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POSITIVE CONTRIBUTION: WHY THE SECOND CIRCUIT'S UNDERSTANDING OF CERCLA § 113 SHOULD MAKE WAY FOR THE THIRD CIRCUIT'S PRO-SETTLEMENT HOLDING IN *TRINITY INDUSTRIES*

SARAH M. GORDON*

Abstract: The U.S. Court of Appeals for the Second Circuit has interpreted section 113(f)(3)(B) of the Comprehensive Environmental Response, Cleanup, and Liability Act, or CERCLA, to only allow a party to seek contribution for claims resolved under CERCLA itself, rather than claims resolved under a state statute. In *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, the U.S. Court of Appeals for the Third Circuit broke from Second Circuit precedent by holding that section 113(f)(3)(B) does not require a settlement under CERCLA to permit a contribution action pursuant to CERCLA. This Comment argues that the Third Circuit's interpretation of section 113(f)(3)(B) is a more accurate reading of the plain language of the statute, a better interpretation of the legislative history of the contribution provision, and more consistent with the policy goals of the CERCLA regime than the interpretation put forth by the Second Circuit.

INTRODUCTION

In 1980, as public awareness of the need to address toxic waste sites reached its zenith, Congress passed the Comprehensive Environmental Response, Cleanup, and Liability Act (“CERCLA”).¹ Through CERCLA,² Congress created a complex scheme to enforce environmental cleanups of hazardous substances, and charged the Act's administration to the Environmental Protection Agency (EPA).³ CERCLA was designed to pass the costs of cleanup on to the parties responsible for the pollution, known as potentially re-

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¹ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2012); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 679–81 (4th ed. 2010); *Superfund: CERCLA Overview*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/policy/cercla.htm> (last updated Dec. 12, 2011), archived at <http://perma.cc/C6ZE-K6BX>.

² *Superfund: CERCLA Overview*, *supra* note 1.

³ 42 U.S.C. §§ 9601–9675; *Superfund: Basic Information*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/about.htm> (last updated Dec. 24, 2013), archived at <http://perma.cc/9CSK-EWL5>; see PLATER ET AL., *supra* note 1, at 679–81.

sponsible parties (“PRPs”).⁴ CERCLA also created a “Superfund” to finance the cleanup operations, originally funded through the taxation of polluting industries, but presently funded with appropriations from the federal budget.⁵

CERCLA plays a critical role in compelling the cleanup of toxins and hazardous waste, which, if left untreated, can have devastating health consequences for both humans and wildlife.⁶ In 2013, in *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, the U.S. Court of Appeals for the Third Circuit addressed the liability of PRPs for the cleanup of a site contaminated with manganese,⁷ which had the potential to enter the groundwater and to be ingested by humans, and lead, which had the potential to enter soil and surface water, and thus impact humans.⁸ Human exposure to either manganese or lead can have disastrous health consequences.⁹ CERCLA endeavors to prevent such disastrous health consequences, which might otherwise result from the failure to clean up environmental contamination.¹⁰

In 2008, Trinity Industries, Inc. and Trinity Railcar Corp. (together “Trinity”) sued Chicago Bridge and Iron Company (“CBI”) for its share of the costs associated with the remediation of a contaminated industrial property

⁴ 42 U.S.C. § 9607(a) (establishing four categories of PRPs: (1) the current owner or operator of the facility or site; (2) past owners or operators of the site; (3) parties who arranged to have any hazardous substances disposed of or treated at the site; (4) parties who transported any hazardous substances to the site); PLATER ET AL., *supra* note 1, at 679–80, 686.

⁵ Martina E. Cartwright, *Superfund: It’s No Longer Super and It Isn’t Much of a Fund*, 18 TUL. ENVTL. L.J. 299, 303–05 (2005); Kathleen Chandler Schmid, Note, *The Depletion of the Superfund and Natural Resource Damages*, 16 N.Y.U. ENVTL. L.J. 483, 489, 511–12 (2008); see 42 U.S.C. § 9611.

⁶ U.S. ENVTL. PROT. AGENCY, THIS IS SUPERFUND: A COMMUNITY’S GUIDE TO EPA’S SUPERFUND PROGRAM 3 (2011), available at <http://www.epa.gov/superfund/community/today/pdfs/TIS%20FINAL%209.13.11.pdf>, archived at <http://perma.cc/WE5C-Z65K>.

⁷ Manganese is a naturally occurring element that is found in rocks; it is used in steel production to improve hardness and strength. *Toxic Substances Portal - Manganese*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=101&tid=23> (last updated on Mar. 20, 2014), archived at <http://perma.cc/5HPP-8UK4>.

⁸ See *Trinity Indus., Inc. v. Chi. Bridge & Iron Co. (Trinity Industries II)*, 735 F.3d 131, 133 (3d Cir. 2013); *Trinity Indus., Inc. v. Chi. Bridge & Iron Co. (Trinity Industries I)*, 867 F. Supp. 2d 754, 758 (D. Pa. 2012) *aff’d in part, vacated in part*, 735 F.3d 131 (3d Cir. 2013).

