C. § 9613(f)(1), (3)(B) (2006).

¹²⁴ *Atlantic*, 551 U.S. at 139; 42 U.S.C. § 9607(a) (2006).

¹²⁵ See Steven Ferrey, *The Superfund Cost Allocation Liability Conflicts Among the Federal Courts*, 11 VT. J. ENVTL. L. 249, 251 (2009) (noting uncertainties and gaps regarding CERCLA private actions); Craig N. Johnston, *United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA*, 22 J. ENVTL. L. & LITIG. 313, 334–41 (2007) (identifying categories of potential plaintiffs for whom it was left unresolved whether they had a claim under section 107 or section 113).

¹²⁶ 551 U.S. at 137.

different procedural circumstances.”¹²⁷ In distinguishing between the two sections, the Court emphasized that “§107(a) permits a PRP to recover only the costs it has ‘incurred’ in cleaning up a site,” whereas section 113(f) applies where a party via settlement or judgment reimburses others for cleanup costs they incurred.¹²⁸ The Court also drew a distinction between section 107 claims brought by parties who have incurred costs voluntarily and section 113 claims brought by parties who have been compelled to pay by suit or settlement under CERCLA.¹²⁹ Yet the *Atlantic* Court recognized that its articulated distinctions—incurring own costs versus reimbursing others, and voluntary versus compelled—did not eliminate ambiguity or overlap between sections 107 and 113 in all settings. In particular, the Court acknowledged that a party who enters into a consent decree with the government following suit under CERCLA and performs cleanup work pursuant to the decree terms is neither incurring costs voluntarily nor reimbursing costs of another, and the Court pointedly declined to “decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both.”¹³⁰

Subsequent lower court decisions have done little to clarify whether a plaintiff has a section 107 or a section 113 claim following a CERCLA consent decree. Some courts have held that a party who enters into a consent decree has a claim only under section 113(f), even for the costs it incurs in performing cleanup work required by the decree.¹³¹ Other courts have ruled that the consent decree party has a claim under both sections 107 and 113.¹³² Commentators are similarly mixed, with some advocating that the consent decree party’s claim is strictly under section 113 because the work was not voluntary,¹³³ while others urge that the claim is governed by section

¹²⁷ *Id.* at 139 (quoting *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 99 (2d Cir. 2005)).

¹²⁸ *Id.*

¹²⁹ *Id.* at 138 n.5, 139, 140 n.6.

¹³⁰ *Id.* at 139 n.6 (“We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. *Key Tronic v. United States*, 511 U.S. 809, 816 (1994) (stating the statutes provide “similar and somewhat overlapping remed[ies]”). For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a). *See, e.g., United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 97 (C.A.1 1994). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate 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).”).

¹³¹ *See, e.g., Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 228–29 (3d Cir. 2010); *Morrison Enters., L.L.C. v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011). The United States in litigation has taken the position that if a party is compelled to incur costs, such as pursuant to a consent decree, that party’s claim is governed by section 113(f) alone. *See Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1330 (N.D. Ala. 2010).

¹³² *See, e.g., New York v. Solvent Chem. Co.*, 685 F. Supp. 2d 357, 425 (W.D.N.Y. 2010).

¹³³ *See, e.g., Mark Yeboah, Case Comment, United States v. Atlantic Research: Of Settlement and Voluntarily Incurred Costs*, 32 HARV. ENVTL. L. REV. 279, 287, 290 (2008).

113 for costs reimbursed to the government but by section 107 for costs incurred in doing cleanup work pursuant to the decree.¹³⁴

The law is similarly muddled when trying to determine which CERCLA section applies in other common scenarios. One example is administrative settlements whereby a party agrees to perform cleanup work. Some administrative settlements have been held to give rise to claims under section 113,¹³⁵ while others have been found to give rise to section 107 claims.¹³⁶ Another example occurs when the United States Environmental Protection Agency (EPA) issues a unilateral administrative order under CERCLA section 106 to a responsible party to clean up a site.¹³⁷ *Post-Aviall*, a contribution claim under section 113(f)(1), by its terms, can only be brought during or following any “civil action” under sections 106 or 107.¹³⁸ A number of courts have held that a CERCLA section 106 administrative order is not a “civil action” and hence the recipient has a section 107 claim, not a section 113 claim, for costs expended in complying with the order.¹³⁹ Yet other courts have held that the order recipient, because it legally was compelled to incur the costs by EPA, has a claim under section 113 rather than section 107.¹⁴⁰

In short, in many situations common in CERCLA litigation, there is little Supreme Court guidance or lower court consensus regarding whether a

¹³⁴ Gershonowitz, *supra* note 16, at 141–42, 154; Gaba, *supra* note 104, at 10,814–15.

¹³⁵ *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124–26 (2d Cir. 2010) (finding that administrative consent order with state agency resolved plaintiff’s CERCLA liability, so plaintiff’s claim against other responsible parties was governed by CERCLA section 113(f)(3)(B)); *Morrison Enters.*, 638 F.3d at 603 (“§ 113(f) provides the exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under §§ 106 or 107.”).

¹³⁶ *W.R. Grace & Co.—Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 92–93 (2d Cir. 2009) (holding that administrative consent order with state agency did not resolve plaintiff’s CERCLA liability, so plaintiff’s claim against other responsible parties was governed by CERCLA section 107); *ITT Indus., Inc. v. Borgwarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) (finding that an administrative consent order with the United States Environmental Protection Agency (EPA), despite resolving CERCLA liability, did not constitute an administrative settlement for purposes of section 113(f)(3)(B), so plaintiff’s claim against other responsible parties was governed by CERCLA section 107).

¹³⁷ Section 106(a) authorizes the United States, if there may be an imminent and substantial endangerment to health, welfare, or the environment because of a release of hazardous substances, either to file a civil action for injunctive relief or issue an administrative order. *See* 42 U.S.C. § 9606(a) (2006). In practice, EPA consistently opts to exercise its section 106 authority via administrative orders. JOHNSTON, FUNK & FLATT, *supra* note 54, at 559.

¹³⁸ “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . during or following any *civil action* under section 9606 . . . or under section 9607(a).” 42 U.S.C. § 9613(f)(1) (emphasis added).

¹³⁹ *Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C.*, 382 F. Supp. 2d 1079, 1091 (S.D. Ill. 2005); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1142–43 (D. Kan. 2006). *But see* *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 840 (W.D. Tenn. 2006) (finding that a CERCLA section 106 unilateral administrative order is a “civil action” giving rise to a claim for contribution under section 113(f)(1)).

¹⁴⁰ *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2009 WL 3931036, at *3 (E.D. Wis. Nov. 18, 2009).

responsible party's CERCLA claim is governed by section 107 or 113.¹⁴¹ Yet, as discussed below, the distinction could make a significant difference regarding the application of joint and several liability and the allocation of orphan shares.

2. The Orphan Share Problem

The *Atlantic* Court did not squarely decide whether a defendant in a section 107 action brought by a responsible party plaintiff is subject to joint and several liability. But in the course of rejecting the government's argument that section 107 should not be available to a responsible party, the Court said: "We assume without deciding that § 107(a) provides for joint and several liability."¹⁴² The United States urged that if a responsible party plaintiff were permitted to sue under section 107, and the defendants were subject to joint and several liability, the plaintiff would always choose to pursue a section 107 claim in order to avoid section 113(f)'s equitable distribution of response costs.¹⁴³ The Court disagreed, explaining that "a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim. . . . Resolution of a § 113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action."¹⁴⁴

The Court did not explain how the assertion of a section 113(f) counterclaim would result in an equitable allocation of response costs in a case between a responsible party plaintiff and a defendant. As will be discussed in Part IV.C, a section 113(f) counterclaim is a flawed approach for achieving equitable allocation in private section 107 actions. Further, the Court ignored other potential impacts of joint and several liability in private CERCLA section 107 actions involving multiple responsible parties. For example, does the defendant bear the sole responsibility for joining and seeking contribution from nonparties, and the concomitant responsibility to bear the equitable shares of other responsible parties that are not joined, as in section 107 actions by federal or state government plaintiffs? More pointedly for our purposes, does joint and several liability in private section 107 actions mean that the defendant bears sole responsibility for paying the shares of parties or nonparties who are insolvent or no longer in existence—i.e., orphan shares?

Subsequent lower court cases consistently have held that defendants in section 107 actions brought by private responsible parties are indeed subject to joint and several liability.¹⁴⁵ Courts, though, are just beginning to grapple

¹⁴¹ "These recent rulings [*Aviall*, *Atlantic*, and *Burlington Northern*] have done little to provide the lower courts with useful guidance in determining which subsection of CERCLA provides a cause of action for parties seeking reimbursement of response costs in differing situations." *New York v. Solvent Chem. Co.*, 685 F. Supp. 2d 357, 425 (W.D.N.Y. 2010).

¹⁴² *Atlantic*, 551 U.S. 128, 140 n.7 (2007).

¹⁴³ *Id.* at 137–38.

¹⁴⁴ *Id.* at 140.

¹⁴⁵ *See, e.g.*, *Bd. of Cnty. Comm'rs v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092, 1117 (D. Colo. 2011); *Ashland Inc. v. Gar Electroforming*, 729 F. Supp. 2d 526, 545–46 (D.R.I. 2010);

with the ramifications associated with joint and several liability in private CERCLA section 107 actions, including how to handle orphan shares.¹⁴⁶ Several commentators, however, have recognized the potential orphan share consequences arising from joint and several liability in favor of responsible party plaintiffs under section 107—that is, defendants alone will bear the risk of orphan shares, just as in governmental section 107 cases.¹⁴⁷

At least in a normative sense, making defendants in private CERCLA actions subject to joint and several liability and sticking them with all the orphan shares, automatically as a matter of law, is a problem. This is exactly what many pre-*Aviall* decisions were trying to avoid by preventing responsible party plaintiffs from suing under section 107.¹⁴⁸ At many Superfund sites the orphan shares may be significant,¹⁴⁹ and requiring defendants alone to bear the orphan shares while freeing a responsible party plaintiff from any orphan share burden would be grossly inequitable and unfair. For example, should the plaintiff, a longtime owner and operator of a sloppy dumpsite who has been ordered by the government to clean up his property after years of refusing to do so, be allowed to hold defendant, a customer who generated a relatively small amount of the wastes which were disposed of at the dumpsite, jointly and severally liable for the orphan shares of the many other generators who are no longer in existence or insolvent?

