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CASE NOTE

WHEN POLICY TRUMPS THE TEXT: HOW AMBIGUOUS STATUTES ALLOW THE COURTS AN OPPORTUNITY TO FURTHER CONGRESSIONAL INTENT

*Cooper Industries, Inc. v. Aviall Services, Inc.*¹

I. INTRODUCTION

The United States has long been an industrious nation. Indeed, industrial and technological progress has afforded the average U.S. citizen a lifestyle that rivals history's most celebrated monarchs. Unfortunately progress in industry and technology has often been coupled with environmental consequences. According to the EPA, industrial and manufacturing processes create many forms of solid and hazardous wastes.² Even when regulated, the effects of such hazardous wastes are potentially devastating to the environment and the general public. Children are especially susceptible to the potential effects of hazardous waste because they do things such as play in the mud and crawl on floors.³ Perhaps more alarming is the fact that, according to the Agency for Toxic Substances and Disease Registry (ATSDR), three million American children live within one mile of a hazardous waste site.⁴ In an effort to minimize the effects of hazardous waste, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. "The Act's main purpose is to promote 'the prompt cleanup of hazardous waste sites.'"⁵ In *Cooper Industries, Inc. v. Aviall Services, Inc.*,⁶ the Supreme Court was given an opportunity to interpret CERCLA in a way that is consistent with this goal. Instead, we now have a federal law that discourages responsible parties from cleaning up hazardous waste until they are sued.

II. FACTS AND HOLDING

In 1981, Cooper Industries, Inc. ("Cooper"), sold four of its aircraft engine maintenance sites to Aviall Services, Inc. ("Aviall").⁷ After operating these Texas properties for a number of years, Aviall learned that both Cooper and Aviall had contaminated these maintenance sites by leaking petroleum and other substances into the ground and ground water.⁸ Aviall then contacted the Texas Natural Resource Conservation Commission ("Commission") and notified it that these sites were contaminated.⁹ Upon hearing this, the Commission informed Aviall that it was in violation of Texas environmental laws, and that the Commission would take enforcement action if Aviall did not clean up the sites.¹⁰

¹ 125 S.Ct. 577 (2004).

² *Basic Information: The Office of Solid Waste (OSW)*, EPA, at <http://www.epa.gov/epaoswer/osw/mission.htm> (last updated May 10, 2005).

³ *Children and Parents*, Agency for Toxic Substances and Disease Registry (ATSDR), at <http://www.atsdr.cdc.gov/child/atsdrpage2.html> (last updated Nov. 12, 2003).

⁴ *Id.*

⁵ *J.V. Peters and Co., Inc. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985) (quoting *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985)).

⁶ 125 S.Ct. 577 (2004).

⁷ *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577, 582 (2004).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* Despite the threat, neither the Commission nor the EPA took any judicial or administrative action. *Id.*

Under the state's supervision, Aviall began cleaning up the properties in 1984.¹¹ After eventually selling the sites to a third party in 1995 and 1996, Aviall filed suit against Cooper in the United States District Court for the Northern District of Texas in 1997 to recover some of the five million dollars that it incurred in cleaning up the properties.¹² In its original complaint, Aviall asserted two claims under CERCLA: one for cost recovery under § 107(a) and another for contribution under § 113(f)(1).¹³ However, Aviall subsequently amended its complaint and combined the two CERCLA claims.¹⁴ By combining the claims, Aviall asserted that § 113(f)(1) allowed it to seek contribution from Cooper because Cooper was a "potentially responsible person" (PRP) under § 107(a).¹⁵

After Aviall filed its amended complaint, both parties moved for summary judgment.¹⁶ In reviewing Aviall's amended complaint, the district court held that when Aviall combined both of its CERCLA claims, it in effect abandoned the § 107 claim and sought contribution solely under the § 113(f)(1) claim.¹⁷ After analyzing the § 113(f)(1) claim, the district court held that because Aviall had not been sued under CERCLA § 106 or § 107, it could not get § 113(f)(1) relief.¹⁸