⁹ Human exposure to high levels of manganese in drinking water can damage the nervous system, leading to a syndrome resembling Parkinsonism. See DRINKING WATER SECTION, CONN. DEP’T OF PUB. HEALTH, MANGANESE IN DRINKING WATER 1 (n.d.), available at http://www.ct.gov/dph/lib/dph/drinking_water/pdf/manganese.pdf, archived at <http://perma.cc/6H3L-K87Z>; *Parkinsonisms and Parkinson’s Plus Syndromes*, PARKINSON’S DISEASE FOUND., http://www.pdf.org/en/parkinsonism_parkinson_syndrome (last visited Mar. 3, 2015), archived at <http://perma.cc/XJ6U-LT3B> (detailing symptoms including tremors, rigidity, and postural instability). Similarly, human exposure to lead can cause a myriad of health problems, such as increased blood pressure, hearing and vision impairment, reproductive problems, damage to the brain and nervous system, anemia, liver and kidney damage, and even developmental delays or death in children. *Superfund: Human Health and Lead*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/lead/health.htm> (last updated Nov. 25, 2013), archived at <http://perma.cc/LJ6N-JTB9>.

¹⁰ U.S. ENVTL. PROT. AGENCY, *supra* note 6, at 3.

that CBI owned before Trinity purchased it.¹¹ At the time, Trinity had settled its cleanup liability with the Commonwealth of Pennsylvania in 2006, but not with the federal government.¹² On appeal, the primary issue was whether a liability settlement under a state environmental statute was sufficient to allow Trinity to seek contribution from CBI under CERCLA, a federal statute.¹³

In *Trinity Industries*, the U.S. Court of Appeals for the Third Circuit broke from Second Circuit precedent in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.* and *W.R. Grace & Co.-Conn. v. Zotos International, Inc.*, by holding that CERCLA section 113(f)(3)(B) does not require a party to have settled its cleanup liability under CERCLA to be permitted to seek contribution from other PRPs pursuant to the statute.¹⁴ This Comment argues that the Third Circuit's interpretation of section 113(f)(3)(B) is a more accurate reading of the plain language of the section, a better interpretation of the contribution provision's legislative history, and in better accord with the policy goals of CERCLA, than the Second Circuit's interpretation.¹⁵

I. FACTS AND PROCEDURAL HISTORY

Between 1911 and 1985, CBI owned an industrial facility ("the site") located on a fifty-three-acre property in Greenville, Pennsylvania, where it constructed steel products such as storage tanks, pressure vessels, water towers, and bridge components.¹⁶ After CBI sold the site in 1985, several interim owners also conducted manufacturing operations there before Trinity purchased it in November of 1988.¹⁷ Between 1988 and 2000, Trinity operated a railcar manufacturing facility on the site, constructing its railcars principally

¹¹ *Trinity Industries II*, 735 F.3d at 133; *Trinity Industries I*, 867 F. Supp. 2d at 756; Plaintiff's Original Complaint at 1, *Trinity Industries I*, 867 F. Supp. 2d 754 (No. 08CV01709) (showing the original filing of complaint in 2008).

¹² *Trinity Industries II*, 735 F.3d at 133.

¹³ *See id.* at 135.

¹⁴ *Id.* at 136.

¹⁵ *See infra* notes 64–93 and accompanying text. As this Case Comment was being prepared to go to press, an analysis of the *Trinity Industries II* decision was published in a student Note in the Kentucky Journal of Equine, Agriculture, and Natural Resources Law. *See* Stephen F. Soltis, Note, *Settlements as an Incentive to Procure Hazardous Waste Site Cleanup: The Third Circuit and a Broad Reading of CERCLA §113(f)(3)(b)*, 7 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 143 (2015). The case analysis undertaken in the Note parallels some of the analysis advanced here. *See generally id.* (containing at times similar, but not identical, analyses).

¹⁶ *Trinity Industries II*, 735 F.3d at 134.

¹⁷ *Trinity Industries I*, 867 F. Supp. 2d at 757. Trinity is an industrial company that provides products and services to the energy, transportation, chemical, and construction sectors. *About Us*, TRINITY INDUS., <http://www.trin.net/aboutus/default.html> (last visited Mar. 16, 2015), archived at <http://perma.cc/598J-RHP8>.

out of steel.¹⁸ Trinity has conceded that some of the paint used in its manufacturing processes spilled onto the ground at the site.¹⁹