On the other hand, why should a defendant in a section 113 case automatically be subject to only several liability? In some situations, the plaintiff may technically be a responsible party, but she stepped up to settle with the government and do the cleanup, while other more culpable responsible parties simply refused to cooperate. If those defendants who laid in the weeds are truly subject to only several liability on plaintiff's section 113 claim for contribution, the cooperative plaintiff may be forced to absorb all of the orphan shares. Similarly, why should an original defendant be subject to joint and several liability on plaintiff's section 107 claim, while a third-party defendant is only severally liable on the original defendant's section 113 claim for contribution? Such drastic differences in who bears the orphan shares should not turn purely on the original plaintiff's choice of whom to sue.

The problem is exacerbated by the fine and still uncertain distinctions regarding when a plaintiff's claim is properly under section 107 or under

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 746 F. Supp. 2d 692, 735 (D.S.C. 2010); ITT Indus., Inc. v. Borgwarner, Inc., 700 F. Supp. 2d 848, 877 (W.D. Mich. 2010); Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co., 661 F. Supp. 2d 989, 1006 (S.D. Ind. 2009); Reichold, Inc. v. U.S. Metals Refining Co., Civ. No. 03-453(DRD), 2008 WL 5046780, at *7 (D.N.J. Nov. 20, 2008); Raytheon Aircraft Co. v. United States, 532 F. Supp. 2d 1306, 1313 (D. Kan. 2007); *see also* Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 121 (2d Cir. 2010) (finding that a private section 107 claim would carry joint and several liability, but holding plaintiff's claim is governed by section 113).

¹⁴⁶ *See infra* Part IV.

¹⁴⁷ *See* Aronovsky, *supra* note 16, at 255; Gershonowitz, *supra* note 16, at 149; Ferrey *supra* note 37, at 660; Gaynor et al., *supra* note 6, at 11,202.

¹⁴⁸ *See supra* Part III.A.

¹⁴⁹ *See* Gershonowitz, *supra* note 16, at 148–49.

section 113. The Supreme Court has not been able to articulate a broadly applicable test for when a private CERCLA claim is governed by section 107 versus section 113, and lower courts are all over the board when it comes to deciding whether section 107 or section 113 applies in a variety of common CERCLA contexts.¹⁵⁰

The unsettled nature of the law in this area may have adverse effects upon CERCLA litigation and cleanups of contaminated sites. There are problems of practice when it is unclear whether the claim is under section 107 or section 113, and whether the liability is joint and several or merely several. Does the plaintiff sue all of the responsible parties or just a few? If the plaintiff fails to sue all responsible parties, should defendants join them or blame the empty chairs? Likewise, there are policy problems. For example, should a responsible party who remediates a site after being threatened with suit, or perhaps after being ordered to do so under another federal statute or state law, have the benefit of joint and several liability and freedom from orphan shares because it can sue under section 107?¹⁵¹ By contrast, should a cooperative responsible party who settles with the government and complies with the terms of a CERCLA consent decree be limited to a section 113 claim and be saddled with the orphan shares due to several liability? Further, parties may be unable to reasonably forecast the results of litigation, due to the huge impact of orphan shares that could swing wholly to the plaintiff or to the defendant depending upon which CERCLA section governs the claim. Where parties are unable to evaluate their potential liability due to such uncertainties, they may be less likely to settle, thus driving up litigation expenses and delaying site cleanups.¹⁵²

IV. A SOLUTION: REJECT “JOINT AND SEVERAL” AND “SEVERAL” IN FAVOR OF EQUITABLE ALLOCATION OF ORPHAN SHARES IN ALL PRIVATE CERCLA ACTIONS

In this Part of the Article, I argue that neither pure joint and several liability nor pure several liability is appropriate for private CERCLA actions and allocation of orphan shares. Indeed, continuing to refer to liability under section 107 as joint and several, and liability under section 113 as several, impedes proper decision-making regarding orphan shares in private CERCLA actions and leads to counterproductive contrivances such as contribution counterclaims. Rather, courts in all private CERCLA actions should apply a uniform scope of liability—neither joint nor several—drawn from traditional and evolving principles of federal common law and tailored

¹⁵⁰ See *supra* Part III.C.1.

¹⁵¹ The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)), is an example of another federal statute that empowers the United States to compel parties to clean up contaminated sites. *Id.* § 6973(a), (b).

¹⁵² See Robert G. Hansen & Randall S. Thomas, *The Efficiency of Sharing Liability for Hazardous Waste: Effects of Uncertainty over Damages*, 19 INT’L. REV. L. & ECON. 135, 138–39 (1999).

to achieve the goals of CERCLA, resulting in the equitable allocation of orphan shares among all responsible parties, plaintiffs and defendants.

A. Section 113

The basis for equitable allocation of orphan shares in CERCLA section 113 actions is straightforward. Several liability is not mandated for section 113 claims. Nothing in the statute's terms indicates that common law several liability should govern section 113 suits or that plaintiffs alone should bear all orphan shares in section 113 actions. To the contrary, CERCLA section 113 expressly instructs that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."¹⁵³ Further, Congress added section 113(f) to CERCLA in 1986 to ensure that the response cost load could be spread equitably among all responsible parties, rather than being borne solely by defendants subject to joint and several liability.¹⁵⁴ Congress viewed contribution, and the equitable allocation of response costs among responsible parties, as crucial to CERCLA's liability scheme, because it would promote quicker and fairer settlements, decrease litigation, and facilitate cleanups.¹⁵⁵ Because orphan shares are common and sizable at Superfund sites, forcing plaintiffs alone to absorb the orphan shares as a matter of law in section 113 actions, as under pure several liability, could often result in highly inequitable allocation of response costs and thus frustrate the express language and goals of section 113. It serves no purpose for a CERCLA section 113 plaintiff, who may have stepped forward and cooperated with the government to pay for or conduct the cleanup of a site, to shoulder the orphan shares *as a matter of law* while recalcitrant defendants are immune from the orphan share burden.

Admittedly, courts have long referred to liability under section 113 as several.¹⁵⁶ Nevertheless, this common law label should not trump the express language of section 113 when allocating response costs and orphan shares. In order to give effect to the terms and purpose of the section and accomplish equitable allocation of response costs at CERCLA sites, it is essential that the orphan shares be allocated among all viable responsible parties—plaintiffs and defendants—based on equitable factors.

A few courts post-*Atlantic* have taken steps toward recognizing and implementing equitable allocation of orphan shares in section 113 cases, despite continuing to characterize liability under section 113 as several. For example, in *Arkema, Inc. v. Asarco, Inc.*,¹⁵⁷ the district court allocated the

¹⁵³ 42 U.S.C. § 9613(f)(1) (2006).

¹⁵⁴ See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1647; H.R. REP. NO. 99-253(I), at 79 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

¹⁵⁵ 100 Stat. 1613; H.R. REP. NO. 99-253(I), at 59, 80 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841, 2862. The legislative history of section 113 never mentions several liability. *See id.*

¹⁵⁶ *See supra* Part III.A. Perhaps it began as a shorthand way of distinguishing liability under section 113 from the joint and several liability of section 107.

¹⁵⁷ No. C05-5087 RBL, 2007 WL 1821024 (W.D. Wash. June 22, 2007).

60% orphan share attributable to a bankrupt responsible party equally to both the plaintiffs and the defendant in a section 113(f) contribution action, notwithstanding the court's characterization of the defendant's liability as several under section 113(f).¹⁵⁸ According to the court, "[u]nder § 113(f)(1), the cost of orphan shares is distributed equitably among all PRPs, just as cleanup costs are."¹⁵⁹ At least one appellate court also recently recognized that an orphan share in a section 113 action can be allocated among all available solvent parties, both plaintiffs and defendants.¹⁶⁰ As mentioned in Part III.A, most pre-*Aviall* courts had invoked the language of section 113(f)(1) to allocate orphan shares among both plaintiffs and defendants in section 113 actions, even though pure several liability would require the plaintiff to shoulder the entire orphan share load.¹⁶¹ It is time for all courts to adopt this approach in section 113 cases, to disregard the label of several liability with respect to allocation of orphan shares, and instead to allocate orphan shares among all viable responsible parties based on equitable factors.

B. Section 107

As discussed in Part II.B, CERCLA does not expressly require joint and several liability for section 107 actions, and the Supreme Court recently affirmed that joint and several liability is not mandated in every section 107 case.¹⁶² In governmental CERCLA section 107 actions, courts consistently look to the Restatement (Second) of Torts for guidance and routinely hold that contamination at CERCLA sites constitutes an indivisible harm; only rarely has a defendant been able to escape joint and several liability by proving divisibility or some reasonable basis for apportionment.¹⁶³ The *Burlington Northern* Court arguably breathed new life into defendants'

¹⁵⁸ *Id.* at *9–10.

¹⁵⁹ *Id.* at *10; *see* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(f)(1) (2006) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

¹⁶⁰ In *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284 (5th Cir. 2010), the plaintiffs had entered into a consent decree with the United States and then sued other responsible parties under CERCLA section 113. Although the court found that a nonparty settler was not an orphan and its share must be borne entirely by plaintiff, the Fifth Circuit recognized that if it had been an orphan, its share could have been allocated among the remaining responsible parties, both plaintiffs and defendants:

Under this [orphan share] doctrine, a court may choose to allocate a proportional fraction of an orphan share to all available, solvent, and responsible parties. The doctrine is an equitable one, vesting courts with the discretion both to determine whether a share is an orphan, and whether to allocate that orphan share to all available responsible parties.

Id. at 303.

¹⁶¹ *See supra* note 89 and accompanying text.

¹⁶² *Burlington Northern*, 129A S. Ct. 1870, 1881 (2009).

¹⁶³ *See* O'Neil v. Picillo, 883 F.2d 176, 178–79 (1st Cir. 1989); JOHNSTON, FUNK & FLATT, *supra* note 55, at 593; RESTATEMENT (SECOND) OF TORTS § 433A cmt. d (1965).

hopes of establishing divisibility or bases for apportionment,¹⁶⁴ but nevertheless, joint and several liability in section 107 cases brought by the government has been the rule rather than the exception.¹⁶⁵

Whether joint and several liability, subject to relatively narrow exceptions for divisibility and reasonable bases for apportionment, is desirable in governmental section 107 cases is beyond the scope of this Article.¹⁶⁶ For the reasons set forth below, however, a similar rule of joint and several liability based on the Restatement (Second) of Torts should not apply in section 107 cases brought by private responsible parties.

