

EPA Administrative Orders on Consent, CERCLA §113(f) Contribution Actions, and the Operative Statute of Limitations After *Atlantic Research*

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“Few statutory schemes—environmental or otherwise—have generated such complex litigation”¹ as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).² Parties seeking to address their CERCLA liability with the U.S. Environmental Protection Agency (EPA) without protracted litigation may find attractive a nonjudicial negotiated settlement, known as an Administrative Order on Consent (AOC). However, after the U.S. Supreme Court’s seminal *United States v. Atlantic Research Corp.*³ and *Cooper Industries, Inc. v. Aviall Services, Inc.*⁴ decisions, subsequent lower court guidance has generated three complex issues that should be considered when entering into an AOC with EPA. First, the U.S. Court of Appeals for the Seventh Circuit’s *Bernstein v. Bankert*⁵ decision creates a circuit split on whether, and in what circumstances, an AOC can give rise to a §107(a) cost recovery action.⁶ Second, outside the Seventh Circuit, or in circumstances where an AOC otherwise cannot support a §107(a) cost recovery action, not all AOCs will give rise to a §113(f) contribution action.⁷

Authors’ Note: All errors are the authors’ own, and institutional affiliations are provided for identification purposes only.

1. Ronald Aronovsky, *CERCLA and the Future of Liability-Based Environmental Regulation*, 41 SW. L. REV. 581, 584 (2012).
2. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.
3. 551 U.S. 128 (2007).
4. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 34 ELR 20154 (2004).
5. *Bernstein v. Bankert*, 702 F.3d 964 (7th Cir. 2012), *reh’g granted in part and opinion amended*, 2012 U.S. App. LEXIS 26993, 43 ELR 20185 (July 31, 2013).
6. See discussion *infra* Part II.A.
7. See discussion *infra* Part II.B.1.

Finally, for AOCs that do support §113(f) contribution actions, a three-year statute of limitations, triggered by the signing of the AOC, likely will apply.⁸ Obtaining the benefits of an AOC requires a careful understanding of these three issues in order to successfully navigate the thicket.

I. Background

The U.S. Congress passed CERCLA to promote the cleanup of hazardous waste sites and to ensure that the responsible parties pay for these environmental response costs.⁹ These potentially responsible parties (PRPs) include: (i) current owners and operators of a facility; (ii) past owners or operators of the facility; (iii) generators of hazardous waste that arrange for disposal or treatment; and (iv) transporters of hazardous waste.¹⁰ At its most basic level, CERCLA involves two phases: cleanup; and cost recovery. During the cleanup phase, EPA, state agencies, or private parties identify contaminated sites and create plans for cleanup.¹¹ Then, either EPA or private parties can implement and pay

8. See discussion *infra* Part II.B.2.
9. *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1874, 39 ELR 20098 (2009); see *Atlantic Research Corp. v. United States*, 459 F.3d 827, 830 (8th Cir. 2006) (noting the goals of CERCLA), *aff’d*, 551 U.S. 128 (2007). Whereas much of federal statutory environmental law is prospective in nature, CERCLA is retrospective, focusing on remediating past contamination. See, e.g., Alexandra Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 920-23 (2004).
10. 42 U.S.C. §9607(a)(1)-(4) (2006); see also *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1145 (9th Cir. 2010).
11. See U.S. EPA, *Superfund: Cleanup Process* (Feb. 28, 2011), <http://www.epa.gov/superfund/cleanup/index.htm> (last visited Sept. 27, 2013).

for the cleanup.¹² During the cost recovery phase, EPA and PRPs, or PRPs among themselves, settle and apportion the liabilities arising from the cleanup phase.¹³

Private parties can resolve their CERCLA liability to EPA by agreement. For example, EPA and private parties can negotiate an AOC, a legal document “that formalize[s] an agreement between EPA and one or more PRPs to address some or all of the parties’ responsibility for a site.”¹⁴ An AOC does not require court approval.¹⁵ Because EPA authorizes AOCs “internally, without need for judicial approval as with consent decrees,” they “can be negotiated more quickly.”¹⁶ EPA also can induce compliance through Judicial Consent Decrees (JCDs) and Unilateral Administrative Orders (UAOs).¹⁷