In June 2004, the Commonwealth of Pennsylvania began investigating allegations that Trinity's railcar manufacturing operation at the site had violated state environmental laws, including the Hazardous Sites Cleanup Act ("HSCA").²⁰ In March 2006, the Commonwealth filed civil and criminal charges against Trinity.²¹ Consequently, in December 2006, Trinity entered into a Consent Order and Agreement (the "Consent Order") with the Pennsylvania Department of Environmental Protection ("PaDEP"), in which Trinity agreed to remediate all environmental contamination at the site.²² The Consent Order included both Trinity's admission that hazardous substances had been released at the site, and PaDEP's finding that Trinity was a "responsible person" under the HSCA.²³ The Consent Order required Trinity to carry out remediation of the site through "Response Actions" that would be approved by and supervised by PaDEP.²⁴

After signing the Consent Order, Trinity sued CBI under CERCLA section 113(f)(3)(B),²⁵ seeking contribution for a share of the remediation costs, along with an injunction ordering CBI's participation in the remediation efforts.²⁶ The district court granted CBI's motion for summary judgment on Trinity's section 113(f)(3)(B) claim, finding that the Consent Order did not resolve Trinity's CERCLA liability.²⁷ Left with no remedy under CERCLA to recover its response costs, Trinity appealed to the Third Circuit.²⁸ On appeal, the federal government filed an amicus curiae brief to urge the court to interpret section 113(f)(3)(B) in a way that would allow Trinity to seek contribu-

¹⁸ *Trinity Industries I*, 867 F. Supp. 2d at 757.

¹⁹ *Id.* Trinity disputed any connection between the paint spills or any other part of its railcar manufacturing process, and any environmental contamination of the site. *Id.*

²⁰ *Id.* at 757–58; see 35 PA. STAT. ANN. §§ 6020.101–6020.1305 (West 2013).

²¹ *Trinity Industries I*, 867 F. Supp. 2d at 757–58. The criminal charges included felony and misdemeanor counts for unlawful storage, transport, and disposal of hazardous waste. *Id.* In October 2006, Trinity pleaded *nolo contendere* to five misdemeanor counts of unlawful conduct. *Id.*

²² *Id.* at 758.

²³ 35 PA. STAT. ANN. § 6020.103; *Trinity Industries I*, 867 F. Supp. 2d at 758.

²⁴ *Trinity Industries I*, 867 F. Supp. 2d at 758.

²⁵ Section 113(f)(3)(B) addresses the rights of a party to seek contribution. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1647–48 (codified as amended at 42 U.S.C. § 9613(f)(3)(B) (2012)).

²⁶ *Trinity Industries II*, 735 F.3d 131, 134 (3d Cir. 2013). Trinity also sued CBI for contribution under section 107(a), raising a distinct legal issue regarding the proper interpretation of that provision (another question of first impression for the Third Circuit, not discussed here). *Trinity Industries I*, 867 F. Supp. 2d at 759–60. The district court held that Trinity could not seek contribution under section 107(a). *Id.* at 761.

²⁷ *Trinity Industries I*, 867 F. Supp. 2d at 761–62.

²⁸ *Trinity Industries II*, 735 F.3d at 133; *Trinity Industries I*, 867 F. Supp. 2d at 761–62.

tion from other PRPs.²⁹ The brief argued that Trinity had settled its liability for a response action under the meaning of CERCLA.³⁰ Trinity also asserted that the Consent Order expressly reserved Trinity’s right to sue or seek other relief from any party not named in the Consent Order.³¹

In *Trinity Industries*, the Third Circuit considered “whether CERCLA [section] 113(f)(3)(B) provides a contribution claim where the party seeking contribution has settled its state-law liability (as opposed to its liability under CERCLA).”³² Upon review, the Third Circuit affirmed the district court’s holding in part and vacated and remanded in part.³³ It held that section 113(f)(3)(B) “does not require resolution of CERCLA liability in particular,” as the statutory language of section 113(f)(3)(B) does not require that “the response action have been initiated pursuant to CERCLA.”³⁴

II. LEGAL BACKGROUND

The Comprehensive Environmental Response, Cleanup, and Liability Act (“CERCLA”) creates a “Superfund” to finance environmental cleanups and establishes wide-sweeping federal authority to respond to the release or threatened release of hazardous materials that could endanger public health or the environment.³⁵ CERCLA includes provisions enforcing strict liability against parties identified as “responsible parties” for the release of hazardous

²⁹ Brief of the United States as Amicus Curiae Supporting Appellant at 17–22, *Trinity Industries II*, 735 F.3d 131 (No. 12-2059), 2012 WL 5817286, at *17–22.

³⁰ *Id.*

³¹ *Trinity Industries II*, 735 F.3d at 134.

The Consent Order provides, in pertinent part, [n]othing in this Consent Order and Agreement “shall constitute or be construed as a release or covenant not to sue” any party that is not named in this Consent Order and Agreement. “Trinity expressly reserves the right to sue” any party that is not named in this Consent Order and Agreement.

Id.

³² *Id.* at 135. The court also considered “whether injunctive relief pursuant to [Resource Conservation and Recovery Act (“RCRA”) section] 7002(a)(1)(B) is available where a remediation plan has already been instituted and begun,” and “whether the District Court abused its discretion in declining to exercise supplemental jurisdiction over Trinity’s state-law claims once it had granted summary judgment to [CBI] on Trinity’s federal claims.” *Id.* This Comment only addresses the legal implications of the CERCLA 113(f)(3)(B) interpretation issue. See *infra* notes 64–93 and accompanying text.