Preliminarily, there is no Supreme Court authority for holding defendants in private CERCLA section 107 actions subject to joint and several liability. Although the *Burlington Northern* Court endorsed joint and several liability in governmental CERCLA section 107 cases, nothing in the opinion speaks to the applicability of joint and several liability in private CERCLA actions. Earlier, the Court in *Atlantic* expressly declined to decide whether defendants in private CERCLA section 107 cases are subject to joint and several liability.¹⁶⁷

Congress intended that the scope of liability under CERCLA section 107, including the applicability of joint and several liability, be determined based on “traditional and evolving principles of common law.”¹⁶⁸ Importantly, both traditional and evolving principles of common law auger against applying joint and several liability in private section 107 cases. The principal *traditional* rationale for joint and several liability is that culpable defendants, rather than the innocent plaintiff, should bear the risk of an insolvent or

¹⁶⁴ Commentators disagree over whether *Burlington Northern* has made it easier for defendants to establish a reasonable basis of apportionment and to avoid joint and several liability in governmental section 107 cases. See *supra* note 58 and accompanying text.

¹⁶⁵ See Judy, *supra* note 58, at 283 (stating that prior to *Burlington Northern*, 160 CERCLA cases had cited *Chem-Dyne* and in only four had defendants proved divisibility or reasonable basis of apportionment).

¹⁶⁶ See John M. Hyson, “Fairness” and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 HARV. ENVTL. L. REV. 137, 144–46 (1997) (noting that the threat of joint and several, disproportionate liability drives responsible party defendants to settle with government rather than litigate); Gold, *supra* note 58, at 323–29 (describing how joint and several liability promotes the “polluter pays” principle and prompt cleanups by placing financial burden of cleanups, including orphan shares, upon solvent responsible parties rather than the public and by driving settlements which reduce government enforcement costs and lead to cleanups by responsible party defendants); see also JOHNSTON, FUNK & FLATT, *supra* note 54, at 594–95 (noting EPA uses joint and several liability to induce settlements, require solvent responsible parties to absorb orphan shares, and streamline enforcement actions); PERCIVAL ET AL., *supra* note 36, at 437 (noting industry opponents to joint and several liability argue it increases transaction costs by making PRPs more resistant to settlement); cf. Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377, 1383–88 (1985) (stating that joint and several liability increases administrative costs and reduces incentives among the regulated community to take precautions to avoid polluting).

¹⁶⁷ *Atlantic*, 551 U.S. 128, at 140 n.7 (2007).

¹⁶⁸ 126 CONG. REC. 30,932 (Nov. 24, 1980) (statement of Sen. Jennings Randolph (D-W. Va.)); 126 CONG. REC. 31,965 (Dec. 3, 1980) (statement of Rep. James Florio (D-N.J.)); *Burlington Northern*, 129A S. Ct. 1870, 1881 (2009); *Chem-Dyne*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

unavailable liable party.¹⁶⁹ Thus joint and several liability arguably makes sense in governmental CERCLA section 107 claims because, consistent with CERCLA's "polluter pays" principle, the responsible party defendants will bear the orphan shares rather than the innocent public. This traditional rationale for joint and several liability, however, does not hold where the plaintiff also is a responsible party.¹⁷⁰ Indeed, traditionally the common law doctrine of contributory negligence provided that any degree of liability by the plaintiff could deny plaintiff all recovery.¹⁷¹ Hence, traditional principles of common law do not favor joint and several liability in CERCLA section 107 actions brought by private responsible parties.

Evolving principles of common law also disfavor joint and several liability in actions by liable plaintiffs; instead they favor a system of comparative responsibility. Today, the strict rule of contributory negligence barring plaintiff's recovery has been abrogated in most states in favor of comparative negligence, as reflected in the Restatement (Third) of Torts.¹⁷² In modern tort law, plaintiff's negligence is simply a factor that may diminish, but may not completely bar, plaintiff's claim.¹⁷³ Analogously, now that a responsible party plaintiff's claim under CERCLA section 107 is no longer completely barred, courts should adopt a comparative liability system for private CERCLA section 107, whereby both plaintiff and defendant share the response cost burden.¹⁷⁴ Similarly, at the time CERCLA was enacted in 1980, joint and several liability was the mainstream rule governing multiple tortfeasor liability for indivisible harms, as reflected by the Restatement (Second) of Torts.¹⁷⁵ Since 1980, however, most states have abandoned rigid joint and several liability in favor of comparative responsibility among multiple tortfeasors, as reflected by the Restatement (Third) of Torts.¹⁷⁶ Even where the harm caused by multiple defendants is indivisible, the liability of

¹⁶⁹ See, e.g., Brandon E. Bass, *Salt in the Wound: How Several Liability Aggravates the Harm to Innocent Plaintiffs*, TENN. B.J., Oct. 2007, at 19, 19.

¹⁷⁰ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. a (2000); DOBBS, *supra* note 19, § 387.

¹⁷¹ RESTATEMENT OF TORTS § 467 (1934). Contributory negligence was still considered a complete bar to plaintiff's recovery in most states at the time the Restatement (Second) of Torts was published, though comparative negligence was on the rise. See RESTATEMENT (SECOND) OF TORTS § 467 & special n., at 516 (1965).

¹⁷² RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 & cmt. a (2000) (replacing RESTATEMENT (SECOND) OF TORTS § 467 (1965)); see JAMES HENDERSON ET AL., *THE TORTS PROCESS* 366 (7th ed. 2007).

¹⁷³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 (2000).

¹⁷⁴ Akin to "pure" comparative negligence, a CERCLA plaintiff's recovery should be diminished by its allocated share, but plaintiff should not be barred from recovery even if its share exceeds 50% or each defendant's share. See *id.* § 7 cmt. a.

¹⁷⁵ RESTATEMENT (SECOND) OF TORTS § 875 (1979); see KEETON ET AL., *supra* note 8, § 52, at 346; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 19 cmt. d (2010).

¹⁷⁶ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000). As of 2000, only 15 states retained pure joint and several liability and most states had adopted some form of comparative responsibility. *Id.* at cmt. a, reporters' note. Since 2000, at least five of those 15 states have enacted legislation limiting joint and several liability. Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 441 (2007).

those defendants is apportioned, and plaintiff cannot recover its entire damages from a single defendant.¹⁷⁷ Accordingly, since principles of common law have evolved away from joint and several liability for multiple tortfeasors, the principles of joint and several liability as reflected in the Restatement (Second) of Torts should not be blindly followed in private section 107 actions. Rather, evolving principles of common law for both plaintiffs and defendants point toward adoption by courts of a comparative responsibility model in private CERCLA section 107 actions.¹⁷⁸

There are wide variations among the comparative responsibility systems from state to state.¹⁷⁹ The system of comparative responsibility to be followed in private CERCLA section 107 actions, however, should not depend on the law of any specific state. Courts adopted a uniform federal approach when determining the scope of liability under CERCLA section 107 in government cases, looking to the Restatement (Second) of Torts to guide the applicability of joint and several liability rather than to the law of any particular state.¹⁸⁰ Likewise, courts can and should apply a uniform federal model of comparative responsibility in private CERCLA section 107 actions.

¹⁷⁷ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 & cmt. a, b (2000) (replacing various sections of Restatement (Second), including § 433A); *see id.* §§ 1, 8, 17 & cmt. a.

¹⁷⁸ Further, the language of CERCLA section 107(a) differentiates between actions by the government and actions by private parties. *Compare* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(4)(A), *with id.* 42 U.S.C. § 9607(a)(4)(B). This lack of parallelism between the express elements of governmental and private section 107 actions arguably authorizes a difference in the scope of liability as well. *See* Judy, *supra* note 58, at 286 n.230.

¹⁷⁹ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000) (setting forth five different tracks for apportioning damages among tortfeasors, including three which are forms of comparative responsibility); HENDERSON ET AL., *supra* note 173, at 369.

¹⁸⁰ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) is the leading case for determining whether a federal court should apply a uniform federal law or look to state common law when evaluating issues relating to a federal program. The *Chem-Dyne* court cited *Kimbell Foods* and found that a federal uniform rule for applying joint and several liability in government cases under CERCLA section 107 was appropriate, *inter alia*, because state law pertaining to waste dumping was generally inadequate, and a uniform federal standard was necessary to carry out the CERCLA program and protect federal interests. *Chem-Dyne*, 572 F.Supp. 802, 808–10 (S.D. Ohio 1983). These same considerations favor a uniform federal scope of liability for private CERCLA section 107 actions as well.

Subsequent Supreme Court cases have arguably restricted federal courts' latitude in creating federal common law, instead referring to the law of the forum state in certain circumstances. *See* O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 83–84 (1994); *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 216 (1997). In the CERCLA context, the Supreme Court has raised but left undecided whether courts should apply federal common law or the law of the forum state when determining if the corporate veil has been pierced so as to render a parent corporation indirectly liable for its subsidiary. *United States v. Bestfoods*, 524 U.S. 51, 63 n.9 (1998). Importantly, however, the Supreme Court recently in *Burlington Northern* adopted a federal uniform scope of liability in governmental CERCLA section 107 cases without even mentioning the possibility of looking to particular state law. *See Burlington Northern*, 129A S. Ct. 1870, 1878–83 (2009).

Moreover, courts may *interpret* federal statutes without reference to state law and may apply federal common law in order to fill the interstices of a federal statute. *Atherton*, 519 U.S. at 218; Gold, *supra* note 58, at 323 (determining scope of CERCLA liability is "not a pure

Courts need not look far to find a model of comparative responsibility appropriate for CERCLA actions among responsible parties: Congress unambiguously provided just such a comparative responsibility model in CERCLA section 113(f). Contribution claims under section 113(f) are claims by responsible parties¹⁸¹ against other responsible parties, and equitable factors expressly govern allocation of response costs among all liable parties in actions brought pursuant to section 113(f)(1).¹⁸² Thus, in adopting a comparative responsibility model for private CERCLA section 107 actions, courts should use the equitable allocation approach of section 113. That is, just as in a section 113 action, the shares of response costs allocated to each responsible party at a site should be based on equitable factors.

Some might argue that joint and several liability should be retained for private plaintiffs in section 107 cases, in order to encourage private plaintiffs to undertake voluntary cleanups.¹⁸³ While facilitating voluntary private party cleanups is a laudable end, joint and several liability for private CERCLA section 107 claims is far too blunt of a means. Not infrequently, the private plaintiff in a section 107 case may be one of the most significant, if not *the* most significant, contributor to contamination at the site.¹⁸⁴ The private plaintiff may have been threatened with suit by the government before “volunteering” to undertake the remediation, or it may even have been ordered to remediate under federal or state law.¹⁸⁵ Rewarding such a plaintiff with the advantages of joint and several liability, while punishing a much less culpable defendant with the whole orphan share burden—as a *matter of law* in every private CERCLA section 107 case—is a recipe for gross inequity. By heavily weighting positive conduct such as voluntary cleanups in their equitable allocation calculus on a case-by-case basis, judges can encourage such conduct by private plaintiffs as well as punish recalcitrant responsible party defendants without the injustices joint and several liability otherwise might impose.