In general, CERCLA offers two causes of action to shift CERCLA-prompted expenditures onto other parties: §107(a) cost recovery actions; and §113(f) contribution actions.¹⁸ Section 107(a) provides that a private party can maintain a cost recovery action for costs incurred in remediating hazardous waste sites.¹⁹ Section 113(f) contains two avenues for contribution.²⁰ The first, §113(f)(1), provides for contribution by one PRP “during or following any civil action under [§§106 or 107(a)]” against another PRP.²¹ The second, §113(f)(3)(B), enables a PRP that “has resolved its liability to the United States or a State . . . in an *administrative or judicially approved settlement*” to obtain contribution against another PRP.²² Notably, the Supreme Court has held that a §107(a) cost recovery action is “distinct from contribution,” and it is only available to a “private party that has itself incurred cleanup costs.”²³ Any costs a PRP incurs “to satisfy a settlement agreement or a court judgment” cannot be recovered by means of a §107(a) action because these costs are, in actuality, reimbursement to “other parties for costs that those parties

incurred.”²⁴ Therefore, according to the Supreme Court in *Atlantic Research*, “the remedies available in §§107(a) and 113(f) complement each other by providing causes of action to persons in different procedural circumstances.”²⁵ However, the Supreme Court acknowledged that there is uncertainty and may even be overlap under §§107(a) and 113(f) where parties have entered into an AOC. Thus, the interplay between §§107(a) and 113(f) actions, and their related statutes of limitations, is not always clear.

The distinction between §§107(a) and 113(f) can be significant because of the different statutes of limitations that apply to these causes of action. Section 107(a) cost recovery claims are governed by the statute of limitations found at §113(g)(2)(A)-(B).²⁶ For more urgent removal actions, the statute of limitations for a cost recovery claim is three years after completion of the removal action. For longer term remedial actions, the statute of limitations for a cost recovery claim is six years after initiation of onsite construction of the remedial action. In general, §113(f) contribution claims are governed by the statute of limitations found at §113(g)(3)(A)-(B).²⁷ The statute of limitations for contribution claims is three years from either (a) the date of judgment or (b) the date of a de minimis administrative settlement or judicially approved settlement. Notably, CERCLA does not include a statute of limitations that explicitly applies to claims based on an AOC.²⁸

II. Private-Party Actions on AOCs

A. §107(a) Cost Recovery Actions on AOCs

The Supreme Court has not resolved the issue of whether costs incurred in responding to an AOC can be recovered with a §107(a) cost recovery action.²⁹ After *Atlantic Research*, the U.S. Courts of Appeals for the Second, Third, Sixth, Eighth, and Eleventh Circuits have all agreed that a party to a settlement agreement cannot pursue a §107(a) cost recovery action because such a claim fits more squarely within the requirements of §113(f).³⁰ Therefore, in all likelihood, a party to an AOC in these circuits (or other circuits finding their analyses persuasive) can only pursue a §113(f) contribution action to recover costs incurred under the AOC.³¹

In contrast to the majority of circuit courts that have addressed this issue, the Seventh Circuit’s recent decision

12. See 42 U.S.C. §9604 (2012).

13. *Aerojet Gen. Corp.*, 606 F.3d at 1145.

14. U.S. EPA, *Types of Superfund Settlements*, <http://www.epa.gov/oecaerth/cleanup/superfund/neg-type.html> (last visited Sept. 27, 2013).

15. *Id.*

16. *Id.*

17. *Id.* A JCD must be “approved and entered by a U.S. district court.” *Id.* If private parties refuse to enter into an AOC or JCD, or private parties to an AOC later refuse to perform, EPA can issue a Unilateral Administrative Order (UAO) to compel cleanup. U.S. EPA, *Superfund Unilateral Orders*, <http://www.epa.gov/compliance/cleanup/superfund/orders.html> (last visited Sept. 27, 2013); see also 2 RCRA AND SUPERFUND: A PRACTICE GUIDE, 3D §13:43 (2012).

18. See *Bernstein*, 2012 U.S. App. LEXIS 26993 at *15.

19. 42 U.S.C. §9607(a)(1)-(4) (2012).

20. See *Atlantic Research*, 551 U.S. at 138 (CERCLA contains “separate rights to contribution in other circumstances, §113(f)(1), 113(f)(3)(B)”).

21. 42 U.S.C. §9613(f)(1) (2012) (emphasis added). In relevant part, §113(f)(1) states: “Any person may seek contribution from any other person who is liable or potentially liable under [§107(a)], during or following any civil action under [§106] or under §107(a).” *Id.*

22. 42 U.S.C. §9613(f)(3)(B) (2012). In relevant part, §113(f)(3)(B) states: A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [§113(f)(2)].

Id.

23. *Atlantic Research*, 551 U.S. at 139.