On appeal, the Fifth Circuit initially affirmed the district court's holding that a PRP may only seek contribution under CERCLA § 113(f)(1) if it has been sued under § 106 or § 107(a).¹⁹ In coming to this decision, the Fifth Circuit relied heavily on the statutory language of § 113(f)(1) itself, which provides: "[a]ny person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title."²⁰ The court interpreted this language to mean that a § 106 or § 107(a) lawsuit was a prerequisite for recovery under § 113(f)(1).²¹ On rehearing en banc, however, the Fifth Circuit reversed its prior decision and held that a proper interpretation of § 113(f)(1) allows a PRP to get contribution from other PRPs whether or not it has been sued under § 106 or § 107(a).²² In justifying its decision, the Fifth Circuit explained that the "*may*" in "[a]ny person may seek contribution." did not mean "*may only*."²³ Thus, the Fifth Circuit reasoned, Aviall could recover from Cooper under § 113(f)(1) without being sued first.²⁴ After its short-lived victory was reversed, Cooper petitioned to the United States Supreme Court for a writ of certiorari.²⁵

On January 9, 2004, the Supreme Court granted certiorari to resolve the issue.²⁶ In a 7-2 decision, the Court wasted little time in holding that Aviall's claim could not be maintained under CERCLA § 113(f)(1).²⁷ In reversing the Fifth Circuit, the Court held that the natural meaning of § 113(f)(1) was that an action for contribution under that section could only be sought "*during or following*" a § 106 or § 107(a) action.²⁸ The Court bolstered its position by reasoning that it would not make sense for Congress to specify a condition if the

¹¹ *Id.*

¹² *Id.* In its opinion, the court noted that though Aviall had already spent five million dollars in cleaning up the properties, the total cost to the company could still increase. *Id.*

¹³ *Id.* Aviall's original complaint also asserted state-law claims. *Id.*

¹⁴ *Id.* Aviall contended that it only combined the two CERCLA claims because Fifth Circuit precedent held that a § 113 claim was a type of § 107 claim. *See id.* at n.4. *See also* Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 924 (C.A.5 2000).

¹⁵ *Id.* Aviall's amended complaint still maintained Texas state-law claims. *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *Id.* at 583.

²⁰ *Id.* (quoting 42 U.S.C. § 9613(f)(1) (2000)) (emphasis added).

²¹ *Id.*

²² *Id.*

²³ *Id.* (emphasis added).

²⁴ *See id.*

²⁵ *Id.*

²⁶ Cooper Indus., Inc. v. Aviall Servs., Inc., 540 U.S. 1099 (2004).

²⁷ Cooper, 125 U.S. at 583.

²⁸ *Id.* (internal citation omitted).

condition need not be met.²⁹ After noting Aviall's assertion that it should be able to recover costs under § 107(a)(4)(B) because such an action is distinct from an action for contribution under § 113(f)(1), the Court refused to address the argument and remanded the issue to the Fifth Circuit.³⁰

III. LEGAL BACKGROUND

By 1980, Congress realized that inactive hazardous waste sites posed problems to public health and the environment.³¹ To address the issue, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.³² Prior to the enactment of CERCLA, federal law concerning the clean up of hazardous substances was characterized as "inadequate" and "redundant."³³ With CERCLA, Congress hoped to correct any insufficiencies in prior federal laws.³⁴

The main purpose of CERCLA is to promote the "prompt cleanup of hazardous waste sites."³⁵ CERCLA's secondary purpose is to make sure that the persons "responsible for the improper disposal of [hazardous waste] bear the cost and responsibility" of cleaning it up.³⁶ Under CERCLA, the federal government can choose to clean up a contaminated area itself or compel the responsible private parties to do so.³⁷ Either way, the federal government can recover its response costs under CERCLA § 107, which specifically provides that potentially responsible persons (PRPs) are liable for "all costs of removal or remedial action incurred by the United States"³⁸

Though it was clear that CERCLA § 107 allowed the federal government to recover costs from PRPs, in the Act's early years it was not clear whether § 107 permitted a PRP to recover its response costs from another PRP. In *Wickland Oil Terminals v. Asarco, Inc.*,³⁹ Wickland Oil purchased a parcel of land that was previously occupied by Asarco, a company that conducted smelting operations.⁴⁰ Three years after buying the property, Wickland Oil learned that the slag that Asarco left on the property contained hazardous concentrations of

²⁹ *Id.*

³⁰ *See id.* at 586.