The importance of equitable allocation of response costs among responsible parties in *all* private CERCLA actions has been manifested in multiple ways since the statute’s inception. In the early 1980s, prior to Congress’s addition of section 113(f), courts implied a right of contribution under section 107 in order to assure that response costs were allocated

exercise of common law judging, but an exercise in interstitial statutory interpretation”). Lastly, CERCLA section 113(f)(1) expressly states that claims under section 113 “shall be governed by Federal law,” and uniform federal law is no less important in private section 107 actions than in section 113 actions. 42 U.S.C. § 9613(f)(1) (2006); *see* Aronovsky, *supra* note 6, at 86.

¹⁸¹ In order to bring a section 113(f) claim, a party must have been sued under CERCLA section 106 or section 107 or have resolved its CERCLA liability via an administrative or judicially approved settlement. 42 U.S.C. § 9613(f)(1), (3)(B) (2006).

¹⁸² *Id.* § 9613(f)(1).

¹⁸³ *See* Raytheon Aircraft Co. v. United States, 532 F. Supp. 2d 1306, 1310–11 (D. Kan. 2007).

¹⁸⁴ *See, e.g.,* Env’tl. Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503, 512 (7th Cir. 1992) (allocating plaintiff 100% share in pre-*Aviall* section 113 case).

¹⁸⁵ *See, e.g.,* Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C., 382 F. Supp. 2d 1079, 1081 (S.D. Ill. 2005) (finding that plaintiff had received CERCLA section 106 administrative order); W.R. Grace & Co.—Conn. v. Zotos Int’l, Inc., 559 F.3d 85, 87 (2d Cir. 2009) (finding that plaintiff had entered into state consent order).

among all responsible parties and that certain responsible parties were not unfairly burdened with the response cost load.¹⁸⁶ Congress added section 113(f) in 1986 expressly to confirm the right of contribution and the allocation of response costs among all liable parties based on equitable factors.¹⁸⁷ Further, for decades courts limited responsible parties to suits under section 113, refusing to allow them to sue under section 107, primarily so that courts could allocate response costs equitably among the liable parties rather than requiring defendants to bear all or most of them as a matter of law.¹⁸⁸ In many CERCLA circumstances now governed by section 107, courts have long been allocating response costs among all responsible parties, plaintiffs and defendants, based on equitable factors pursuant to section 113.¹⁸⁹

Although the Supreme Court in *Aviall* limited the circumstances in which a section 113 claim could be maintained, the Court nevertheless has continued to recognize the importance of equitable allocation of response costs among responsible parties in actions brought under section 107.¹⁹⁰ The *Atlantic* Court made it clear that a private plaintiff in a section 107 action could not avoid paying its equitable share of response costs. Assuming, without deciding, that a section 107 claim provides for joint and several liability,¹⁹¹ the Court explained that a defendant in a section 107 suit could force the equitable apportionment of costs by filing a section 113(f) counterclaim.¹⁹² Accordingly, equitable allocation of response costs among all responsible parties should be the goal and practice in all private CERCLA actions, for claims under both sections 107 and 113.

Critically, in order to achieve equitable allocation of response costs among responsible parties in private CERCLA section 107 cases, it is essential that orphan shares be allocated equitably among all responsible parties as well. Orphan shares are common and frequently sizable in CERCLA cases;¹⁹³ permitting the plaintiff to evade any portion of the orphan

¹⁸⁶ See *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 223–29 (W.D. Mo. 1985); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); see also *United States v. New Castle Cnty.*, 642 F. Supp. 1258, 1269 (D. Del. 1986) (finding right to contribution in federal common law); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1488–89 (D. Colo. 1985) (finding the same).

¹⁸⁷ See *supra* notes 154–55 and accompanying text.

¹⁸⁸ See *supra* Part III.A.

¹⁸⁹ See *supra* Part III.

¹⁹⁰ See *Atlantic*, 551 U.S. 128, 140–41 (2007).

¹⁹¹ *Id.* at 140 n.7 (“We assume without deciding that § 107(a) provides for joint and several liability.”).

¹⁹² *Id.* at 140 (“[A] defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim. . . . Resolution of a § 113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action.”).

¹⁹³ See, e.g., *Action Mfg. Co., Inc. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288, 294 (E.D. Pa. 2006), *aff’d*, 287 F. App’x 171 (3d Cir. 2008) (allocating \$16,466,995 of orphan shares); *ITT Indus., Inc. v. Borgwarner, Inc.*, 700 F. Supp. 2d 848, 888 (W.D. Mich. 2010) (allocating \$1,852,663.69 of orphan shares); *In re Kaiser Grp. Int’l, Inc.*, 289 B.R. 597, 608 (Bankr. D. Del. 2003) (allocating \$3,985,276.16 of orphan shares).

share, as under pure joint and several liability, would result in frequent inequity. Similarly, permitting the defendants to be immune from orphan share responsibility, as under pure several liability, would likewise be antithetical to a system of equitable allocation of total site cleanup costs.¹⁹⁴ Therefore, regardless of whether the claim is under section 107 or section 113, orphan shares should be allocated among all viable responsible parties based on equitable factors.

In sum, joint and several liability in private CERCLA section 107 actions is not mandated by the statute, is inconsistent with Congressional intent and traditional and evolving principles of common law, and inaccurately describes how response costs and orphan shares should be allocated by courts in CERCLA section 107 cases. Accordingly, it is time to acknowledge that a section 107 claim by a private party does not make a defendant jointly and severally liable, but rather simply makes a defendant liable for an equitable share of the response costs at the site. As in a section 113(f) claim for contribution, a liable defendant's equitable share of the response costs ultimately should depend upon the equitable shares attributable to other responsible parties, including the plaintiff. That is, the court should allocate the response costs among all of the responsible parties according to equitable factors. Any orphan shares should be allocated among all of the remaining viable responsible parties pursuant to equitable factors, too.

C. Counterclaims Are Counterproductive

Some might argue that adopting a uniform scope of liability for sections 107 and 113 is not necessary in order to accomplish equitable allocation of response costs and orphan shares. Instead, building upon the Supreme Court's suggestion in *Atlantic*,¹⁹⁵ joint and several liability for section 107 claims could be maintained and section 113 counterclaims could be used to attain equitable allocation of response costs and orphan shares among viable responsible parties.

Indeed, post-*Atlantic*, a few courts have shown a willingness to equitably allocate the orphan shares among all viable responsible parties in private CERCLA section 107 cases where a contribution counterclaim has been asserted under section 113. For example, in *Litgo New Jersey, Inc. v. Martin*,¹⁹⁶ the plaintiffs initiated a section 107 claim for past and future response costs, and the defendants counterclaimed for contribution under CERCLA section 113(f)(1).¹⁹⁷ Invoking the equitable factors language of

¹⁹⁴ See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 10 cmt. a (2000) (stating that both joint and several liability and several liability have "the handicap of systematically disadvantaging either plaintiffs or defendants with the risk of insolvency" and that "[e]ither of these systems can . . . be made more attractive by providing a reallocation provision when one or more defendants is insolvent").

¹⁹⁵ See *Atlantic*, 551 U.S. at 140 (suggesting that defendant could file section 113(f) counterclaim to blunt any inequitable allocation resulting from joint and several liability associated with plaintiff's section 107 complaint, but not mentioning orphan shares).

¹⁹⁶ No. 06-2891(AET), 2010 WL 2400388 (D.N.J. June 10, 2010).

¹⁹⁷ *Id.* at *27.

section 113(f)(1), the district court allocated the twenty-three percent share attributable to the State of New Jersey, which was immune from suit under the Eleventh Amendment, among all of the responsible parties in the case, both plaintiffs and defendants, in accordance with their proportionate shares of response costs.¹⁹⁸ Other courts similarly have asserted that, although liability under section 107 is joint and several, they have the discretion to allocate orphan shares equitably among all viable parties in section 107 actions as a result of the section 113(f) counterclaims.¹⁹⁹

While it is salutary that some courts are trying to find a way to allocate response costs and orphan shares in section 107 actions among all viable responsible parties, the reliance on a section 113(f) counterclaim as the means to accomplish this end is problematic. For multiple reasons, using a section 113 counterclaim in an effort to counter the effects of joint and several liability in private section 107 actions is legally flawed, complicates the litigation unnecessarily, and may not achieve the goal of equitable allocation. First, the need for a section 113 counterclaim is premised upon liability under section 107 being joint and several. If defendants are jointly and severally liable for response costs at a site by virtue of plaintiff's section 107 complaint, then arguably by virtue of defendants' section 113 counterclaim those same costs could be allocated equitably among defendants and the responsible party plaintiff. But it is not at all clear why the section 113 counterclaim would make a plaintiff responsible for any portion of the shares of nonparties (including orphan shares), since under joint and several liability the defendants have the burden of joining and seeking contribution from the nonparties, and the plaintiff has no such duty.²⁰⁰

Second, a predicate for a claim of contribution is that two or more persons are liable to the same plaintiff for the same harm.²⁰¹ A contribution counterclaim would mean that the original plaintiff is liable to itself. To the

¹⁹⁸ *Id.* at *36–38. The court did not mention joint and several liability, explaining that “[w]hen there are multiple responsible parties and claims for contribution, ‘the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.’” *Id.* at *36 (quoting Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(f)(1) (2006)). The court further stated that “a court may equitably allocate orphan shares among liable parties at its discretion.” *Id.*

¹⁹⁹ *See* *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, No. 2:05-cv-2782-MBS, 2011 WL 2119256, at *50 (D.S.C. May 27, 2011) (second amended order and opinion) (holding that if a liable party is determined to be defunct, each other liable party will be responsible for its proportional share of the defunct party's share); *Bd. of Cnty. Comm'rs v. Brown Retail Grp., Inc.*, 768 F. Supp. 2d 1092, 1119–20 (D. Colo. 2011) (stating that orphan shares may be equitably allocated); *ITT Indus., Inc. v. Borgwarner, Inc.*, 700 F. Supp. 2d 848, 889 (W.D. Mich. 2010) (stating that orphan shares are apportioned among all solvent responsible parties in the case “in amounts corresponding to their relative equitable responsibility for any indivisible harm for which joint and several liability otherwise applies”) (quoting *Charter Twp. of Oshtemo v. Am. Cyanamid Co.*, 898 F. Supp. 506, 509 (W.D. Mich. 1995)).