³³ *Trinity Industries II*, 735 F.3d at 141.

³⁴ *Id.* at 136. The court also affirmed the district court’s grant of summary judgment to CBI regarding Trinity’s plea for injunctive relief under RCRA section 7002(a)(1)(B). *Id.* at 140. By remanding the CERCLA section 113(f)(3)(B) claim, the Third Circuit gave the district court another opportunity to consider exercising supplemental jurisdiction over Trinity’s state-law claims. *Id.* at 141.

³⁵ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2012); *Superfund: CERCLA Overview*, *supra* note 1.

waste at contaminated sites.³⁶ It also authorizes several types of response actions to clean up contaminated sites and to remediate any harm from the contamination.³⁷

When CERCLA was originally passed in 1980, it did not contain a contribution provision—an omission widely perceived and criticized as a legislative flaw.³⁸ Congress sought to fix this flaw with the passage of the Superfund Amendments and Reauthorization Act (“SARA”).³⁹ SARA contains section 113(f)(3)(B), which provides, “[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”⁴⁰

After the creation of the federal “Superfund” under CERCLA, many states either revised existing environmental hazard response programs or created their own state Superfund schemes.⁴¹ These programs were created to supplement federal funding or to fund the cleanup of sites that did not qualify for the CERCLA National Priorities List.⁴² Pennsylvania’s Hazardous Sites

³⁶ Cartwright, *supra* note 5, at 306. See generally David W. Lannetti, Note, “Arranger Liability” Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent, 40 WM. & MARY L. REV. 279, 280 (1998) (arguing that Congress intended for CERCLA to hold polluters to strict liability standards). But see generally Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 590 n.40 (1993) (describing problems with CERCLA’s construction, and arguing for a narrow application of CERCLA’s strict liability provisions).

³⁷ *Superfund: CERCLA Overview*, *supra* note 1. Specifically, CERCLA authorized two kinds of response actions: (1) short-term removals, where release or threatened release require a prompt response, and (2) long-term remedial response actions, designed to permanently reduce the harm associated with the release or threatened release of hazardous substances, where the harm is serious, but not immediately life threatening. *Id.*

³⁸ 42 U.S.C. §§ 9601–9675; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 113, 94 Stat. 2767, 2781 (1980), amended by An Act to extend and amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 99-499, 100 Stat. 1613 (1986); see Richard O. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 TUL. ENVTL. L.J. 323, 324 (2005) (describing legislative history and the changing analysis of CERCLA’s contribution provisions); Elizabeth F. Mason, Comment, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin’s Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 75 (1991).

³⁹ Mason, *supra* note 38, at 91–93; see Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1647–48 (codified as amended at 42 U.S.C. § 9613(f)(3)(B)).

⁴⁰ Superfund Amendments and Reauthorization Act of 1986, 100 Stat. at 1648.

⁴¹ See Elaine C. Warren, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 ENVTL. L. REP. 10,348, 10,348–60 (1983) (analyzing the relationship between state “superfund” statutes and CERCLA); see also Robert B. McKinstry, Jr., *The Role of State “Little Superfunds” in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 5 VILL. ENVTL. L.J. 83, 93–96 (1994) (analyzing the relationship between Pennsylvania’s Hazardous Sites Cleanup Act and CERCLA).

⁴² McKinstry, *supra* note 41, at 92–93; see John S. Applegate, *How to Save the National Priorities List from the D.C. Circuit—and Itself*, 9 J. NAT. RESOURCES & ENVTL. L. 211, 212–25

Cleanup Act (“HSCA”)⁴³ and Land Recycling and Environmental Remediation Standards Act (“LRA”)⁴⁴ are two such state environmental response statutes.⁴⁵

At least three federal circuit courts of appeal have considered whether a party must settle its cleanup liability pursuant to CERCLA in order to then sue for contribution under CERCLA section 113(f)(3)(B).⁴⁶ A clear circuit split has arisen between the U.S. Courts of Appeals for the Second Circuit and the Third Circuit.⁴⁷ Beyond the Second and Third Circuits, the U.S. Court of Appeals for the Sixth Circuit and district courts across the country have also struggled to interpret section 113(f)(3)(B), with conflicting results.⁴⁸

(1994) (describing the relationship between CERCLA enforcement and the NPL); *National Priorities List (NPL)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/sites/npl> (last updated Oct. 16, 2013), archived at <http://perma.cc/CV59-FJDE> (noting that the NPL is the EPA’s list of national priorities among the known or threatened releases of hazardous substances, pollutants, and contaminants in the United States).