24. *Id.*

25. *Id.* (quotation marks omitted).

26. 42 U.S.C. §9613(g)(2)(A)-(B) (2012).

27. 42 U.S.C. §9613(g)(3)(A)-(B) (2012).

28. See discussion *infra* Part II.B.2.

29. See *Atlantic Research*, 551 U.S. at 139 n.6 (“We do not decide whether [the] compelled costs of response are recoverable under §113(f), §107(a), or both.”).

30. See *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127-28 (2d Cir. 2010); *Agere Sys. Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010); *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007); *Morrison Enter. LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1237, 42 ELR 20062 (11th Cir. 2012).

31. See discussion *infra* Part II.B.

in *Bernstein v. Bankert*³² creates the possibility that an AOC can sustain a §107(a) cost recovery action. Due to the unique holdings of the *Bernstein* panel, discussed below, the United States and other parties requested rehearing and rehearing en banc. The United States filed an amicus brief in support of the petitions for rehearing en banc, arguing that the *Bernstein* opinion was contrary to the plain text of CERCLA and its statutory context, jeopardized the prompt cleanup of contaminated sites by reducing polluters' incentives to settle with the United States, and was in considerable tension, if not direct conflict, with Sixth Circuit precedent.³³ The Seventh Circuit denied rehearing en banc, but the panel granted rehearing in part, on July 31, 2013, to amend its opinion in order to clarify concerns raised by the United States and others in their motions for rehearing.³⁴ Notwithstanding the amended opinion, the court's holding remained the same—the AOC at issue in *Bernstein* could not sustain a §113(f) contribution action, and instead gave rise only to a §107(a) cost recovery action.

At issue in *Bernstein* were two AOCs—one executed in 1999 and one in 2002.³⁵ In both the 1999 and 2002 AOCs, EPA included covenants not to sue conditioned on completing the work described under each respective AOC.³⁶ When the lawsuit was filed, the work under the 1999 AOC had been completed, but the removal action work under the 2002 AOC was still ongoing.³⁷ The *Bernstein* court held that this distinction between ongoing and completed work determined the availability of §§107(a) and 113(f) actions. The court began its analysis by examining the prerequisites to each action.³⁸ Under §107(a), PRPs are liable for, among other things, “any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.”³⁹ According to *Bernstein*, the phrase “any other person” “has been read literally to mean *any person other than the United States, a State, or an Indian tribe.*”⁴⁰ Therefore, §107(a)(4)(B) “grants one PRP the same rights as an innocent party,” which would allow PRPs to use §107(a) cost recovery actions.⁴¹

As for §113(f) contribution claims, the *Bernstein* court explained that §113(f) offers “two distinct rights to contribution, each subject to its own prerequisites.”⁴² The first, §113(f)(1), “*must be pre-dated by the filing of a civil action pursuant to [§106 or §107(a)].*”⁴³ The second, §113(f)(3)(B), “is *only* available to a person who has ‘resolved its

liability . . . in an administrative or judicially approved settlement.”⁴⁴ After an in-depth analysis of this phrase's meaning, the court held,

the “ordinary or natural” meaning of the phrase “resolved its liability . . . in an administrative or judicially approved settlement” is clear and unambiguous. To meet the statutory trigger for a contribution action under §9613(f)(3)(B), the nature, extent, or amount of a PRP's liability must be decided, determined, or settled, at least in part, by way of agreement with the EPA.⁴⁵

Therefore, the court held that a PRP that has entered into an AOC does not have a §113(f) contribution claim until the covenant not to sue from EPA is effective.⁴⁶ In its amended opinion, the court emphasized the fact that EPA can, and has, crafted AOCs with immediately effective covenants not to sue, which could give rise to a §113(f) contribution claim.⁴⁷ However, the precise distinctions in the examples of AOCs cited by the court are not entirely clear.