²⁰⁰ *See supra* Part II.A. Additionally, if liability under section 113 were truly several, the original plaintiff would have no obligation to join nonparties, as that burden would stay with the original defendants. *Supra* Part II.A.

²⁰¹ *See* RESTATEMENT (SECOND) OF TORTS § 886A(1) (1979).

extent the defendant is contending that the plaintiff should bear some share of plaintiff's own cleanup costs, defendant's contention is more properly an affirmative defense, not a counterclaim.²⁰² As another professor of environmental law and civil procedure has noted, the notion of a contribution counterclaim is an oxymoron.²⁰³

Third, the section 107 complaint / section 113 counterclaim approach results in unnecessary claims and pleadings. In section 113 cases, courts achieve the same end—equitable allocation of response costs and orphan shares among all viable responsible parties—without the need for a counterclaim.²⁰⁴ When the plaintiff asserts a section 113(f) complaint, the defendant does not have to assert a counterclaim in order to trigger the allocation of response costs and orphan shares among responsible parties in accordance with equitable factors.²⁰⁵ Indeed, as mentioned above, courts are willing to allocate orphan shares among all of the solvent, existing responsible parties by virtue of the section 113(f) complaint.²⁰⁶ Further, eliminating joint and several liability for private section 107 claims could eliminate the need for defendants to assert section 113 cross-claims and third-party complaints for contribution.²⁰⁷

Fourth, there may be circumstances in which a defendant is barred from asserting a section 113 counterclaim due to contribution protection, thus resulting in defendant shouldering a disproportionate and inequitable portion of response costs and orphan shares. For example, responsible party P settles its CERCLA liability with the federal government via a consent decree and receives contribution protection under CERCLA section

²⁰² Contributory and comparative negligence are affirmative defenses rather than counterclaims. FED. R. CIV. P. 8(c)(1). Although if a party mistakenly designates a defense as a counterclaim, or vice versa, the court must, if justice requires, treat the pleading as though it were correctly designated, FED. R. CIV. P. 8(c)(2), calling a defense a counterclaim does not alter its effect.

²⁰³ Alfred R. Light, *CERCLA's Wooden Iron: The Contribution Counterclaim*, 23 TOXICS L. REP. (BNA) 642 (July 24, 2008).

²⁰⁴ Eliminating defendant's counterclaim also would eliminate the need for plaintiff to file an answer to the counterclaim. See FED. R. CIV. P. 7(a)(3).

²⁰⁵ A number of decisions prior to the *Aviall-Atlantic* watershed cited this reason for rejecting a section 107 complaint/section 113 counterclaim approach. *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 (6th Cir. 1998); *T H Agriculture & Nutrition Co. v. Aceto Chem. Co.*, 884 F. Supp. 357, 361 (E.D. Cal. 1995).

²⁰⁶ For post-*Atlantic* cases, see *supra* Part IV.A. For earlier cases, see *supra* Part III.A. To the extent the plaintiff asserting a section 107 complaint is not admittedly a responsible party, under my approach defendant could raise the issue of plaintiff's liability as an affirmative defense in its answer, and defendant would have the burden of proving that plaintiff is a responsible party under section 107(a)(1)–(4). Once liability is shown, then the court can allocate among all of the liable parties based on equitable factors.

²⁰⁷ See *Pinal Creek*, 118 F.3d 1298, 1303 (9th Cir. 1997) (noting that allowing joint and several liability on a private section 107 claim “could result in a chain reaction of multiple, and unnecessary lawsuits” (quoting *Ciba-Geigy Corp. v. Sandoz Ltd.*, No. 92–4491 (MLP), 1993 WL 668325 *7 (D.N.J. June 17, 1993))); see also *Morrison Enters.*, 302 F.3d at 1135; *Centerior*, 153 F.3d at 354; see generally *infra* Part IV.D.1.

113(f)(2).²⁰⁸ P then files a section 107 complaint against D1 and D2 to recover the response costs P incurs in completing the site remediation pursuant to the terms of the consent decree. D2 is insolvent. D1 may be prohibited from asserting a section 113 contribution counterclaim because P has contribution protection, thus making D1 responsible for 100% of P's response costs—even though D1 may be a far less culpable party than P or D2.²⁰⁹

Fifth, subjecting defendants in section 107 actions to the potential for joint and several liability will often force them, in an effort to avoid joint and several liability, to argue that the harm at the site is divisible or otherwise reasonably apportionable. Such arguments, in turn, will force plaintiffs to respond and courts to decide whether the harm indeed is divisible or otherwise reasonably apportionable. In the aftermath of *Burlington Northern*, defense efforts to prove divisibility or a reasonable basis for apportionment and thus evade joint and several liability will likely be even more frequent and courts will have to routinely engage in such painstaking inquiries in many private section 107 actions. By contrast, no such divisibility or reasonable apportionment analysis is necessary or appropriate in section 113 actions²¹⁰ or in the private section 107 claim paradigm proposed in this Article. Rather, response costs and orphan shares are allocated pursuant to equitable factors, without regard to whether the Restatement (Second) of Torts criteria of divisibility or reasonable apportionment are met.

Illustrative of how a divisibility analysis unnecessarily complicates a private CERCLA section 107 action is *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*²¹¹ Ashley, the current owner of a contaminated site and a responsible party under section 107(a)(1), “voluntarily” incurred cleanup costs and sued PCS Nitrogen, a former operator of the site and a responsible party under section 107(a)(2), for cost recovery under CERCLA section 107,

²⁰⁸ 42 U.S.C. § 9613(f)(2) (“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.”). The *Atlantic* Court held that section 113(f)(2) bars a CERCLA section 113(f) claim but not a claim under CERCLA section 107. 551 U.S. at 140–41; see *infra* Part IV.D.2.

²⁰⁹ See *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 228–29 (3d Cir. 2010) (holding that a settling claimant could sue only under section 113(f), because if allowed to sue under section 107, defendant would be precluded from asserting counterclaim due to contribution protection afforded settler by consent decree); *United States v. Kramer*, No. 89-4340 (JBS), 2009 WL 2339341, at *6–7 (D.N.J. July 27, 2009) (explaining that if settling claimant sues under CERCLA section 107, nonsettling defendant will have no CERCLA section 113 contribution counterclaim because settling claimant has contribution protection under CERCLA section 113(f)(2)); Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENVT. L. 191, 239 (2009). The courts may eventually eliminate this risk, *inter alia*, by deciding that a party entitled to contribution protection under CERCLA section 113(f)(2) is limited to suing under CERCLA section 113(f)(3)(B), but the risk still exists under today's unsettled law regarding the interface between sections 107 and 113. See *supra* Part III.C.1.

²¹⁰ See, e.g., *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996); *United States v. Kramer*, 644 F. Supp. 2d 479, 490 (D.N.J. 2008).

²¹¹ No. 2:05-cv-2782-MBS, 2011 WL 2119256 (D.S.C. May 27, 2011) (second amended order and opinion).

seeking to hold PCS jointly and severally liable for the cleanup costs at the site. Pursuant to section 113(f)(1), defendant PCS filed a contribution counterclaim against plaintiff Ashley, as well as contribution claims against other responsible parties.²¹² Finding that “[l]iability under CERCLA § 107(a) is joint and several if the harm is indivisible,”²¹³ the district court undertook to determine whether PCS had satisfied its burden of proving that harm at the site is divisible and thus avoid joint and several liability. Invoking the Restatement (Second) of Torts section 433A, and citing *Chem-Dyne* and *Burlington Northern*, the court analyzed whether PCS had demonstrated that the harm was divisible or there was a reasonable basis of apportionment.²¹⁴ After evaluating in detail at least five different methodologies advanced by PCS, the court concluded that the harm was indivisible and there was no reasonable basis for apportionment.²¹⁵ Only then did the court turn to the contribution claims and allocation of the cleanup costs based on equitable factors pursuant to section 113(f)(1), resulting in allocation of a five percent share of the cleanup costs to plaintiff Ashley, thirty percent to PCS, and the remaining 65% percent to other responsible parties.²¹⁶ Using my proposed section 107 paradigm instead, once the *Ashley* court determined who was liable, it simply could have equitably allocated the cleanup costs at the site among all of the responsible parties, without the need to wrestle with the issues of divisibility and reasonable basis for apportionment associated with joint and several liability.²¹⁷

Finally, an example of the folly of treating the scope of liability under section 107 and section 113 as separate species is provided by *Ashland Inc. v. Gar Electroforming*.²¹⁸ The case had its origins in a 1980s CERCLA

²¹² *Id.* at *1.

²¹³ *Id.* at *40.

²¹⁴ *Id.* at *40–41.

²¹⁵ *Id.* at *40–48.

²¹⁶ *Id.* at *48–61. Judgment was entered holding PCS jointly and severally liable to plaintiff for all of the response costs at the site, less setoffs including the share attributable to plaintiff. Judgments also were entered in favor of PCS on its contribution claims against the other responsible parties in amounts corresponding to those third-party defendants’ allocated shares. *Id.* at *65. Although the court found no orphan share, it instructed that if a third-party defendant was later determined to be unable to pay its judgment to PCS, that third-party defendant’s share would be re-allocated in accordance with each liable party’s proportionate share. *Id.* at *50.

²¹⁷ Other notions of “divisibility” will remain relevant under my proposed section 107 paradigm, as well as in cases under section 113. For example, if a defendant can show that the “facility” is actually two separate facilities, the defendant might be liable as an owner, operator, generator, or transporter only for one facility but not the other. *See* 42 U.S.C. §§ 9601(9), 9607(a) (2006). Also, if a defendant can show that its waste caused only some of the harm at the facility, that showing may be relevant to the equitable allocation of response costs and orphan shares for the facility. Such showings, however, are distinct factually and legally from the divisibility or reasonable basis of apportionment contemplated by the Restatement (Second) of Torts § 433A (1965). *See Burlington Northern*, 129 A.S.Ct. 1870, 1882 n.9 (2009) (explaining that reasonable basis for apportionment to avoid joint and several liability differs from equitable allocation under section 113(f)(1)); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26(a) (2000) (stating that damages can be divided by causation into indivisible parts, and then liability for each part is apportioned by comparative responsibility).