⁴³ 35 PA. STAT. ANN. §§ 6020.101–6020.1305 (West 2013). The HSCA gives PaDEP the funding and authority to conduct cleanup actions at sites where environmental contamination has occurred. *Id.*; *Hazardous Sites Cleanup Program*, PA. DEP’T OF ENVTL. PROT., www.portal.state.pa.us/portal/server.pt/community/hazardous_sites_cleanup_program/20600 (last visited Mar. 17, 2015), archived at <http://perma.cc/3JBU-6XDA>. It also gives PaDEP the authority to force those parties responsible for the release of hazardous substances to fund and conduct cleanup actions or to repay any public funds spent on such cleanup. *Hazardous Sites Cleanup Program*, *supra*. HSCA also allows Pennsylvania to participate in the cleanup of Pennsylvania sites under CERCLA. *Id.* Further, the HSCA liability scheme is modeled after CERCLA and is comparable to the CERCLA liability scheme. Mckinstry, *supra* note 41, at 93–94; Thomas J. Elliott, *Environmental Law*, 61 PA. B. ASS’N Q., Jan. 1990, at 13, 13–14. The Third Circuit has found that a defendant’s liability “is neither greater nor lesser under the HSCA” because “the cost recovery and contribution provisions in HSCA are virtually identical to those in CERCLA.” *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 236 (3d Cir. 2010). Like the HSCA, the LRA also “bears a strong resemblance to CERCLA.” *Trinity Indus., Inc. v. Chi. Bridge & Iron Co. (Trinity Industries II)*, 735 F.3d 131, 137 (3d Cir. 2013).

⁴⁴ 35 PA. STAT. ANN. § 6026.101–908 (West 2012).

⁴⁵ Mckinstry, *supra* note 41, 93–96; Warren, *supra* note 41, 10,348–60; see Thomas G. Kessler, Comment, *The Land Recycling and Environmental Remediation Standards Act: Pennsylvania Tells CERCLA Enough Is Enough*, 8 VILL. ENVTL. L.J. 161, 180–86 (1997) (arguing that the LRA addresses problems with CERCLA, encouraging development of previously contaminated sites).

⁴⁶ See *infra* notes 49–63 and accompanying text.

⁴⁷ See *infra* notes 49–63 and accompanying text.

⁴⁸ See *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 459–61 (6th Cir. 2007) (holding that plaintiff could not seek contribution under section 113(f)(3)(B) because the consent order it entered into with the EPA did not constitute a settlement under that section); *Differential Dev.-1994, Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 738–43 (D. Tex. 2007); *Fireman’s Fund Ins. Co. v. City of Lodi, Cal.*, 296 F. Supp. 2d 1197, 1210–12 (D. Cal. 2003); Michael K. Murphy & Jessica Greenston, *CERCLA in the Post-Atlantic Research World: Some Emerging Questions*, 20 A.B.A. ENVTL. LITIGATOR, no. 2, Spring 2009, at 1, 4–5, available at <http://www.gibsondunn.com/publications/Documents/Murphy-Greenston-CERCLAInPostAtlanticResearchWorld.pdf>, archived at <http://perma.cc/MUA8-46K7> (describing the emerging circuit split regarding interpretation of CERCLA section 113(f)(3)(B)). Compare *Differential*, 470 F. Supp. 2d at 738–43 (holding that plaintiff could not seek contribution under section 113(f)(3)(B) because the cleanup agreement entered into with a state environmental agency *did not* resolve plaintiff’s CERCLA liability, and was thus not a settle-

In 2005, in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, the Second Circuit interpreted CERCLA section 113(f)(3)(B) as only allowing contribution for claims resolved under CERCLA itself, rather than claims resolved under a state statute.⁴⁹ In this case, a utility company sued the former operator of a manufactured gas plant, seeking contribution under CERCLA for response costs it incurred in the cleanup of environmental contamination.⁵⁰ Plaintiff argued that the “Voluntary Cleanup Agreement” it had entered into with the New York Department of Environmental Conservation constituted an administrative settlement under section 113(f)(3)(B), and that it was therefore eligible to seek contribution from other potentially responsible parties (“PRPs”) under this provision.⁵¹ The Second Circuit held that “section 113(f)(3)(B) . . . create[s] a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, [are] resolved . . . because resolution of liability for ‘response action[s]’ is a prerequisite to a section 113(f)(3)(B) suit[,] and a ‘response action’ is a CERCLA-specific term”⁵² The court based its holding in part on its reading of the legislative history of SARA.⁵³ Specifically, it relied on a passage from the Report of the House Committee on Energy and Commerce.⁵⁴

In 2009, in *W.R. Grace & Co.-Conn. v. Zotos International, Inc.*, the Second Circuit decision reaffirmed its interpretation section 113(f)(3)(B) of CERCLA.⁵⁵ In this case—on facts similar to *Consolidated Edison*—the Second Circuit held that the plaintiff’s consent order with a state agency did not resolve CERCLA claims under the meaning of section 113(f)(3)(B), and the plaintiff therefore could not seek contribution from other PRPs under that

ment under that section), with *Fireman’s Fund*, 296 F. Supp. 2d at 1210–12 (holding that plaintiff could seek contribution because the cooperative agreement it had entered into with a state agency *did* constitute a settlement under section 113(f)(3)(B)).