³¹ *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989).

³² *Id.*

³³ *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (citing F. ANDERSON, ET.AL, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984) (footnote omitted)).

³⁴ *See Voluntary Purchasing Groups*, 889 F.2d at 1386.

³⁵ *Id.* (internal citations omitted).

³⁶ *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991).

³⁷ *See* 42 U.S.C. § 9604 (2000).

³⁸ *Id.* § 9607(a)(4)(A). Section 107(a) provides that there are four classes of PRPs:

- (1) the owner and operator of a vessel or a facility;
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

Id. § 9607(a).

³⁹ 792 F.2d 887 (9th Cir. 1986).

⁴⁰ *Id.* at 889.

metals.⁴¹ After incurring \$150,000 in testing for hazardous substances, Wickland Oil brought a § 107(a) claim against Asarco praying for damages.⁴² The Ninth Circuit held that § 107(a) allowed Wickland Oil to recover from Asarco.⁴³ Though various other courts agreed with the holding of *Wickland Oil*, the issue of whether § 107 allowed a PRP to recover costs from another PRP remained open in a number of jurisdictions.⁴⁴

Another CERCLA issue that courts dealt with shortly after its enactment was whether a PRP could acquire contribution from another PRP if the first had been sued in a cost recovery action.⁴⁵ This issue arose because the Act did not expressly provide a PRP with a cause of action for contribution.⁴⁶ To get around this, some district courts interpreted CERCLA to imply a right of action for contribution.⁴⁷ Other district courts held that a right of action for contribution arose as a matter of federal common law.⁴⁸ For example, in *United States v. New Castle County*,⁴⁹ New Castle County and Stauffer Chemical Company (“Defendants”) were sued in a CERCLA cost recovery action.⁵⁰ The Defendants then filed a third-party complaint against other PRPs for contribution under § 107.⁵¹ The Third-Party Defendants moved to dismiss the Defendants’ claim by arguing that no right to contribution existed under CERCLA.⁵² Though the district court for the District of Delaware concluded that CERCLA did not expressly create a right of contribution, it went on to hold that the Defendants’ claim could not be dismissed because CERCLA’s legislative history indicated that Congress empowered the federal courts to create a federal common law of contribution.⁵³ At the time the *New Castle County* case was decided, many courts agreed with its outcome.⁵⁴ However, some of those courts took issue with the reasoning of the *New Castle County* court.⁵⁵ Thus, the state of the law on a PRP’s right to contribution under CERCLA at the time of the *New Castle County* case was tenuous, and many courts believed that a right of contribution existed under CERCLA, but there was no consensus on where that right came from. It was clear there was a need for Congress to set the record straight.

In 1986, Congress enacted CERCLA § 113(f)(1) to explicitly provide a cause of action for contribution.⁵⁶ Section 113(f)(1) provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.⁵⁷

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 892.

⁴⁴ See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577, 581 (2004).

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ See *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27, 31 (E.D. Mo. 1985), cited in *Cooper*, 125 S.Ct. at 581.

⁴⁸ See *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985), cited in *Cooper*, 125 S.Ct. at 581.

⁴⁹ 642 F. Supp. 1258 (D. Del. 1986), cited in *Cooper*, 125 S.Ct. at 581.

⁵⁰ *Id.* at 1261.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1265.

⁵⁴ See e.g. *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27, 31 (E.D. Mo. 1985).

⁵⁵ See *id.*

⁵⁶ 42 U.S.C. § 9613(f) (2000).

⁵⁷ *Id.*

Thus, after the 1986 amendments, a PRP who believes it is entitled to money from another PRP has at least two potential routes under CERCLA.⁵⁸ The first is § 107(a), which allows the federal government and certain private parties to recover costs from PRPs.⁵⁹ The second is § 113(f)(1), which gives a PRP a separate right to contribution from another PRP.⁶⁰