²¹⁸ 729 F. Supp. 2d 526 (D.R.I. 2010).

governmental action which resulted in a consent decree whereby United Technologies Corporation (UTC) agreed to perform a cleanup at the site. UTC asserted a CERCLA section 113 claim against various other responsible parties, including Ashland. As a result of a 1998 trial in *United States v. Davis*,²¹⁹ parties including Ashland were found liable and there was an equitable adjudication of the soil cleanup costs at the site. In 2008 Ashland initiated a CERCLA section 107 action against various defendants, including UTC and other parties who were subject to the 1998 allocation, seeking recovery of costs incurred by Ashland to remediate groundwater at the same site.²²⁰ Preliminarily, the defendants, supported by an amicus brief by the United States, argued that 1) Ashland cannot maintain a section 107 claim because it had not voluntarily incurred the cleanup costs; and 2) even if a section 107 claim were proper, there should be no joint and several liability because Ashland is a responsible party.²²¹ The court rejected both arguments, ruling that Ashland could maintain a section 107 claim because it had directly incurred the cleanup costs—as opposed to reimbursing another for the costs as in a section 113 action—and that section 107 imposes joint and several liability.²²²

The court then addressed the defendants' other argument—that based on principles of collateral estoppel the equitable allocation of cleanup costs from the twenty-six-day 1998 trial in *Davis* should apply to this new action.²²³ Although the new action involved the same parties and the same site,²²⁴ the court held that the 1998 allocation did not apply to this new action.²²⁵ In particular, the court emphasized that the 1998 trial had been governed by section 113 where liability of defendants is several, costs are allocated based on equitable factors, and plaintiff bears the burden of establishing each defendant's equitable share. By contrast, the court said this section 107 action imposes joint and several liability upon defendants, unless the defendants satisfy the burden of showing divisibility: "Because the allocations in *Davis*, which was a Section 113(f) contribution action, were based primarily on equitable considerations, they do not automatically apply

²¹⁹ 31 F. Supp. 2d 45 (D.R.I. 1998), *aff'd in part*, 261 F.3d 1 (1st Cir. 2001).

²²⁰ See *Ashland*, 729 F. Supp. 2d at 533–34.

²²¹ See *id.* at 537–38. The government urged that Ashland's claim was properly under CERCLA section 113 apparently in an effort to immunize UTC from Ashland's claim by virtue of contribution protection afforded under the prior consent decree by 42 U.S.C. § 9613(f)(2). *Id.* at 537. Contribution protection is discussed in more detail at Part IV.D.2.

²²² See *Ashland*, 729 F. Supp. 2d at 542–46.

²²³ See *id.* at 547–48.

²²⁴ The 1998 trial addressed soil contamination cleanup costs, while the 2008 action involved groundwater contamination cleanup costs, but the evidence relating to the parties' liability and how contamination was caused at the site apparently was the same for both the soil and groundwater. *Id.* at 545. Instead, the court emphasized that "the mechanics of the liability determination for each case are conceptually different and require a separate analysis." *Id.*

²²⁵ See *id.* at 547–48.

in this case. Instead, liability, if proven, will be joint and several unless the defendants can establish that the hazardous waste is divisible.”²²⁶

The *Ashland* decision improperly exalts form over substance. The results of a twenty-six-day allocation trial should not be disregarded in a later case at the same site involving the same parties, merely because the original claim was under CERCLA section 113 and the later action is under CERCLA section 107. Although the Supreme Court has said that sections 107 and 113 provide two “clearly distinct” remedies,²²⁷ the Court was much more accurate when it explained that sections 107 and 113 provide “somewhat overlapping remed[ies]”²²⁸ “to persons in different procedural circumstances.”²²⁹ The relief afforded private plaintiffs by sections 107 and 113 should be the same.²³⁰

In conclusion, orphan shares should be allocated pursuant to equitable factors in every private CERCLA action, rather than automatically being allocated wholly to defendants or plaintiffs based on inapt scope of liability labels such as joint and several or several. Courts can accomplish such equitable allocation of orphan shares in section 113 actions by invoking section 113(f)(1)’s instruction to allocate response costs among liable parties using equitable factors. In section 107 actions, rather than clinging to the notion of joint and several liability and the artifice of a section 113 counterclaim, courts should interpret section 107 as providing the same relief as in a section 113 action—i.e., each liable party is allocated an equitable share of the response costs, including orphan shares.

D. Implementing the Solution: Related Issues

1. Joinder and Contribution

The concepts of joint and several liability and several liability affect more than who bears orphan shares. Traditionally, they also dictate who must join nonparty liable persons, and who bears responsibility for the shares of those nonparties if they are not joined, as well as the existence of contribution rights.²³¹ As discussed in Part II.A, under joint and several liability, defendants must join other liable persons or be responsible for those nonparties’ shares. A defendant subject to joint and several liability

²²⁶ *Id.* at 548. The court acknowledged that the defendants may file section 113(f) counterclaims to offset plaintiff’s recovery, but the court refused to consider the applicability of the 1998 allocation to those counterclaims. *Id.*

²²⁷ *Atlantic*, 551 U.S. 128, 138 (2007) (quoting *Aviall*, 543 U.S. 157, 163 n.3 (2004)).

²²⁸ *Id.* at 139 n.6 (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994)).

²²⁹ *Id.* at 139 (quoting *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 99 (2d Cir. 2005)).

²³⁰ *See New York v. Solvent Chem. Co.*, 685 F. Supp. 2d 357, 425–26 (W.D.N.Y. 2010) (claimant could proceed under either CERCLA section 107 or section 113, but regardless the court would use section 113(f)(1) equitable factors to allocate response costs among the various parties).

²³¹ *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ A18 cmt. a, 11 cmt. a, c (2000).

has the right to seek contribution, to the extent it has paid more than its fair share, from other responsible parties. Under several liability, plaintiffs must join or otherwise sue all other liable persons in order to be made whole, and a defendant has no right of contribution because it is not subject to liability to plaintiff for more than its fair share.²³²

At least prior to the *Aviall-Atlantic* watershed, CERCLA cases generally followed the same dichotomy. In section 107 actions, the defendant had the burden of joining or otherwise seeking contribution from other responsible parties.²³³ In section 113 actions, the plaintiff generally had the burden of joining other responsible parties, and defendants had neither the need nor the right to seek contribution.²³⁴ Today, with the frequent confusion regarding whether a private CERCLA claim is governed by section 107 or section 113, adhering to that same dichotomy for joinder and contribution is a recipe for procedural chaos. For example, if a party enters into a consent decree with the government and then brings a CERCLA action against other responsible parties, it may not be clear whether the claim is governed by section 107, section 113, or both.²³⁵ Should a plaintiff pursue a strategy, commonly followed by the government in section 107 actions, of suing just a few deep-pocket, clearly liable parties? Or should plaintiff sue all potential responsible parties on its section 113 claim for reimbursement of past costs paid to the government and just a few PRPs on its section 107 claim for cleanup costs it is incurring? Can or should a defendant join responsible parties beyond those sued by plaintiff as original defendants? To avoid such problems, I propose adopting a uniform approach for joinder and contribution as well as for scope of liability for private claims under CERCLA sections 107 and 113.

Courts seemingly could choose one of three different uniform approaches to issues of joinder and contribution in private CERCLA actions, while still allocating orphan shares among all viable responsible parties based on equitable factors.²³⁶ One approach is based on classic several

²³² See *supra* Part II.A. Typically, under joint and several liability the court will determine the shares only of the actual parties; it is defendant's duty to join others. See RESTATEMENT (SECOND) OF TORTS § 886A cmt. i (1979); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. b (2000). By contrast, under several liability the court typically will determine the shares of nonparties as well, in order to ascertain the share of defendant. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY. § 11 cmt. a (2000).

²³³ See, e.g., *United States v. Marisol, Inc.*, 725 F. Supp. 833, 842–43 (M.D. Pa. 1989); *Cal. Dep't of Toxic Substances Control v. Alco Pac. Inc.*, 217 F. Supp. 2d 1028, 1036 (C.D. Cal. 2002).

²³⁴ See, e.g., *Pinal Creek*, 118 F.3d 1298, 1301 (9th Cir. 1997) (because liability under section 113 is several, defendants cannot assert third-party complaints for contribution); *New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (same). But see *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1373–74 (D.N.J. 1996) (refusing to dismiss defendants' third-party complaints for contribution against other responsible parties, although liability under section 113 is several, because original defendants might be allocated some portion of orphan shares).

²³⁵ See *supra* Part III.C.1.

²³⁶ The comparative responsibility tracks set forth in the Restatement (Third) of Torts do not squarely address the unique orphan share problem of CERCLA. Track C contemplates re-allocation of a defendant's equitable share among all parties, including plaintiff, in proportion to

liability, with the plaintiff bearing the burden of joining other responsible parties or of absorbing their equitable shares. Under this “several-like” approach, the plaintiff would have the burden of proving the existence of any orphan share; once plaintiff proved that a responsible party was insolvent, dead, or no longer in existence, that party’s orphan share would then be subject to equitable allocation among all of the viable parties rather than being allocated entirely to plaintiff. That is, plaintiff would have to prove that a responsible party is an “orphan” before the equitable share attributable to that orphan could be distributed among the plaintiff and the defendants based on equitable factors.²³⁷ If plaintiff fails to prove the nonparty is an orphan, plaintiff absorbs that nonparty’s share. This approach was followed by at least some courts in pre-*Aviall* section 113 actions.²³⁸

This “several-like” approach has a number of advantages. Because plaintiffs will bear the shares of nonparties (except for those proved to be orphans), plaintiffs are motivated to join all viable responsible parties as defendants in the same case. This is positive because CERCLA plaintiffs typically are in a better position to identify and to sue other responsible parties than are defendants. Plaintiffs usually have had longer and more extensive involvement at the site (e.g., were sued earlier, performed response work) so they have more access to information about the site and other responsible parties. By contrast, defendants may have little knowledge about the site before service of plaintiff’s complaint, at which point they are under more stringent time constraints to join other responsible parties to

their assigned percentages of comparative responsibility—but only where it is proved that defendant is insolvent and its share is uncollectible. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 10 cmt. a., C18, C21(a) & cmt. a, b (2000). Responsible parties who no longer exist or cannot be joined are not addressed. *Id.*

In comparison to joint and several liability and several liability, Track C is “theoretically the most appealing in that it apportions the risk of insolvency to the remaining parties in the case in proportion to their responsibility, thereby providing an equitable mechanism for coping with insolvency.” *Id.* § 17 cmt. a. Track C is based on joint and several liability principles, but the Restatement acknowledged that a similar result could be achieved via several liability principles subject to re-allocation in the event of insolvency. *Id.* The Restatement expressed concerns about the burdens a several-liability-based approach might impose on innocent plaintiffs. *Id.* § 11 cmt. a. Private CERCLA plaintiffs, though, typically are responsible parties. See *infra* Part IV.E.