⁴⁹ 423 F.3d 90, 95–96 (2d Cir. 2005).

⁵⁰ *Id.* at 92–93.

⁵¹ *Id.* at 95–96.

⁵² *Id.*

⁵³ *Id.* at 96.

⁵⁴ *Id.*; H.R. REP. 99-253, at 79–80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861–62. In pertinent part, the report states,

It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA Other courts have recognized that a right to contribution exists without squarely addressing the issue This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.

H.R. REP. 99-253, at 79–80.

⁵⁵ 559 F.3d 85, 90 (2d Cir. 2009); see *Consolidated Edison*, 423 F.3d at 95–97.

section.⁵⁶ The court based its holding on the same statutory interpretation that it did in *Consolidated Edison*, and on the additional concern that the party would still face a CERCLA action brought by the EPA.⁵⁷

In 1993, in *United States v. Rohm & Haas Co.*, the Third Circuit considered whether the United States could recover costs it had incurred overseeing a cleanup in accordance with a Consent Order issued pursuant to Resource Conservation and Recovery Act (“RCRA”) section 3008(h).⁵⁸ In *Rohm & Haas*, the defendants argued that RCRA and CERCLA represent two different statutory schemes, and therefore, remediation costs incurred under RCRA are not recoverable under CERCLA section 107.⁵⁹ They argued this despite the fact that the costs would qualify as removal costs under CERCLA, and would have been recoverable had the Consent Order been agreed to pursuant to a CERCLA action.⁶⁰ The Third Circuit was not persuaded by this argument, however, and found that the plain language of section 107(a) allows the government to recover “all costs of removal,” without qualification.⁶¹ Accordingly, and further due to the similarity between CERCLA and RCRA, the court reasoned that the United States *could* recover costs incurred pursuant to RCRA, under CERCLA.⁶² The Third Circuit also clarified the policy benefits of treating remediation actions under RCRA as removal actions under CERCLA, and in particular, stressed the ability to take full advantage of two statutes similarly designed to force parties to undertake “corrective activity.”⁶³

III. ANALYSIS

In *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, the U.S. Court of Appeals for the Third Circuit held that section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) “does not require resolution of CERCLA liability in particular,” as the plain language of section 113(f)(3)(B) does not specify that “the response

⁵⁶ See *W.R. Grace*, 559 F.3d at 90; *Consolidated Edison*, 423 F.3d at 92–93.

⁵⁷ *W.R. Grace*, 559 F.3d at 90–91; *Consolidated Edison*, 423 F.3d at 95–96.

⁵⁸ 2 F.3d 1265, 1267, 1274–75 (3d Cir. 1993), *overruled on other grounds* by *United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161 (3d Cir. 2005).

⁵⁹ *Id.* at 1274.

⁶⁰ *Id.* at 1274–75. “We find no support in the text or legislative history of CERCLA for the suggestion that identical oversight activity on the part of the government should be considered a removal if the government invokes CERCLA, but not a removal if other statutory authority is invoked.” *Id.* at 1275.

⁶¹ *Id.*

⁶² *Id.* at 1274–78. The court, however, held that the United States could not recover costs in this case, as the oversight activity in question did not fall under CERCLA’s definition of removal. *Id.*

⁶³ See *id.* at 1275.

action have been [sic] initiated pursuant to CERCLA.”⁶⁴ Thus, a response action that has been initiated pursuant to a state statute is sufficient to allow a responsible party to seek contribution from other potentially responsible parties (“PRPs”) in the Third Circuit.⁶⁵ The Third Circuit’s holding is in direct opposition to the holding of the U.S. Court of Appeals for the Second Circuit in *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*⁶⁶ In that case, the Second Circuit interpreted section 113(f)(3)(B) as only allowing contribution for claims settled under CERCLA itself, rather than claims settled under a state statute.⁶⁷ The Third Circuit’s interpretation of section 113(f)(3)(B), however, reflects a more accurate analysis of the legislative history, is more consistent with the plain meaning of the section, and is better suited for accomplishing the policy goals of CERCLA.⁶⁸

The *Trinity Industries* holding reflects a more accurate reading of the legislative history of the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), which enacted section 113(f)(3)(B).⁶⁹ The court in *Consolidated Edison* relied on a passage from a House sub-committee report that refers to claims under CERCLA section 113(f)(1), not claims under section 113(f)(3)(B).⁷⁰ The passage is only salient for the interpretation of section 113(f)(1) as it relates to sections 106 and 107, and specifically to whether or not CERCLA was intended to impose joint and several liability on PRPs—an entirely separate issue from the interpretation of 113(f)(3)(B) contributory liability.⁷¹ This passage, and the *Consolidated Edison* holding that erroneously relied on it, should not, therefore, be applied to an interpretation of section 113(f)(3)(B).⁷²

The Third Circuit’s interpretation of section 113(f)(3)(B) in *Trinity Industries* not only avoids the Second Circuit’s flawed reading of the legislative history, but also is more consistent with the plain language of the statute.⁷³ As

⁶⁴ *Trinity Indus., Inc. v. Chi. Bridge & Iron Co. (Trinity Industries II)*, 735 F.3d 131, 136 (3d Cir. 2013); see Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(f)(3)(B) (2012).