After its legal explication, the *Bernstein* court concluded that the incomplete 2002 AOC could not sustain a §113(f) contribution action, but instead gave rise to a §107(a) cost recovery action.⁴⁸ Because the plaintiffs were not subject to a civil action under §§106 or 107(a), nor was the covenant not to sue in the 2002 AOC effective at the time of filing, both §113(f) contribution avenues were unavailable.⁴⁹ Rather, because plaintiffs “incur[red] costs of response consistent with the national contingency plan,” they could file a §107(a) cost recovery action.⁵⁰ The Seventh Circuit found support for this position in *Atlantic Research*. The court explained that *Atlantic Research* does not stand for the proposition that “a [§107(a)] cost recovery action is available only to plaintiffs who incurred costs voluntarily” nor does it hold that “[c]ompelled costs . . . may only be recovered through a [§113(f)] contribution action.”⁵¹ Indeed, *Atlantic Research* itself arguably eschewed such a reading, cautioning that it did “not suggest that §§107(a)(4)(B) and 113(f) have no overlap at all.”⁵² Based on its reading of *Atlantic Research*, the *Bernstein* court found that the incomplete 2002 AOC supported only a §107(a) cost recovery action.⁵³

After determining that a §107(a) cost recovery action existed for the removal action work under the 2002 AOC, the *Bernstein* court applied the statute of limitations at §9613(g)(2)(A), which allows a plaintiff to file suit within

32. *Bernstein v. Bankert*, 702 F.3d 964 (7th Cir. 2012), *reh'g granted in part and opinion amended*, 2012 U.S. App. LEXIS 26993, 43 ELR 20185 (July 31, 2013).

33. *Bernstein v. Bankert*, Nos. 11-1501, 11-1523, 2013 WL 1216971, United States' Brief as Amicus Curiae in Support of Bankert Appellees' Petition for Panel Rehearing or Rehearing En Banc (7th Cir. Mar. 14, 2013).

34. *Bernstein*, 2012 U.S. App. LEXIS 26993 at **1-3.

35. *Id.* at **6-8.

36. *Id.* at **6-8, 24-25, 36.

37. *Id.*

38. *Id.* at **14-21.

39. *Id.* at *16 (citing 42 U.S.C. §9607(a)(4)(B) (2012)) (emphasis added).

40. *Id.*

41. *Id.*

42. *Id.* at *18.

43. *Id.* at *19.

44. *Id.* at *20 (citing 42 U.S.C. §9613(f)(3)(B) (2012)).

45. *Id.* at *51.

46. *Id.*

47. *Id.* at **56-59.

48. Conversely, the completed 1999 AOC gave rise to a §113(f) contribution action, but not a §107(a) cost recovery action. *Id.* at *32 (noting that, although a §107(a) cost recovery action would in theory be available, “we agree with our sister circuits that a plaintiff is limited to a [§113(f)] contribution remedy when one is available”); see discussion *infra* Part II.B.2.

49. *Id.* at **36-37.

50. *Id.* at *37.

51. *Id.* at *38.

52. *Id.* at **38-40 (citing *Atlantic Research*, 551 U.S. at 139 n.6).

53. *Id.* at **59-60.

three years following completion of the removal action.⁵⁴ The *Bernstein* court held that the three-year statute-of-limitations period had not yet begun to run, because it is triggered by completion of the removal action, which had not yet occurred.

The amended Seventh Circuit decision in *Bernstein* may still be appealed. The parties have 90 days from the date of the amended ruling to determine whether to file a petition for writ of certiorari to the Supreme Court. Therefore, while *Bernstein* is currently the law in the Seventh Circuit, the future of this precedent is still highly uncertain.

B. Section 113(f) Contribution Actions on AOCs

Despite the recent *Bernstein* opinion in the Seventh Circuit, a majority of courts have held that a §113(f) contribution action is the most appropriate action to recover costs incurred under an AOC. To decide whether a party can recover such AOC costs with a §113(f) contribution action,⁵⁵ courts engage in a two-part analysis.⁵⁶ First, courts examine whether the AOC can give rise to a §113(f) contribution action. Second, because AOCs are not an enumerated “trigger” under the statute of limitations otherwise relevant to §113(f) contribution actions (§113(g)(3)), courts then must determine what statute of limitations applies to a “§113(f)-proper” AOC. Each is addressed in turn below.

I. Only Certain AOCs Can Give Rise to §113(f) Contribution Actions

CERCLA provides that a PRP can sustain a contribution action against other PRPs in the situations outlined at CERCLA §§113(f)(1) and 113(f)(3)(B).⁵⁷ Generally, only §113(f)(3)(B) contribution actions apply to AOCs.⁵⁸ The relevant text is as follows:

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [§113(f)(2)].⁵⁹

In order to sustain a §113(f)(3)(B) contribution action, a PRP must resolve at least some of its CERCLA liability with the government.⁶⁰