²³⁷ Typically, orphans are dead, defunct, or insolvent responsible parties. See U.S. ENVTL. PROT. AGENCY, *supra* note 63, at 2 (defining “orphan shares” as those of identifiable responsible parties who are insolvent or defunct, with no successor or affiliated liable party). A number of courts have defined “orphan” more broadly to include responsible parties who cannot now be identified or located. See *Lyondell Chem. Co v. Occidental Chem. Corp.*, 608 F.3d 284, 303 (5th Cir. 2010); *Pinal Creek*, 118 F.3d at 1303.

²³⁸ Illustrative is *United States v. Davis*, 31 F. Supp. 2d 45 (D.R.I. 1998), *aff’d in part*, 261 F.3d 1 (1st Cir. 2001). Claimant UTC had settled the federal government’s CERCLA section 107 claim for response costs and then brought section 113 contribution claims against various other responsible party defendants. *Id.* at 49–50. Although the court described the contribution-defendants’ liability as several, it recognized that orphan shares could be allocated among all liable parties, UTC and defendants, pursuant to equitable factors. *Id.* at 62. UTC argued that certain other responsible parties were orphans, but the court found that UTC had failed to establish that they were orphans and therefore the contribution-defendants did not have to bear the shares of those other responsible parties. *Id.* at 68–69.

the case via contribution claims.²³⁹ Moreover, defendants under this approach have no right to contribution because they will not pay more than their equitable share—except for part of any orphan share, which by definition there is no one to seek contribution from—so third-party practice is reduced.²⁴⁰

However, because defendants do not bear the risk of nonparty shares under the “several-like” approach, they benefit from arguing that nonparties are liable and should be allocated a hefty share, while having no incentive to join them. Plaintiffs then must either join the nonparties identified by defendants,²⁴¹ rebut defendants’ proof that the nonparties are liable,²⁴² or show that the nonparties are actually orphans.²⁴³ This could result in excessive joinder and satellite litigation over the liability and shares of nonparties and whether they are indeed orphans.

A second approach incorporates principles of classic joint and several liability. If there is a responsible nonparty, defendants must either join and seek contribution from the responsible nonparty (or else be saddled with that nonparty’s share) or show that the nonparty is an orphan (in which event the share can be allocated equitably among plaintiff and defendants). This “joint-and-several-like” approach, however, does nothing to spur plaintiffs to join all responsible parties, placing that burden solely on defendants even though plaintiffs typically are in the better position for accomplishing such joinder. Also, as with the first approach, this second approach may result in excessive joinder and satellite litigation over the liability and shares of nonparties.²⁴⁴

A third approach is to toss aside the concepts of several and joint and several entirely with respect to joinder and contribution. Instead, the risks of non-joinder and the benefits of contribution are shared among all of the viable responsible parties, both plaintiffs and defendants. Under this approach, response costs are allocated solely among the parties in the case. If a responsible party is not joined, there is no reason for the court to determine the share of that nonparty or whether it is an orphan; the nonparty’s share is ignored and as a result is spread among the responsible

²³⁹ For example, a defendant has only 14 days after service of its original answer to file a third-party complaint without leave of court. FED. R. CIV. P. 14(a)(1).

²⁴⁰ See, e.g., *Port of Tacoma v. Todd Shipyards Corp.*, No. C08-5132BHS, 2009 WL 113852, at *5 (W.D. Wash. Jan. 14, 2009); *City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1332 (E.D. Cal. 1998).

²⁴¹ See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIABILITY § B19 cmt. g (2000) (stating that under several liability, defendant must identify nonparties it contends are liable).

²⁴² *Port of Tacoma*, 2009 WL 113852, at *4.

²⁴³ See *id.*

²⁴⁴ Courts in private CERCLA section 107 actions post-*Atlantic* have allowed defendants subject to joint and several liability to assert section 113 contribution claims against additional defendants. See *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, No. 2:05-2782-CWH, 2008 WL 2462862, at *6-7 (D.S.C. June 13, 2008) (using Fed. R. Civ. P. 19 rather than Fed. R. Civ. P. 14); *L.A. Unified Sch. Dist. v. BP Am.*, No. CV 10-1181 PSG (PLAx), 2010 WL 1854070, at *5 (C.D. Cal. May 6, 2010) (denying Rule 19 motion but allowing defendant to implead under Rule 14).

parties already in the case.²⁴⁵ Effectively, every nonparty is treated as an orphan for purposes of equitable allocation. Because each responsible party may be allocated a share larger than its share would have been if other responsible parties were in the case, each responsible party in the case would have a right of contribution against nonparties. Hence, either plaintiff or defendant could join a nonparty responsible party, which would then become one of the parties among whom response costs would be allocated in the original case. Any of the parties adjudged liable and allocated a share in the original case could pursue a contribution claim in a later suit against one or more of the nonparties, but of course a later contribution suit against an orphan would be futile.

This approach has a number of advantages. The risk of non-joinder is spread among all parties, and all parties have both the right and incentive to join other responsible parties into the original case. There is no need to determine the liability or shares of nonparties, nor is there a need to determine whether any nonparty is an orphan. The shares of all nonparties, including orphan shares, are allocated among the other liable parties.²⁴⁶

²⁴⁵ See *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 19–20 (1st Cir. 2004) (holding that court in CERCLA section 113 action has discretion to allocate response costs equitably just among the parties in the case).

²⁴⁶ Under all three approaches, the burdens of proof would be the same. That is, the plaintiff would have the burden of proving that each defendant is liable under section 107(a); the defendant would have the burden of proving that each plaintiff is liable under section 107(a), if not admitted; and any proponent of a third-party complaint would have the burden of proving that each third-party defendant is liable. Once the liability of each party is established, the court allocates response costs, and orphan shares if applicable, among all of the liable parties.

Courts have long been split on how a settlement affects the amount a private plaintiff can recover from nonsettling defendants in CERCLA cases. Some follow the pro tanto approach, which reduces the nonsettling defendants' liability by the amount the settler actually paid the plaintiff. *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 307–08 (7th Cir. 1999). Others follow the proportionate share approach, which reduces the nonsettling defendants' liability by the equitable share of the settler. *Am. Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 219 (D.R.I. 1993). The pro tanto approach is embraced by the Uniform Contribution Among Tortfeasors Act (UCATA). UCATA §§ 1–2 (rev. 1955), 12 U.L.A. 201–02, 263–64 (2008). However, the Uniform Comparative Fault Act (UCFA) of 1977 and Restatement (Third) of Torts endorse the proportionate share approach. UCFA § 2, 12 U.L.A. 135–36 (2008); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 16 (2000). The pro tanto approach, which CERCLA expressly adopts where the United States is the plaintiff, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(f)(2) (2006), allows plaintiff to be made whole, regardless of how much it received from the settler, and avoids the need for the court to determine the settler's share. The proportionate share approach protects nonsettling defendants in the event of a "sweetheart" deal where the settler pays too little, but requires litigation of settler's share. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212 (1994). Under my "several-like" first option, the plaintiff's potential recovery should be reduced by the settler's share, just as it would be reduced by the share of any nonparty nonorphan. Under my second and third options, either approach is feasible, but the proportionate share approach better promotes the goal of equitable allocation among all viable responsible parties.

2. Contribution Protection and Statutes of Limitations

The ramifications of whether a private CERCLA action is governed by section 107 or section 113 can extend to other provisions of the statute. In particular, whether a claim is under section 107 or 113 can affect the applicability of contribution protection under CERCLA section 113(f)(2) and the statutes of limitations under CERCLA section 113(g).²⁴⁷ My proposal for a uniform scope of liability in private section 107 and section 113 actions need not alter the law applicable to CERCLA contribution protection or statutes of limitations. However, by freeing courts to focus on deciding issues of contribution protection and statutes of limitations without the baggage of how such decisions will affect the allocation of response costs and orphan shares, my proposal could help lead to improved decisions regarding these other important CERCLA provisions.

Contribution Protection. When Congress added section 113(f) to CERCLA in 1986, an express “contribution protection” provision was included in section 113(f)(2).²⁴⁸ Persons who settle with the government in an administrative or judicially approved settlement resolving CERCLA liability “shall not be liable for claims for contribution regarding matters addressed in the settlement.”²⁴⁹ This contribution protection provision helps entice responsible parties to settle with the government because such settlers will be protected from future contribution actions by nonsettling responsible parties. In the absence of contribution protection, settlers could be sued by non-settlers who claim that the settlers did not pay their equitable share of response costs at a site.²⁵⁰ Prior to *Aviall* and *Atlantic*, section 113(f)(2) afforded a settler broad protection since all CERCLA actions by responsible party non-settlers were deemed contribution actions governed by section 113.²⁵¹ In *Atlantic*, however, the Court restricted the scope of contribution protection afforded by section 113(f)(2). Focusing on the language of section 113(f)(2), the Court found that it protected settlers only from “contribution” claims under section 113(f) and not from cost recovery claims under section 107.²⁵² Hence, today parties who settle their CERCLA liability at a site with the government may be sued by nonsettling responsible parties for response costs at the same site under section 107.²⁵³ The Court opined that this “supposed loophole” would not discourage settlements with the government, *inter alia*, because courts evaluating equitable factors in the case by the non-settler would consider the prior

²⁴⁷ See, e.g., PERCIVAL ET AL., *supra* note 36, at 444; Gaba, *supra* note 104, at 10,811–12.

²⁴⁸ 42 U.S.C. § 9613(f)(2) (2006).

²⁴⁹ *Id.*

²⁵⁰ Cf. *McDermott*, 511 U.S. at 211–12 (discussing admiralty).

²⁵¹ See *supra* Parts III.A–B. Whether contribution protection applied usually turned on whether the suit was a “matter addressed” in the settlement, within the meaning of 42 U.S.C. § 9613(f)(2). See *United States v. Union Gas Co.*, 743 F. Supp. 1144, 1153–55 (E.D. Pa. 1990); *HYSON*, *supra* note 77, at 126.

²⁵² *Atlantic*, 551 U.S. 128, 140 (2007).