⁶⁵ See *Trinity Industries II*, 735 F.3d at 136–37; *supra* note 45 and accompanying text.

⁶⁶ See *Trinity Industries II*, 735 F.3d at 136; *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 95–96 (2d Cir. 2005).

⁶⁷ *Consolidated Edison*, 423 F.3d at 90, 95–96.

⁶⁸ See *infra* notes 69–93 and accompanying text.

⁶⁹ See H.R. REP. 99-253, at 79–80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861–62; *supra* notes 52–54 and accompanying text; *infra* notes 70–71 and accompanying text.

⁷⁰ *Trinity Industries II*, 735 F.3d at 135–36 (citing *Consolidated Edison*, 423 F.3d at 95–96); see H.R. REP. 99-253, at 79–80; *supra* note 53 and accompanying text.

⁷¹ See *Trinity Industries II*, 735 F.3d at 135–36.

⁷² See *supra* notes 69–71, and accompanying text.

⁷³ See *Trinity Industries II*, 735 F.3d at 135–36; *Dodd v. United States*, 545 U.S. 353, 359 (2005). “[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Dodd*, 545

the Third Circuit held, the plain language of section 113(f)(3)(B) only requires a party to have “resolv[ed its] liability to the United States or a state ‘for some or all of a response action’” in order to seek contribution.⁷⁴ Section 113(f)(3)(B) does not require the response action to have been initiated under CERCLA; Congress could have easily written such a requirement into the statute, had that been its intent.⁷⁵

At the urging of the federal government, the Third Circuit also dismissed the Second Circuit’s concern that a PRP that had settled its liability under a state environmental statute could still face a CERCLA action brought by the federal government.⁷⁶ In *W.R. Grace & Co.-Conn. v. Zotos International Inc.*, the Second Circuit raised the concern that, as the PRP had not faced a CERCLA action prior to seeking contribution from other PRPs, there was still an “open . . . possibility” that the PRP could face a CERCLA action brought by the Environmental Protection Agency (EPA) or an equivalent state agency.⁷⁷ As the potential for such an action remains a hypothetical possibility, the Second Circuit reasoned that the PRP could not have resolved its liability to the federal government under section 113(f)(3)(B), even if the PRP has settled its liability under a CERCLA-equivalent state statute.⁷⁸ In its amicus curiae brief, the federal government urged the Third Circuit not to adopt this flawed interpretation of section 113(f)(3)(B), arguing that a party, having settled with a state agency to undertake response actions, is not likely to then be sued either by the state or federal government under CERCLA.⁷⁹

Finally, the Third Circuit’s approach is well suited for accomplishing CERCLA’s policy goals.⁸⁰ As the Third Circuit established in *United States v. Rohm & Haas Co.*, it will interpret CERCLA provisions in light of the statute’s broader policy goals.⁸¹ The court in *Rohm & Haas* considered whether the United States could recover costs it had incurred overseeing a cleanup in accordance with a RCRA section 3008(h) Consent Order.⁸² The Third Circuit held that the plain language of section 107(a) allows the government to re-

U.S. at 359 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

⁷⁴ *Trinity Industries II*, 735 F.3d at 136–37.

⁷⁵ *See id.*

⁷⁶ *See id.*; Brief of the United States as Amicus Curiae Supporting Appellant, *supra* note 29, at 25–26.

⁷⁷ *Trinity Industries II*, 735 F.3d at 136 (quoting *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 91 (2d Cir. 2009)).

⁷⁸ *See id.*

⁷⁹ Brief of the United States as Amicus Curiae Supporting Appellant, *supra* note 29, at 19, 25–26.

⁸⁰ *Trinity Industries II*, 735 F.3d at 137–38; *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1275 (3d Cir. 1993).

⁸¹ *See* 2 F.3d at 1275.