The Sixth Circuit has addressed the extent to which liability must be resolved to give rise to a §113(f) contribution claim in *ITT Industries v. BorgWarner, Inc.*⁶¹ The case involved an AOC that the court held could not sustain a §113(f) contribution action. There, in 2001, the state environmental department discovered trichloroethene in groundwater near the site.⁶² In 2002, the plaintiff and EPA entered into an AOC.⁶³ In a later §113(f) contribution action, the court dismissed the claim because the AOC, in its view, was not a “settlement” under §113(f)(3)(B).⁶⁴ The court explained that, for “an administrative or judicially approved settlement” to give rise to a §113(f) contribution action, the settlement must resolve “some or all” of the plaintiff’s liability to the United States.⁶⁵ The court held that the plaintiff had “not resolved *any* of its liability” because: (i) the AOC gave EPA the unilateral right to terminate the AOC and further adjudicate legal liability; and (ii) the plaintiff refused to concede liability when it settled with EPA.⁶⁶

Other opinions involve fact patterns where the AOC at issue resolves “enough” of a party’s liability to the United States in order to sustain a §113(f) contribution action. In fact, EPA has revised the standard language it uses in AOCs to avoid the pitfalls identified by the Sixth Circuit. For example, *Chitayat v. Vanderbilt Associates*⁶⁷ presented a relatively straightforward situation. There, the AOC provided that, once the state environmental department received plaintiff’s final payment, the plaintiff would receive a full and complete release for CERCLA liabilities relating to the site.⁶⁸ The court held that the AOC could sustain a §113(f) contribution action.⁶⁹

In *American Premier Underwriters v. General Electric Co.*,⁷⁰ the court was presented with a more ambiguous settlement agreement. There, in 2005, the plaintiff and EPA entered into a JCD.⁷¹ The parties disputed whether the 2005 JCD resolved “some or all” of the plaintiff’s

54. *See id.*; *see also* discussion *supra* Part I.

55. In other words, the fact that a PRP likely cannot pursue a §107(a) cost recovery action on an AOC does not mean that a PRP can automatically pursue a §113(f) contribution action. In certain fact patterns, a plaintiff may have no cause of action for costs incurred pursuant to an AOC, notwithstanding that the action would be considered “timely” in other fact patterns. *Cf., e.g., BorgWarner*, 506 F.3d at 456 (court rejected both the §107(a) action because plaintiff was a PRP and the §113(f) action because the AOC did not resolve CERCLA liability); *see* discussion *infra* Part II.B.1.

56. This two-part analysis is not always explicit. However, as the cases illustrate, many challenges to plaintiffs’ §113(f) contribution actions concern at least one of these analytical parts. *See, e.g., Chitayat v. Vanderbilt Assocs.*, 702 F. Supp. 2d 69, 78-83 (E.D.N.Y. 2010) (analyzing the §113(f) contribution action in two parts: (i) whether the AOC could give rise to a §113(f) contribution action; then (ii) whether the §113(f) contribution action was timely); *BorgWarner*, 506 F.3d at 459 (resolving, “as an initial matter,” whether the AOC could give rise to a §113(f) contribution action).

57. *Atlantic Research*, 551 U.S. at 138; *Cooper Indus.*, 543 U.S. at 167; *Am. Premier Underwriters, Inc. v. Gen. Electric Co.*, 866 F. Supp. 2d 883, 902-03 (S.D. Ohio 2012).

58. Because PRPs and EPA can negotiate AOCs regardless of pendant §§106 or 107(a) actions, the first contribution avenue of §113(f)(1) generally is not applicable. *See* 42 U.S.C. §9613(f)(1) (2012) (“Any person may seek contribution from any other person who is liable or potentially liable under [§107 (a)], *during or following* any civil action under [§106] or under [§107 (a)].” (emphasis added)).

59. 42 U.S.C. §9613(f)(3) (2012).

60. *See ITT Industries v. BorgWarner, Inc.*, 506 F.3d 452, 459 (6th Cir. 2007) (noting that “as an initial matter, §113(f)(3)(B) requires that parties resolve ‘some or all’ of their liability as to the United States”).

61. 506 F.3d 452 (6th Cir. 2007).

62. *Id.* at 454.

63. *Id.* at 455.

64. *Id.* at 459.

65. *Id.*

66. *Id.* at 459-60 (emphasis added).

67. 702 F. Supp. 2d 69 (E.D.N.Y. 2010).

68. *Id.* at 81.

69. *Id.*

70. 866 F. Supp. 2d 883 (S.D. Ohio 2012).