²⁵³ At minimum, section 107 governs claims for response costs voluntarily incurred by the nonsettling party. See *supra* Parts III.B–C.1.

settlement.²⁵⁴ While presumably true, the settler is still required to defend another CERCLA lawsuit. This aspect of the *Atlantic* opinion has been widely criticized as discouraging settlements with the government and ignoring the realities of CERCLA litigation.²⁵⁵

My proposal would not necessarily alter the effect of *Atlantic* upon contribution protection: courts could still find that section 107 claims are beyond the protection of section 113(f)(2). However, treating the scope of liability under sections 107 and 113 as the same might spur courts to re-evaluate the wisdom of allowing settlers to be sued under section 107. That is, if the scope of liability under both sections is the same, and courts continue to struggle with figuring out when section 107 should apply rather than section 113, perhaps the Supreme Court should re-visit its *Atlantic* interpretation of section 113(f)(2) and extend contribution protection to section 107 claims as well as section 113 claims, thus facilitating settlements with the government in CERCLA cases.²⁵⁶

Statutes of Limitations. Neither would my proposal necessarily alter the applicability of CERCLA's statutes of limitations under sections 113(g)(2) and (3).²⁵⁷ Section 113(g)(2) sets forth separate statutes of limitations for removal actions and remedial actions: in general, actions to recover response costs for a removal action must be commenced within three years of completion of the removal action, and actions to recover costs of a remedial action must be commenced within six years of initiation of physical on-site construction of the remedy.²⁵⁸ Section 113(g)(3)—labeled “Contribution”—sets forth another limitations period, stating that “[n]o action for contribution for any response costs . . . may be commenced more than 3 years after” the date of a judgment in a CERCLA case, of certain CERCLA section 122 administrative settlements, or of a CERCLA judicial settlement.²⁵⁹

There long has been considerable disagreement regarding the proper application of these statutes of limitations in private CERCLA cases.²⁶⁰ Some courts and commentators say only claims under section 107 should be governed by CERCLA section 113(g)(2), whereas all claims under section 113(f) should be governed by the “contribution” statute of limitations in CERCLA section 113(g)(3).²⁶¹ Others note, however, that the triggering

²⁵⁴ *Atlantic*, 551 U.S. at 140–41.

²⁵⁵ See Aronovsky, *supra* note 16, at 259; Gaba, *supra* note 104, at 10,815–16; Yeboah, *supra* note 133, at 288–89.

²⁵⁶ Others might argue, though, that granting contribution protection from section 107 claims allows the government unfairly to favor a settler over a non-settler, depriving the non-settler of the ability to shift even a portion of its own response costs at a site to the favored settler. John M. Hyson, *CERCLA Settlements, Contribution Protection and Fairness to Nonsettling Responsible Parties*, 10 VILL. ENVTL. L. J. 277, 359–60 (1999).

²⁵⁷ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(g)(2)–(3) (2006).

²⁵⁸ *Id.* § 9613(g)(2)(A)–(B).

²⁵⁹ *Id.* § 9613(g)(3).

²⁶⁰ See HYSON, *supra* note 77, at 144.

²⁶¹ See *United Tech. Corp. v. Browning-Ferris Indus. Inc.*, 33 F.3d 96, 98–99 (1st Cir. 1994); Gershonowitz, *supra* note 16, at 146.

events listed in section 113(g)(3) do not cover all of the circumstances that give rise to contribution claims under section 113(f). Hence, rather than leave certain section 113(f) claims subject to no statute of limitations, section 113(g)(2) should be applied to any claim for recovery of a party's own incurred costs, irrespective of whether the claim is governed by section 113(f).²⁶²

Thus, while it is not clear that the applicable CERCLA statute of limitations actually depends upon whether section 107 or section 113 governs a claim, courts can continue to differentiate between section 107 and 113 claims for statute of limitations purposes, if they choose, even were my proposal for a uniform scope of liability for sections 107 and 113 adopted. What my proposal will do, though, is allow the statute of limitations decision to be made on its merits, without the baggage that a decision regarding the applicability of section 107 or section 113 also will affect the allocation of response costs or orphan shares.

E. No Exception for Innocent Private Plaintiff

Even during the era when courts were restricting all responsible party plaintiffs to section 113 actions, many courts stated that "innocent" private plaintiffs could maintain a section 107 action; if the plaintiff was not a liable party, it could bring a section 107 claim.²⁶³ Arguably, consistent with this historical treatment, there should be an exception to my proposal for innocent plaintiffs, allowing them to have the benefits of joint and several liability, and immunity from orphan shares, when maintaining section 107 claims. Such an exception also would be consistent both with CERCLA's "polluter pays" principle and with the traditional purpose of joint and several liability, which is to make culpable defendants bear the risk of non-recovery instead of the innocent plaintiff.²⁶⁴

The problem, in my view, is that the exception would swallow the rule. It is extraordinarily rare for a truly non-labile private plaintiff to assert a CERCLA claim for response costs. As the *Atlantic* Court recognized, "[T]he statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs. Hence, if PRPs do not qualify as 'any other person' for

²⁶² See *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192 (10th Cir. 1997); Alfred R. Light, *CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?*, 16 SOUTHEASTERN ENVTL. L.J. 245, 279 (2008); Tilleman & Swindle, *supra* note 81, at 181.

²⁶³ See, e.g., *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1133-35 (10th Cir. 2002); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-25 (2d Cir. 1998); *New Castle Cnty. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1496 (11th Cir. 1996). Uniquely, the Seventh Circuit held that even a responsible party plaintiff could maintain a section 107 action if it did not actually contribute to the contamination. Thus, a current owner of a contaminated site may be a responsible party under section 107(a)(1) and have no defense under section 107(b), but nevertheless be eligible to bring a section 107 claim if it had not contributed to contamination at the site. *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *AM Int'l, Inc. v. Datacard Corp.*, *DBS, Inc.*, 106 F.3d 1342, 1346-47 (7th Cir. 1997).

²⁶⁴ See *supra* Part II.

purposes of § 107(a)(4)(B), it is unclear what private party would.”²⁶⁵ Amici in *Atlantic* noted that in reported CERCLA cases between 1995 and 2000, involving 364 contaminated sites, only one involved a plaintiff that was not a responsible party.²⁶⁶

While the benefits of such an exception would be enjoyed only by the rare innocent plaintiff, the detriments of allowing for such an exception would be substantial and widespread. Most section 107 cases would begin with a plaintiff who has not yet admitted liability or been adjudicated a liable party.²⁶⁷ As a result, defendants in such cases would be putatively subject to joint and several liability, at least until the defendants actually prove that the plaintiff is a responsible party without a defense to liability. Typically such questions of a plaintiff’s liability would not be decided until summary judgment at the earliest, and because such a determination is frequently the subject of disputed facts, plaintiff’s liability often would not be decided until trial.²⁶⁸ By that stage in the case, defendants would have borne the burdens of joining and seeking contribution against other responsible parties, including proving their liability and equitable shares.²⁶⁹ In addition, because of the possibility of joint and several liability, the issues of divisibility or reasonable basis of apportionment routinely would be in play, thus requiring the parties and the court to devote time and resources to those otherwise unnecessary issues.²⁷⁰ Then when plaintiff ultimately was proven to be a liable party, the entire posture of the case would shift—e.g., defendants would no longer be exclusively responsible for joinder, contribution, and orphan shares—thus fomenting procedural chaos and delay.

Accordingly, any small advantage theoretically afforded those few innocent plaintiffs by the benefit of joint and several liability is outweighed by the practical disadvantages that would plague the vast bulk of private CERCLA section 107 actions. In those rare cases where the private plaintiff

²⁶⁵ *Atlantic*, 551 U.S. 128, 136 (2007).

²⁶⁶ Brief for Amici Curiae Natural Resources Defense Council et al. in Support of Respondent at 10 n.12, *Atlantic*, 551 U.S. 128 (2007) (No. 06-562), 2007 WL 1046712. There is little incentive for a nonliable person to undertake a voluntary cleanup and then assert a CERCLA section 107 claim. CERCLA, unlike many environmental statutes, does not allow private plaintiffs to recover their attorney fees or other litigation costs. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). The only relief afforded a private plaintiff under section 107 is recovery of the response costs it incurs, and only then where the costs are shown to be necessary and consistent with the National Contingency Plan. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(4)(B) (2006).

²⁶⁷ There is no requirement that a plaintiff self-identify as a responsible party in its complaint. Recipients of CERCLA section 106 administrative orders are not necessarily liable, and even parties who have entered into a consent decree often do not have to admit liability. See ELLIOT J. GILBERG, U.S. ENVTL. PROT. AGENCY, ISSUANCE OF 2009 REVISED CERCLA MODEL REMEDIAL DESIGN/REMEDIAL ACTION CONSENT DECREE ¶ F (2009) (memorandum explaining revisions to the decree), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-rdra-2009-mem.pdf>.

²⁶⁸ Summary judgment cannot be granted unless the movant shows that there is no genuine issue of material fact. FED. R. CIV. P. 56(a).

²⁶⁹ See *supra* Part II.B discussing joinder and contribution in governmental CERCLA section 107 actions.

²⁷⁰ See *supra* Part IV.C.

actually is not a responsible party, the court could equitably decide to allocate defendants a 100% share, including any and all orphan shares, thus making the innocent plaintiff whole.²⁷¹

V. CONCLUSION

The handling of orphan shares has long been one of the most troublesome issues in private CERCLA cases, carrying great consequences to the parties, yet fraught with uncertainty and plagued by cloudy analysis. The Supreme Court in *Aviall* and *Atlantic* ushered in a new era in private CERCLA actions, expanding the availability of section 107 claims but raising the specter that jointly and severally liable defendants would have to bear the entire orphan share burden as a matter of law, even where the plaintiff is more culpable. This Article posits that this new era in private CERCLA litigation affords a fresh opportunity to rectify the long-standing problem of orphan shares.

Orphan shares in private actions under sections 107 and 113 should be allocated among all viable responsible parties, both plaintiffs and defendants, pursuant to equitable factors. It is time to discard the labels “joint and several” and “several” when describing the scope of liability in private actions under CERCLA sections 107 and 113, as clinging to those outdated common law labels unnecessarily complicates private CERCLA litigation, fosters counterproductive contrivances like contribution counterclaims, and impedes the allocation of orphan shares in accordance with the goals of the statute. Instead, private claims under sections 107 and 113 should be governed by a uniform scope of liability, resulting in orphan shares being equitably allocated among all viable responsible parties.

²⁷¹ Cf. *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 549 (6th Cir. 2001) (holding that plaintiff was responsible party but defendant was allocated 100% share in CERCLA section 113 action).