Though the 1986 amendments cleared up the issue as to whether CERCLA provided a PRP with a right to contribution, courts struggled with what the requirements to bring a § 113(f)(1) cause of action were.⁶¹ Specifically, courts were split on whether a PRP had to be sued under § 106 or § 107(a) before it could bring an action for contribution under § 113(f)(1).⁶² The split in the courts was due to the ambiguity of the text of § 113(f)(1).⁶³ The first argument was that Congress only allowed a PRP to bring a § 113(f)(1) contribution action “during or following” a § 106 or § 107(a) action.⁶⁴ According to this argument, a PRP that voluntarily cleans up hazardous waste or does so at the direction of a state agency would not be entitled to contribution under § 113(f)(1).⁶⁵ The second argument was that a PRP could bring a § 113(f)(1) claim against another PRP at any time because of the statute’s “savings clause,” which reads that “[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.”⁶⁶ Both of these arguments have their proponents and have proved to be equally persuasive.⁶⁷ In fact, when *Cooper Industries v. Aviall Services* came up on appeal, the Fifth Circuit had trouble choosing one argument and sticking with it.⁶⁸

After the district court for the Northern District of Texas granted summary judgment for Cooper, Aviall appealed to the court of appeals for the Fifth Circuit.⁶⁹ A divided panel affirmed the district court by interpreting “may” to mean “may only” and focusing on the “during or following” language of § 113(f)(1).⁷⁰ Thus, the Fifth Circuit held that “a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it.”⁷¹ In addition, the Fifth Circuit rejected the argument that § 113(f)(1)’s “savings clause” allowed a CERCLA contribution action where a PRP had not been sued yet, holding that the clause merely preserved a PRP’s right to bring state law contribution actions.⁷² However, the Fifth Circuit reversed itself a year later *en banc*.⁷³ Adopting the opposite argument, the en banc court held that § 113(f)(1) allows a PRP to bring a § 113(f)(1) contribution action

⁵⁸ See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577, 581-82 (2004). The 1986 amendments also created § 113 (f)(3)(B), which is another right to contribution in addition to § 113(f)(1). *Id.* at 581. Section 113(f)(3)(B) provides an express right of contribution for a “person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement.” *Id.* (quoting 42 U.S.C. § 613(f)(2)).

⁵⁹ 42 U.S.C. § 9607(a).

⁶⁰ *Id.* § 9613(f).

⁶¹ See generally Recent Case, Joshua P. Fershee, *Aviall Services v. Cooper Industries: The Fifth Circuit Makes Securing CERCLA Contribution for Environmental Cleanup a Messy Proposition*, 76 TUL. L. REV. 1749, 1750-53 (2002).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ Note, Andrea Kang, *Aviall Services v. Cooper Industries: The Fifth Circuit’s Decision To Limit The Availability Of Contribution Actions Under CERCLA May Discourage Voluntary Cleanups*, 15 TUL. ENVTL. L.J. 133, 136 (2002).

⁶⁶ *Id.* (quoting 42 U.S.C. § 9613(f)(1) (000)).

⁶⁷ See *id.* at 136-37.

⁶⁸ See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577, 582-83 (2004).

⁶⁹ *Id.* at 582.

⁷⁰ *Id.* at 582-83.

⁷¹ *Id.* (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 263 F.3d 134, 145 (5th Cir. 2001)).

⁷² *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 263 F.3d 134, 140 (5th Cir. 2001).

⁷³ *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 312 F.3d 677, 681 (5th Cir. 2002), cited in *Cooper*, 125 S.Ct. at 583 [hereinafter *Cooper en banc*].

“regardless of whether [it] has been sued under § 106 or § 107.”⁷⁴ The court held that “may” did not mean “may only” and that the “savings clause” was consistent with the interpretation that a PRP need not be sued in order to bring a § 113(f)(1) claim.⁷⁵ It is axiomatic to say that until *Cooper* went to the United States Supreme Court, no one knew for sure what the prerequisites for a § 113(f)(1) claim were.⁷⁶

IV. INSTANT DECISION

In an opinion written by Justice Thomas, the Supreme Court declared that the issue was whether a private party who had not been sued under CERCLA § 106 or § 107(a) could obtain contribution under § 113(f)(1) from another liable party.⁷⁷ To begin its analysis, the Court looked to the language of § 113(f)(1) itself.⁷⁸ When quoting the text of § 113(f)(1), the Court found it necessary to emphasize certain words in the statute: “Any person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title.”⁷⁹ After quoting the statute the Court concluded that “[t]he natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action.”⁸⁰