⁸² *Id.* at 1267, 1274.

cover “all costs of removal,” and therefore the United States could recover costs incurred under Resource Conservation and Recovery Act (“RCRA”), if the remediation actions taken met the CERCLA criteria for removal actions.⁸³ In so holding, the Third Circuit discussed the policy benefits of treating remediation actions under RCRA as removal actions under CERCLA, in order to take full advantage of two similar statutes, both designed to force parties to take corrective action.⁸⁴ The reasoning from *Rohm & Haas* further bolsters the Third Circuit’s interpretation of section 113(f)(3)(B) in *Trinity Industries*, because both cases promote the cleanup of hazardous waste sites through a broad and practical reading of the statute, thus furthering the policy goals of CERCLA.⁸⁵

The Third Circuit’s interpretation of section 113(f)(3)(B) is in accord with the primary purpose of CERCLA: to encourage the “clean up [of] hazardous waste sites.”⁸⁶ In order to achieve this goal, and thereby protect human health,⁸⁷ CERCLA is intended to “encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.”⁸⁸ Private parties have a greater incentive to assume the initial financial responsibility for a cleanup if they have the ability to seek contribution from other PRPs.⁸⁹

For CERCLA to function and effectuate cleanup of contaminated sites, private parties must be encouraged to settle with state authorities and take on financial responsibility for cleanups.⁹⁰ By permitting private parties to seek contribution for cleanups under 113(f)(3)(B), without settling their liability under CERCLA, the Third Circuit’s approach encourages settlement, furthering CERCLA’s aims of promoting timely and efficient site cleanup and remediation, and thus protecting human health and the environment.⁹¹ The Second Circuit’s interpretation might incentivize private parties, such as Trinity Industries, to resist entering into cleanup settlements with the state, and to in-

⁸³ *Id.* at 1274.

⁸⁴ *Id.* at 1275.

⁸⁵ See *Trinity Industries II*, 735 F.3d at 135–38; *Rohm & Haas Co.*, 2 F.3d at 1275; *infra* notes 86–89 and accompanying text.

⁸⁶ *Rohm & Haas Co.*, 2 F.3d at 1270; see *Trinity Industries II*, 735 F.3d at 135–38.

⁸⁷ See U.S. ENVTL. PROT. AGENCY, *supra* note 6, at 3.

⁸⁸ *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 226 (3d Cir. 2010) (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994)).

⁸⁹ See 42 U.S.C. § 9607(a) (2012); H.R. REP. 99-253, at 80 (1985); *supra* note 4 and accompanying text.

⁹⁰ See *Trinity Industries II*, 735 F.3d at 136–38; Eric DeGroff, *Raiders of the Lost Arco: Resolving the Partial Settlement Credit Issue in Private Cost Recovery and Contribution Claims Under CERCLA*, 8 N.Y.U. ENVTL. L.J. 332, 361 (2000); Joanna M. Fuller, Note, *The Sanctity of Settlement: Stopping CERCLA’s Volunteer Remediators from Sidestepping the Settlement Bar*, 34 COLUM. J. ENVTL. L. 219, 227, 265–66 (2009).

⁹¹ See *supra* notes 64–90 and accompanying text.

stead wait for the filing of federal civil actions against them, to ensure their rights to seek contribution under section 113(f)(3)(b) are preserved.⁹² Several district courts have adopted the *Consolidated Edison* holding, and, as a result, a number of plaintiffs who have settled with state agencies have been prevented from seeking contribution from other PRPs under CERCLA.⁹³

CONCLUSION

In *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, Trinity Industries Inc., owner of a manufacturing site contaminated with manganese, sued Chicago Bridge and Iron Company, the former owner of the site, under section 113(f)(3)(B) of the Comprehensive Environmental Response, Cleanup, and Liability Act (“CERCLA”), seeking contribution for a share of the remediation costs. Trinity had previously entered into a settlement agreement with the Commonwealth of Pennsylvania, under a state environmental remediation statute, but had not yet been charged under the federal statute. The U.S. Court of Appeals for the Third Circuit held that section 113(f)(3)(B) does not require a party to have previously settled its liability in a federal CERCLA action in order to be allowed to seek contribution from other potentially responsible parties (“PRPs”). The Third Circuit’s holding broke with precedent set by the U.S. Court of Appeals for the Second Circuit in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, where the Second Circuit interpreted section 113(f)(3)(B) as being limited to contribution actions for claims resolved under CERCLA itself, rather than claims resolved under a state statute.

This Comment argues that the Third Circuit’s holding in *Trinity Industries* offers a clear explanation of why section 113(f)(3)(B) does not require a party to have previously settled its cleanup liability in a federal CERCLA action, as opposed to an equivalent state action, in order to be allowed to seek contribution from other PRPs pursuant to CERCLA. The holding, which relies on an analysis of the plain language of the statute, the legislative history, and a consideration of the policy goals of CERCLA, can and should help to guide other circuits and district courts around the country that are struggling to interpret section 113(f)(3)(B). The Third Circuit’s interpretation encourages private parties to settle with state agencies under state CERCLA statutes, rather than CERCLA itself, thus relieving some of the burden for environmental cleanup from the federal government. The decision further allows for more efficient remediation of hazardous sites, in furtherance of the original legislative intent behind CERCLA.

⁹² See *supra* notes 64–90 and accompanying text.

⁹³ See *Differential Dev.-1994, Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 740–43 (D.Tex. 2007); *Waukesha v. Viacom Int’l Inc.*, 404 F. Supp. 2d 1112, 1115 (D.Wis. 2005).