71. *Id.* at 903-04.

liability to the United States.⁷² To analyze the issue, the *American Premier Underwriters* court looked to the *BorgWarner* AOC on three points.⁷³ First, both *BorgWarner* and *American Premier Underwriters* involved agreements in which plaintiffs did not admit liability.⁷⁴ Second, EPA in both instances reserved its rights to pursue legal action to enforce the agreements' terms.⁷⁵ But, the agreements differed in one final, "important" respect: the *American Premier Underwriters* JCD did not give EPA the unilateral right to terminate the agreement if the PRP did not satisfactorily perform its obligations, whereas the *BorgWarner* AOC did.⁷⁶ Accordingly, because the JCD extinguished one avenue of CERCLA liability, it was a "judicially approved settlement' within the meaning of Section [1]13(f)(3)(B)."⁷⁷

2. "Section 113(f)-Proper" AOCs and the Application of §113(g)(3)'s Three-Year Statute of Limitations

Assuming that an AOC sufficiently resolves a PRP's CERCLA liability to sustain a §113(f) contribution action, the next question is what statute of limitations applies to this "§113(f)-proper" AOC. As discussed *supra*, CERCLA §113(g)(3) outlines the statute of limitations for contribution actions.⁷⁸ The relevant text is as follows:

(3) Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of an administrative order under [§122(g)] (relating to de minimis settlements) or [§122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.⁷⁹

The Supreme Court has summarized §113(g)(3) as providing "two corresponding 3-year limitations periods for contribution actions, one beginning at the date of judgment, §113(g)(3)(A), and one beginning at the date of settlement, §113(g)(3)(B)."⁸⁰ According to one commentator, "[a]fter *Atlantic Research*, it is clear that section 113(g)(2) applies to the PRP's private cost recovery claims under section 107."⁸¹ However, just "how contribution claims . . . fit in CERCLA's scheme is not as clear."⁸²

Arguably, AOCs do not "trigger" any of the events outlined under §113(g)(3). As the dissent described in *RSR Corporation v. Commercial Metals Co.*,⁸³ the "plain statutory language" indicates only four events trigger the three-year statute of limitations under §113(g)(3): "(1) the entry of a judgment; (2) a §[1]22(g) de minimis settlement; (3) a §[1]22(h) cost recovery settlement; [or] (4) a judicially approved settlement."⁸⁴ Indeed, according to one commentator, the "main interpretative problem" with §113(g)(3) is that, on its face, it only applies in certain factual scenarios, all of which do not encompass AOCs.⁸⁵ These enumerated factual scenarios may explain why several pre-*Atlantic Research* and *Cooper Industries* decisions refused to apply §113(g)(3) to situations with no "triggering" event.⁸⁶

But, the consensus of several post-*Atlantic Research* appellate and district court decisions demonstrates an about-face—now, the three-year statute of limitations set forth at §113(g)(3) likely applies to §113(f) contribution actions on AOCs or settlements with EPA more generally. For example, the Sixth Circuit's majority opinion in *RSR Corporation* rejected a novel argument in which §113(g)(3)'s three-year statute of limitations would not apply to §113(f) contribution actions on settlements with EPA. There, in 1999, the district court entered a JCD signed by the United States, the plaintiff, and other parties.⁸⁷ In 2003, the plaintiff filed a §113(f) contribution action, which the lower court dismissed based on the three-year statute of limitations.⁸⁸ According to the Sixth Circuit, the plaintiff conceded it sought a "§113(f) contribution action and that the 1999 JCD was a "judicially approved settlement" resolving its liability with the United States "for the purpose of *authorizing* a contribution action."⁸⁹ Therefore, the court saw "no reason why it does not also constitute a 'judicially approved settlement' for the purpose of *limiting* when that action may be brought—for determining, in other words, when the right to bring that action accrues for statute-of-limitation purposes."⁹⁰ The Sixth Circuit

72. *Id.* at 905-06.

73. *See id.* at 906-07.

74. *Id.* at 906.

75. *Id.*

76. *See id.* at 906-07.

77. *Id.* at 907.

78. *See* 42 U.S.C. §9613(g)(3) (2012).

79. *Id.*

80. *Cooper Indus.*, 543 U.S. at 167.

81. Alfred Light, *CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?*, 16 SOUTHEASTERN ENVTL. L.J. 245, 279 (2008).

82. *Id.*

83. 496 F.3d 552 (6th Cir. 2007).

84. *Id.* at 560 (Clay, J., dissenting).

85. *See* Light, *supra* note 81, at 278.