Arguing against this conclusion, Aviall asserted that the word “may” in § 113(f)(1) should not be read to mean “may only.”⁸¹ Aviall’s argument was that by reading the word “may” in the statute permissively, filing a § 113(f)(1) action after it had been sued was just one way, but not the only way, that a party could obtain contribution under the statute.⁸² Thus, Aviall asserted, a party could obtain contribution under § 113(f)(1) in situations where it had not yet been sued.⁸³ In dismissing Aviall’s argument, the Court then provided three reasons that § 113(f)(1) itself rejected such an interpretation.⁸⁴ First, the Court reiterated that reading “may” to indicate “may only” was the natural meaning of the word within the context of the statute.⁸⁵ Second, the Court reasoned that it would be illogical for Congress to specify the “during or following” condition if the condition need not be met.⁸⁶ Thus, the Court noted that under Aviall’s interpretation of § 113(f)(1), part of the statute would be rendered meaningless, which would violate precedence holding that every word in a statute should be given some operative effect.⁸⁷ Finally, the Court noted that § 113(f)(1)’s “savings clause” also failed to advance Aviall’s case.⁸⁸ That sentence reads: “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.”⁸⁹ The Court concluded that this sentence did not establish another cause of action, but rather meant that § 113(f)(1) had no effect on any other causes of action that may exist apart from it.⁹⁰

⁷⁴ *Cooper*, 125 S.Ct. at 583 (citing *Cooper en banc*, 312 F.3d at 681)).

⁷⁵ *Id.* (citing *Cooper en banc*, 312 F.3d at 687).

⁷⁶ Fershee, *supra* note 61, at 1750.

⁷⁷ *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577, 580 (2004).

⁷⁸ *Id.* at 583.

⁷⁹ *Id.* (quoting 42 U.S.C. § 9613(f)(1) (2000)) (emphasis in original).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting 42 U.S.C. § 9613(f)(1)).

⁹⁰ *Id.* at 583-84.

The Court then gave an additional reason for its conclusion.⁹¹ In its analysis, the Court noted that § 113 provides that the limitation period on contribution actions under §113 begins from the moment that a judgment has been entered or a settlement reached.⁹² The Court further observed that § 113 does not provide a limitation period for cases which do not end with a judgment or settlement.⁹³ Thus, the Court reasoned that because there would be no limitations period for actions in which the party seeking contribution had not been sued, it was doubtful that § 113(f)(1) allowed such an action.⁹⁴

After holding that Aviall could not proceed under § 113(f)(1) because it had not yet been sued, the Court addressed Aviall's alternative argument that it could still recover costs under § 107(a)(4)(B).⁹⁵ The Court refused to resolve the issue for three reasons. First, because none of the lower courts reached the merits of Aviall's § 107(a)(4)(B) claim,⁹⁶ the Court stated that it was unprepared to address the issue.⁹⁷ Second, the Court noted that the § 107 issue, and its sub-issues, were beyond the scope of the briefing and were not included in Aviall's "question presented."⁹⁸ Finally, the Court refused to reach the § 107 issue because Aviall itself had requested that the Court refrain from resolving the issue and instead remand it for consideration.⁹⁹ The Court then reversed the Fifth Circuit and remanded the case for further proceedings.¹⁰⁰

V. COMMENT

There can be little doubt that Justice Thomas' opinion in *Cooper* is a logical, persuasive, and well-reasoned argument in favor of interpreting § 113(f)(1) to require a PRP to be sued under § 106 or § 107(a) before it can obtain contribution from another PRP. In fact, one who is uninformed with the issues involved in *Cooper* might fail to see how the Fifth Circuit could possibly reach a different conclusion. However, upon further study one realizes that the Supreme Court's argument in *Cooper* is a familiar one; it is essentially what the Fifth Circuit originally held when it first heard *Cooper*.¹⁰¹ This is significant because though the Fifth Circuit initially reached the same conclusion as the Supreme Court, it changed its mind and decided to reverse itself.¹⁰² Why would the Fifth Circuit reach a completely different conclusion over a year later? In short, the answer is that the court felt its initial reasoning, the same reasoning that was essentially adopted by the Supreme Court, did not stand up to scrutiny.¹⁰³ Perhaps the most disappointing thing about the Supreme Court's holding in *Cooper* is that in light of § 113(f)(1)'s textual ambiguity, the Court could have reached a decision that would have been more consistent with the goals of CERCLA.

When interpreting statutory language, it is imperative that courts keep in mind why the statute was passed in the first place. As mentioned above, Congress enacted CERCLA in 1980 out of concern that

⁹¹ *Id.* at 584.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* After noting that both parties insisted that the purpose of CERCLA strengthened their arguments, the Court concluded that there was no need to consult the purpose of CERCLA because the meaning of § 113(f)(1) was apparent from the text. *Id.*

⁹⁵ *Id.*

⁹⁶ The courts below did not reach the merits of Aviall's § 107(a)(4)(B) claim because there was dispute on whether Aviall had waived such a claim in favor of its § 113(f)(1) claim. *Id.* at 584-85.

⁹⁷ *Id.* at 585.

⁹⁸ *Id.*

⁹⁹ *Id.* at 586. The Court also refused to decide whether Aviall had an implied right to contribution under § 107. *Id.*

¹⁰⁰ *Id.* In a dissent joined by Justice Stevens, Justice Ginsburg argued that the Court should have reached the § 107 issue. *Id.* at 588 (Ginsburg, J., dissenting).

¹⁰¹ *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 263 F.3d 134 (2001).

¹⁰² *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 312 F.3d 677 (2002).

¹⁰³ *See id.*

hazardous waste sites threatened public health and the environment.¹⁰⁴ Indeed, courts have often stated that CERCLA's goals are to promote the "prompt cleanup of hazardous waste sites"¹⁰⁵ and to ensure that the persons responsible for the improper disposal of hazardous waste bear the cost and responsibility of cleaning it up.¹⁰⁶ Thus, it is logical to consider CERCLA's goals when interpreting its provisions because it is likely that its statutes are consistent with its goals. Admittedly, it is to the text of the statute, not its underlying policies, that a court must initially look to when interpreting legislation.¹⁰⁷ However, when the text of a statute is ambiguous, courts have the most power. When a court is called upon to interpret an ambiguous statute, the ambiguity empowers the court to make a decision that is difficult to criticize; it is hard to misinterpret a statute when its meaning is unknown. However, it is also in such a situation where a court has the most responsibility to honor the purpose of the legislation. Congress, not the Supreme Court, has been chosen to make policy.¹⁰⁸ Thus, when the meaning of a statute is not apparent on its face or by surrounding statutory inferences, courts have a duty to construe a statute in a way that is both logical and in accordance with Congress' wishes.

At first glance, § 113(f)(1) seems relatively straightforward when it provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title."¹⁰⁹ Looking at this sentence alone it seems as if a PRP must first be sued under § 106 or § 107(a) to bring a contribution action. However, the situation gets murkier in light of the "savings clause" which appears later in § 113(f)(1). The "savings clause" declares that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."¹¹⁰ When the first sentence of § 113(f)(1) is considered in light of that section's "savings clause," one might wonder whether the "during or following" requirement is actually a requirement or just an illustration of one of the many situations in which a contribution action is allowed. Unfortunately, despite being faced with these two seemingly contradictory provisions of § 113, the Supreme Court said that the meaning of the text was "clear" and that "there is no need to . . . consult the purpose of CERCLA at all."¹¹¹

Considering that CERCLA's primary goal is the "prompt cleanup of hazardous waste sites," the potential effect of the Supreme Court's holding in *Cooper* is troubling.¹¹² By ruling that § 113(f)(1) requires a PRP to be sued before it can obtain contribution, the Supreme Court has discouraged PRPs from voluntarily cleaning up hazardous waste sites. Instead, PRPs will wait for a § 106 administrative order to be entered against them or wait to be sued in a cost recovery action under § 107(a) before they will cleanup hazardous waste if they hope to obtain contribution under CERCLA. This means that the cleanup of pollution will be anything but "prompt," as CERCLA desires. Ironically, though the Supreme Court felt that not requiring a PRP to be sued before it could seek contribution would render the "during or following" condition of § 113 (f)(1) "superfluous," its interpretation of the statute has arguably rendered the entire purpose of CERCLA "superfluous."¹¹³ Even though CERCLA intended for hazardous waste to be cleaned up as fast as possible, did Court issued a decision that effectively encouraged PRPs to wait to be sued before they will clean up the environment. If the Court had interpreted § 113(f)(1)'s "savings clause" to mean that a PRP did not have to be sued before it could seek contribution, voluntary cleanups would not be discouraged and congressional intent

¹⁰⁴ Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1386 (5th Cir. 1989).