86. *See, e.g., id.* at 279-81; Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 924-25, 31 ELR 20369 (5th Cir. 2000) ("Whether a party is seeking recovery under section 107(a) or contribution under section 113 does not always determine the applicable statute of limitations. . . . [W]here a party seeks contribution but none of the triggering events has occurred, Congress did not designate the statute of limitations."); Sun Co., Inc. (R&M) v. Browning-Ferris, Inc., 124 F.3d 1187, 1191-93, 27 ELR 21465 (10th Cir. 1997) ("A close reading of §113(g) makes it clear, however, that not all contribution claims have the same statute of limitations."); City of Merced v. Fields, 997 F. Supp. 1326, 1334-35 (E.D. Cal. 1998) (describing the three approaches that courts had taken thus far: (i) no statute of limitations; (ii) six-year statute of limitations from §113(g)(2); and (iii) three-year statute of limitations from §113(g)(3)); Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1522-23, 25 ELR 21331 (D. Utah 1995) (§113(g)(3)'s three-year statute of limitations does not apply); Gould Inc. v. A&M Battery & Tire Serv., 901 F. Supp. 906, 913-15, 26 ELR 20516 (M.D. Pa. 1995), *vacated on other grounds*, 232 F.3d 162, 31 ELR 20251 (3d Cir. 2000) (§113(g)(3)'s three-year statute of limitations does not apply).

87. *RSR Corp.*, 496 F.3d at 554.

88. *Id.*

89. *Id.* at 556.

90. *Id.*

affirmed that the §113(f) contribution action was time barred under §113(g)(3).⁹¹

Although the Seventh Circuit recently had the opportunity to do so, it declined to rule on this statute-of-limitations issue. In *Bernstein*, the Seventh Circuit found that plaintiffs could pursue a §113(f) contribution action on a completed 1999 AOC.⁹² The lower court's decision in *Bernstein* referenced post-*Atlantic Research* opinions to find that §113(g)(3)'s three-year statute of limitations applied to a §113(f) contribution action on an AOC.⁹³ But, given the amount of time that had elapsed from when plaintiffs completed work under the 1999 AOC to when they filed the lawsuit, the Seventh Circuit decided that it did not matter whether §§113(g)(2) or (3) applied because "the outcome [was] the same either way."⁹⁴ The §113(f) contribution action on the 1999 AOC was time barred, and the court declined to "resolve the 'coverage gap' dispute."⁹⁵

In addition to the *Bernstein* district court decision, other district court decisions are consistent with *RSR Corporation*, holding that the three-year statute of limitations in §113(g)(3) applies to §113(f) contribution actions on AOCs.⁹⁶ For example, in *Chitayat*, the plaintiff and the state environmental department entered into an AOC in 1998.⁹⁷ The AOC provided that, after receipt of payments in connection with the state's investigation and remediation, the state would release all CERCLA claims against the plaintiff.⁹⁸ In 2003, the plaintiff brought a §113(f) contribution claim.⁹⁹ The plaintiff argued it was not bound by §113(g)(3) because the AOC was not an enumerated trigger.¹⁰⁰ The *Chitayat* court rejected this argument, noting "the decisions in *Cooper Industries* and *Atlantic Research Corp.* eliminate the availability of the six-year statute of limitations set forth in section 113(g)(2) as an option for contribution cases."¹⁰¹ Furthermore, the court rejected the argument that §113(f) contains no statute of limitations "if a judgment or settlement never occurs, as is the case with a

purely voluntary cleanup."¹⁰² Because the plaintiff entered into the AOC in 1998 and filed the §113(f) contribution action in 2003, the court found plaintiff's claims were time barred by §113(g)(3).¹⁰³

Another issue facing PRPs that enter into AOCs with EPA is how courts will treat costs incurred to clean up a site before entry of the AOC. At least one court has allowed a PRP to seek contribution for costs incurred before entry of the AOC, while reaffirming that the three-year statute of limitations under §113(g)(3) applied. In *Tennessee v. Roane Holdings Ltd.*,¹⁰⁴ the site was placed on the state "List of Inactive Hazardous Substances Sites" in 1989.¹⁰⁵ In 2009, plaintiffs and the state entered into an AOC to complete remedial activities outlined in an earlier remedial-design report.¹⁰⁶ In late 2010, plaintiffs and the state entered into a JCD "to ensure the payment of response costs."¹⁰⁷ In 2011, plaintiffs filed a §113(f) contribution action.¹⁰⁸ Defendants argued that plaintiffs could not be reimbursed for costs incurred in the 1980s and 1990s because plaintiffs, at the time, were not subject to a settlement agreement or a judgment.¹⁰⁹ The court rejected this argument, noting that §113(g)(3)'s "clear language" meant that the statute of limitations for §113(f) contribution actions "begins to run when a court enters a judicially approved settlement or the date of an administrative order, *not when the activities related to the recovery of costs or damages occurred.*"¹¹⁰ Because the parties entered into the AOC in 2009 and the JCD in 2010, the §113(f) contribution action filed in 2011 was timely.¹¹¹ Therefore, to the extent a PRP can argue that costs incurred in earlier years are addressed by a later AOC, *Roane Holdings* might support a narrow argument for additional reimbursement.¹¹²