¹⁰⁵ J.V. Peters and Co., Inc. v. EPA, 767 F.2d 263, 264 (6th Cir. 1985).

¹⁰⁶ Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991).

¹⁰⁷ *Cooper*, 263 F.3d at 144.

¹⁰⁸ See U.S. CONST. art. I, § 1.

¹⁰⁹ 42 U.S.C. § 9613(f) (2000).

¹¹⁰ *Id.*

¹¹¹ *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577, 584 (2004).

¹¹² J.V. Peters and Co., Inc. v. EPA, 767 F.2d 263, 264 (6th Cir. 1985).

¹¹³ *Cooper*, 125 S.Ct. at 583.

would be furthered. Instead, the Court postulated that the “savings clause” was meant only to preserve claims for contribution that exist outside of CERCLA (and thus contribution actions could still be brought under state law).¹¹⁴ Though this explanation of the savings clause is arguably rational, it hardly seems to be in the spirit of CERCLA to provide a PRP with a disincentive to clean up hazardous waste.

One of the major reasons that the Supreme Court held that CERCLA requires a PRP to be sued before it can bring a contribution claim is that, according to the Court, the limitations period on contribution actions is triggered in only two ways: (1) when a judgment has been entered or (2) when a settlement is reached.¹¹⁵ Thus, the Court reasoned that because the limitations period would never be triggered if a PRP is not sued, it was doubtful that CERCLA allowed a contribution action with an indefinite statute of limitations.¹¹⁶ However, some courts have found a way to start the limitations period running on contribution actions in which a PRP has not been sued. In *Sun Co. Inc. v. Browning-Ferris, Inc.*, the Tenth Circuit, reasoning that a § 113 contribution action was essentially a type of cost recovery action under § 107, held that the statute of limitations for cost recovery actions should apply to contribution actions in which a PRP had yet to be sued.¹¹⁷ Thus, a PRP who has not been sued would have six years to bring a contribution action after starting to voluntarily clean up hazardous waste.¹¹⁸ If the Supreme Court had adopted this method in *Cooper*, it would have reached a result that was both reasonable and consistent with the primary goal of CERCLA: the prompt cleanup of dangerous substances. Instead, we now have a statute that discourages PRPs from removing harmful materials from the environment until they are sued.

VI. CONCLUSION

While arguably rational, the Supreme Court’s decision in *Cooper* is questionable in light of the primary goal of CERCLA: the “prompt cleanup of hazardous waste.”¹¹⁹ By holding that PRPs may not obtain contribution under CERCLA without having first been sued, the highest court in the land has essentially discouraged voluntary cleanups. In short, instead of giving a PRP an incentive to remove hazardous substances from the environment as soon as possible, this decision encourages a responsible party to act only when it is legally forced to. Perhaps the most disheartening thing about the Court’s decision is that CERCLA § 113(f)(1) is ambiguous enough for the Court to have interpreted it in a way that is more consistent with CERCLA’s principles. If the court had capitalized on the statute’s ambiguity it would have rendered a decision that better served the environment and the public health.

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¹¹⁴ *See id.* at 583-84.

¹¹⁵ *Id.* at 584.

¹¹⁶ *Id.* After noting that both parties insisted that the purpose of CERCLA strengthened their arguments, the Court concluded that there was no need to consult the purpose of CERCLA because the meaning of § 113(f)(1) was apparent from the text. *Id.*

¹¹⁷ 124 F. 3d 1187, 1192 (10th Cir. 1997).

¹¹⁸ *Id.*

¹¹⁹ *J.V. Peters and Co., Inc. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985).