III. Conclusion

Lower courts after *Atlantic Research* have offered a relatively clear message—the clock likely starts ticking after a PRP signs an AOC, and a PRP must file its §113(f) contribution action on the AOC within three years to satisfy §113(g)(3)'s statute of limitations. The Seventh Circuit's twist in *Bernstein*, that work under the AOC must be complete or the covenant not to sue in the AOC must be immediately effective before a plaintiff can pursue a §113(f) contribution action,¹¹³ suggests that parties to an AOC in the Seventh Circuit (or other circuits finding its analysis persuasive) must act within a narrow window. In other words, they likely must file the §113(f) contribution action

91. *Id.* at 560.

92. *Bernstein*, 2012 U.S. App. LEXIS 26993 at *32. Recall that the court concluded that plaintiffs could pursue a §107(a) cost recovery action, but not a §113(f) contribution action, on the incomplete 2002 AOC. *See id.* at 981-84; discussion *supra* Part II.A.

93. *Bernstein v. Bankert*, No. 1:08-CV-0427-RLY-DML, 2010 WL 3893121, at *9 (S.D. Ind. Sept. 29, 2010) (citing *Niagara Mohawk*, 596 F.3d 112 and *Chitayat*, 702 F. Supp. 2d 69).

94. *Bernstein*, 2012 U.S. App. LEXIS 26993 at **34-35.

95. *Id.*

96. *See, e.g., Chitayat*, 702 F. Supp. 2d at 81-83; *Basic Mgmt., Inc. v. United States*, 569 F. Supp. 2d 1106, 1122 (D. Nev. 2008); *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 840 F. Supp. 2d 1013, 1033-34 (S.D. Ohio 2011) (noting the "point" of §113(g)(3), "as the introductory clause indicates, is to establish a time bar for contribution actions" without any distinction for the type of contribution claim (footnote and quotation marks omitted)). *But see Appleton Papers Inc. v. George A. Whiting Paper Co.*, 776 F. Supp. 2d 857, 871 (E.D. Wis. 2011), *on reconsideration*, 2011 WL 2633332 (E.D. Wis. 2011), *opinion clarified*, 2011 WL 4585343 (E.D. Wis. 2011) (limiting §113(g)(3)'s application to the enumerated "triggering" events, though curiously without reference to *Atlantic Research* or later interpretative decisions).

97. *Chitayat*, 702 F. Supp. 2d at 74.

98. *Id.* at 74-75.

99. *Id.* at 71, 83.

100. *Id.* at 81.

101. *Id.* at 82.

102. *Id.* at 83 (quoting *Cooper Indus.*, 543 U.S. at 167).

103. *Id.*

104. 835 F. Supp. 2d 527 (E.D. Tenn. 2011).

105. *Id.* at 531.

106. *Id.* at 531-32.

107. *Id.* at 532.

108. *Id.*

109. *Id.* at 542.

110. *Id.* (emphasis added).

111. *Id.* at 542-43.

112. *See id.* at 542 (noting that §113(g)(3) does not turn on "when the activities related to the recovery of costs or damages occurred").

113. *See Bernstein*, 2012 U.S. App. LEXIS 26993 at **55-56.

both: (i) after completing the work under the AOC; but (ii) before three years after signing the AOC have elapsed. In many situations, cleanup work may take more than three years, potentially leaving the PRP without any ability to obtain contribution. Of course, under the *Bernstein* precedent, such PRPs would be able to seek cost recovery claims under §107(a) before the §113(f) contribution claim accrues. While earlier decisions may have suggested a more

flexible framework, courts interpreting the reach of §113(g)(3)'s statute of limitations after *Atlantic Research* have rejected many previously accepted arguments that allowed PRPs to escape §113(g)(3)'s application to AOCs. In sum, the ability after *Atlantic Research* to seize upon CERCLA's relatively poor draftsmanship in order to avoid §113(g)(3)'s three-year statute of limitations grows dim.